From Principle to Practice

Evaluation of legislation dealing with racial and ethnic discrimination in certain EU Member States

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Layout and Print: Color Impact, Brussels

June 2001

Published by the European Network Against Racism (ENAR)
with the financial support of the European Commission (DG "EMPL")

Preface

The adoption of the Council Directive 2000/43/EC implementing the principle of equal treatment between persons irrespective of racial or ethnic origin of 29 June 2000 is a milestone in the European fight against racism.

However legislation to punish discrimination on the grounds of race and ethnicity exists in several EU member states. In recent years victims of racism, judicial bodies and activists have experienced its positive or sometimes even negative impact on the fight against racism.

The publication in front of you gives you an introduction of national legislation of a selection of member states of the EU and evaluates the success of the enforcement of these laws. The goal of this publication is to identify the gaps within existing legislation.

The count down for the implementation of Article 13 into national law has now started. All countries of the EU have to finalise their work by July 2003. In order to evaluate and to make best use of existing experience of national legislation, ENAR compiled this information. It should help you as representatives of NGOs active in the fight against racism to avoid the gaps and improve the weaknesses when you lobby on the implementation of Article 13.

The implementation of Article 13 gives us a unique chance: strong legislation is a first step and it is crucial but the proper enforcement of the law will be even more crucial. We all need to make sure that the involved institutions and bodies enforce the law and show with these means that racism is not acceptable.

We need to be aware of experience – good or bad – made in other countries to improve our requests towards policy makers and make useful and constructive contributions in the implementation process.

NGOs have a role to play until the implementation of Article 13 is finalised and beyond.

Vera Egenberger
Director of ENAR

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Introduction

(Maria Miguel Sierra, Deputy Director of ENAR)

Since July 2000, the EU has had a Directive which, at the level of the 15 Member States, harmonises protection for victims of discrimination based on race or ethnic origin. The Member States must take all the necessary measures to comply with the Directive by 19 July 2003 at the latest.

The compliance stage is crucial for a number of reasons. First and foremost, it provides an opportunity to evaluate the measures which already exist at national level. The majority of the countries of the EU have a range of measures of greater or lesser significance to enable them to combat racism. Nevertheless, these measures are not always adapted to reality or may not be correctly applied. An evaluation of the national legislation already in force should form a prerequisite for the harmonisation of national legislation with the European Directive. In addition, the compliance process is an opportunity to go beyond what is enshrined in the Directive. The Directive effectively establishes a common minimum standard which must be respected by the 15 Member States. However, there is nothing to prevent the national legislature from introducing a greater level of protection, for instance by extending the scope of the Directive to areas which are not covered by it.

In this publication we look at the legislation in force in five countries: Belgium, France, the Netherlands, Sweden and the United Kingdom. These countries have many years of experience in combating racism and have particular experience with regard to legislation.

We felt it would be interesting to analyse the content of the legislation in these different countries and its concrete application. This is why we asked the authors to present briefly the laws in force in the different countries, to evaluate them, to point out the principal gaps and to highlight the adjustments necessary to ensure greater effectiveness, particularly in the light of the European Directive.

We hope that the experiences presented here will prove useful to the different member organisations of ENAR in the 15 countries of the EU. Some countries have antiracism legislation which is comparatively recent and consequently have fewer means for evaluating what should or should not be included, adapted and improved at national level when the Directive is implemented.

In many countries, concepts such as indirect discrimination, victimisation and harassment do not yet feature in the legal vocabulary in relation to combating racism. In some of them, the bodies for promoting equal treatment which, in accordance with the Directive must be set up in the 15 Member States, do not yet exist. For this reason, we invite our readers to draw inspiration from some of the measures, practices and provisions mentioned in this publication which might be adapted at national level.

The effective protection of victims of discrimination based on race or ethnic origin will depend to a great extent on the correct interpretation and implementation of the Directive. This is why it is essential that organisations which contribute to combating racism in the EU participate in the compliance process. This participation should consist of the formulation of concrete proposals on how the Directive should be implemented at national level, how the legislation in force may be strengthened and improved and how the compliance process might be monitored.

It should be noted that the Directive (Art. 12) invites the Member States to encourage dialogue with non-governmental organisations with a view to promoting equal treatment. In some countries consultations with NGOs have been organised but it is important that this happens in all 15 Member States, so that the non-governmental organisations may put forward their concerns and formulate their proposals.

This publication is intended as a contribution to the work towards a satisfactory implementation of the Directive.

Chapter I
The effectiveness of antiracism legislation in Belgium

(Marianne Gratia, MRAX, Mouvement contre le Racisme, l'Antisémitisme et la Xénophobie)

There are several legal instruments in national law which punish incitement to racial hatred. We shall begin by listing these before concentrating on some of the provisions contained in the first one:

- the law of 30 July 1981 on the punishment of certain acts inspired by racism or xenophobia
- the law of 23 March 1995 on the punishment of the denial, reduction, justification or approval of the genocide perpetrated by the German National Socialist regime during the Second World War.[1]

We shall look here at how far the law of 30 July 1981 enables the effective implementation of a policy of prevention and punishment of discrimination. We shall do this on the basis, first, of the available court decisions in this sphere and, secondly, of our experience as an association with social objectives which in part identify with the aims of these texts. We shall also consider the two European Directives of 29 June 2000 and 17 October 2000 on equal treatment, which are or will be implemented in part into national law, in terms of the possible implications they may have on the effectiveness of Belgian antiracist legislation. [2]

1. Introduction

First of all it is of use to define what is covered by the term "discrimination", in relation to the text which will form the main focus of this study: the law of 30 July 1981 on the prevention of certain acts inspired by racism and xenophobia.

1° In this law "**discrimination**" is understood to mean any distinction, exclusion, restriction or preference, the effect or aim of which is to destroy, compromise or limit the recognition, enjoyment or exercise, in conditions of equality, of human rights and fundamental freedoms in the political, economic, social or cultural spheres or in any other area of social life.

"The effect or aim of which": from this it can be taken that the law punishes both direct and indirect discrimination; that is, where an apparently neutral practice is likely to lead to a specific disadvantage for certain individuals. In order to avoid the problems of interpretation, it would without doubt have been wiser to include the term (and the definition of) "indirect discrimination", as defined in Directive 2000/43/EC.[3]

2° The types of discrimination covered are those based on an individual's race, colour, descent, national or ethnic origin or nationality.

However, the draft bill (*avant-projet de loi*) on strengthening antiracism legislation replaces the word "race" with the expression "supposed race". The intention behind this alteration to the terminology of the law is to avoid giving undue legitimacy to the belief that separate human races exist. The insertion of nationality as a reason for discrimination represents an advance in comparison with the text of Directive 2000/43/EC.

On the other hand, this draft bill, with the aim of giving legistic coherence to the different grounds for discrimination, has omitted the term "nationality" from the list of the five grounds for discrimination.

This attempt at harmonisation risks reducing the scope of the law, since the public nature of the intention to resort to discrimination, hatred or violence because of the nationality of the victim is no longer mentioned in the provisions of this draft bill. The commentary on the articles explains that the concept of "national or ethnic origin" which is used is broad and also includes nationality.

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[1] Other texts of national law deal more specifically with extreme right-wing groups. To these texts must be added Articles 10, 11 (non-discrimination) and 150 of the Constitution (recategorisation of press offences of a racist nature).

[2] Two texts which aim to improve the legislation on combating discrimination are currently the subject of discussion: one is a draft bill (*avant-projet de loi*) on strengthening legislation to combat racism and xenophobia and the other is a bill (*proposition de loi*) on combating discrimination. We shall consider both of these in the course of this report.

[3] The Directive of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin which, for the sake of simplicty, we shall refer to as "Directive 2000/43/EC".

It is to be feared that this precaution is inadequate. If the terms of the law are clear, the judge will not necessarily consult the commentaries on the articles. Yet the Directive implementing the principle of equal treatment between persons irrespective of racial or ethnic origin specifies that, "The implementation of this Directive should not serve to justify any regression in relation to the situation which already prevails in each Member State".

Discrimination based on the language in which a person or a community expresses itself and discrimination based on political convictions are not included in the scope of the law of 30 July 1981, nor is any provision made for them in the legislative amendments proposed with regard to combating discrimination. Yet these types of discrimination, especially discrimination based on language, may take the place of racist or xenophobic discrimination. In contrast, discrimination based on religious or philosophical convictions was included in the latest version of the anti-discrimination bill (*proposition de loi*).

2. Incitement to racial hatred

1. *Article 1 of the law of 30 July 1981* on the prevention of certain acts inspired by racism or xenophobia punishes whoever, in one of the circumstances set out in Article 444 of the Penal Code,

1° incites discrimination, hatred, or violence against a person on the grounds of his or her race, colour, descent or national or ethnic origin.
2° Whoever, in one of the circumstances set out in Article 444 of the Penal Code, incites discrimination, segregation, hatred or violence against a group, community or members of it on the grounds of the race, colour, descent, or national or ethnic origin of its members, or some of them.
3° Whoever, in one of the circumstances set out in Article 444 of the Penal Code, announces publicly intent to perpetrate discrimination, hatred or violence against a person on the grounds of his or her race, colour, descent, origin or nationality.
4° Whoever, in one of the circumstances set out in Article 444 of the Penal Code, announces publicly intent to perpetrate discrimination, hatred, violence or segregation against a group, community or members of it on the grounds of the race, colour, descent, origin or nationality of its members, or some of them.

This clause does not punish racist opinion but the public incitement (in the circumstances set out in Article 444 of the Penal Code) to hatred or violence against a person or a group on the grounds of their race or colour. The first two offences in this article deal with incitement, the following two deal with intent. The difference between the words "intent" and "incitement" can be difficult to define but these four offences are crimes of intent; the accused must have wished to incite a reaction of hatred or discrimination.

In its decision of 19 May 1993, the Court of Cassation (*Cour de cassation*) stated that Article 1, paragraphs 2 and 3, of the law of 30 July 1981 does not require the aim of the incitement to have been the perpetration of a specific act of racism or xenophobia by a specific person or group.

The problems of the enforcement of this Article are, on the one hand, the fact that it is not easy to provide proof of intent and, on the other hand, that it is essential not to confuse abuse with the offences covered by Article 1.

Proof of intent to practise discrimination may be provided by demonstrating that the discrimination is manifested in various ways, even though the author of the remarks may deny having had any intention to discriminate. Thus, the phrase in an advertisement for a flat to let stating that the owner "does not intend to let to Muslims or Arabic-speakers" will be covered by Article 1 of the law. However, two judgements concluded that discriminatory intent could not be adequately established with regard to the phrase "All welcome (except wogs)" which appeared on an invitation to a ball which was sent out to members of an association.

On the other hand, other examples of court decisions illustrate the confusion between abuse and the offence covered by Article 1, examples in which the judge deduces from the recording of a racist insult the existence of incitement to discrimination or racial hatred.

The solution would involve adding the indictable offences of defamation and racist abuse to the law of 30 July 1981.

The draft bill on strengthening antiracism legislation, currently under discussion, goes some way to remedying this deficiency. One of the provisions of this draft bill introduces a term taken from German legislation, "abject motive" ("*motif abject*"), and establishes it as an aggravating circumstance for certain crimes and offences, since racist intent comes within the scope of the concept of an abject motive (according to German case law).

A restricted list of crimes and offences are covered by this provision – including abuse. However, defamation is not covered. Thus, abuse alone falls within the scope of the law of 30 July 1981. Currently it is only punishable if it is demonstrated that it was perpetrated with the aim of inciting others to racial hatred. The offence of harassment also appears in this list of offences; thus, Belgium will comply with Directive 2000/43/EC.

However, it is regrettable that, in pursuance of the proposed provision, racist intent only constitutes an aggravating circumstance for certain offences.

One may wonder about the reasons for this limitation. In effect, a large number of offences may be committed for racist reasons. Some people fear that the inclusion of a general provision establishing the abject motive as an aggravating circumstance for all offences would lead to excesses. We do not understand this indecisive attitude. If certain offences are never committed with racist intent, this aggravating circumstance will simply never be applied to them.

It has been seen that incitement to discrimination must be of a public nature. Therefore, it must be perpetrated in public places, in places to which a limited number of persons have access, in any place in the presence of witnesses, or through written texts which are public disseminated (displayed or sold), or written material which is sent or communicated to several persons. Thus, the law does not cover possession in private of Nazi insignia or the sending of anonymous letters with racist content to a specific individual.

With regard to incitement to racial discrimination through the press, the amendment of Article 150 of the Constitution, by the law of 7 May 1999, ended the *de facto* impunity enjoyed by the authors of press offences inspired by racism and xenophobia.

Before the law of 7 May 1999 came into force, such offences came under the competence of the Court of Assizes (*Cour d'assises*). If prosecutions were commenced against an individual for incitement to racial discrimination and one of the means used to incite hatred was a written text, the criminal court often considered it to be a press offence, declared itself to be incompetent and sent the case to the Court of Assizes. However, the Court of Assizes was never constituted for such offences and no judgements were made in this regard before the constitutional amendment.

The new text of Article 150 stipulates that "a jury is established in all criminal cases and for political or press offences, with the exception of press offences which are inspired by racism or xenophobia".

It would have made more sense to make all press offences come under the competence of the criminal courts. If a text violates both the law of 30 July 1981 and the law of 23 March 1995 and has a straightforward defamatory content, the court will declare itself incompetent, in pursuance of the rules on related offences. In order to remedy this problem, a prosecution would have to be commenced solely for the racist aspect of the text or two separate complaints would have to be lodged.

2. Article 1 of the law of 30 July 1981 as it is interpreted by the courts does not allow the punishment of the development of an argument which denies or grossly minimises the genocide perpetrated during the Hitler regime.

Therefore the Belgian legislature decided to make certain types of conduct illegal and adopted *the law of 23 March 1995 on punishing the denial, reduction, justification or approval of the genocide perpetrated by the German National Socialist Regime during the Second World War*.

Article 1 of this law punishes anyone who, in one of the circumstances set out in Article 444 of the Penal Code, denies, grossly minimises, attempts to justify or approves of the genocide perpetrated during the Second World War.

3. Membership of a group or association which advocates discrimination, hatred or racial violence

Article 3 of the law of 30 July 1981 punishes "Whoever belongs to a group or organisation that clearly and repeatedly incites or advocates discrimination in the circumstances set out in Article 444 of the Penal Code, or who lends support to any such group or association."

The offence also comprises the indictable offence of intent. The legislature thereby punishes the membership of a group or association which practises or advocates discrimination or even lends support to such a group or association. This is an extension of Article 1 of the same law.

This article is only rarely enforced. This is due to the number of conditions which must be fulfilled for the offence to be established and the difficulty of providing proof that these conditions have been fulfilled.

Effectively, the group or association must have committed one of the offences listed in Articles 1, 2 and 2bis of the law, clearly and repeatedly; or have advocated it in a place which complies with the definition of a public place ("in the circumstances set out in Article 444 of the Penal Code").

In addition, the courts have sometimes added a condition for which no provision is made in this article: that the incitement to racial hatred must be the main activity of the association.

In order for the group to be dissolved, all its members would have to be convicted: yet convictions for violations of this provision are rare.

The group, as covered by this article, does not necessarily have to have a political identity and the number of members is not important. The individual is punishable if he or she belongs to an association of this type or lends it his or her support. According to legal opinion, the act of financing such a group or giving a lecture to it are punishable. The individual does not have to be an active member of the association to be punished; it is enough for him or her to be aware of the group's aims.

In pursuance of Article 3, the members of the "Forces Nouvelles" ("New Forces") movement who took part one evening in an organised racist attack against some North Africans were convicted on the basis of Articles 1 and 3 of the law of 30 July 1981.

Publications produced by the group are often provided as proof of its clearly racist nature. Before the amendment of Article 150 of the Constitution, it often happened that the court declared itself incompetent to try these offences. Since the re-categorisation of the racist or xenophobic press offence, the effectiveness of Article 3 has been strengthened.

But the **clear** and **repeated** nature of incitement to racial hatred is difficult to prove; the courts interpret this condition restrictively.

The difficulty of fulfilling this condition can have disastrous consequences. If an association which has the social objective of combating racism brings an action against an individual on the basis of Article 3 of the law of 30 July 1981 and the court decides not to proceed with this offence because it considers that the plaintiff has not satisfactorily established that the movement of which the defendant is a member clearly and repeatedly incites racial discrimination, this may turn out to give the group in question a certain legitimacy.

A large proportion of convictions which were handed down on the basis of the law of 30 July 1981 were given for the breach of Article 1 and a large number of them were against political personalities.

4. The perpetration of certain acts

4.1 When providing goods or services

Article 2 of the law of 30 July 1981 punishes *"Whoever, in supplying or offering to supply services, goods or the enjoyment of them, commits discrimination against a person on the grounds of his or her race, colour, descent, origin or nationality…". The same applies if the discrimination is committed against a group, a community or its members."*

The law of 12 April 1994 amended the law of 30 July 1981 and removed the condition of the offence being committed in public which was previously required. Since then, the refusal to rent out property is included in the scope of Article 2. It is nevertheless difficult to provide the proof of the existence of such discrimination.

The words "offer to supply or supply of services, goods or the enjoyment of them" must be interpreted broadly. This expression includes any means of acquiring property, the renting of goods or real estate and any provision of services, both free and subject to payment. Thus, a judgement of 12 February 1996 delivered by Dendermonde Criminal Court convicted, on the basis of Article 2, a refuse collector who refused to collect refuse from persons of foreign origin. The judges also saw a violation of Article 2 in the attitude of waiters and proprietors of cafés who refused to serve drinks to individuals because of they were of foreign origin (Hasselt Criminal Court, 27 March 1995).

The refusal to grant admission to a night club for racist reasons (or under pressure from the establishment's clientele) also comes within the scope of Article 2 of the law of 30 July 1981.

However, proprietors often conceal their real motives for refusal behind pretexts which may appear to be objective, for example, "there are too many people inside", "patrons must have a membership card which must obtained during the week", "evening dress is obligatory". It is therefore difficult for the person refused entry to establish the discriminatory nature of the refusal. Evidence must be gathered from persons who were subsequently granted admission to the establishment without encountering the same excuses. Apart from the fact that such evidence is difficult to obtain, it would not necessarily be sufficient to establish the racist grounds as the basis of the refusal and the defendant must receive the benefit of any doubt.

This goes some way to explaining why, in spite of the scale of this type of discrimination, few people who are daily victims of such discrimination take action.

One method used in France by SOS Racisme and in the Netherlands, which is going ahead in Belgium as well, is the use of **situational tests**. This method consists of "comparing the attitudes of persons suspected of racist conduct in the provision of a service or in the supply or enjoyment of goods, depending on whether they are requested by a foreigner alone, a foreigner accompanied by witnesses (not foreign) as "ad hoc" witnesses or by these witnesses alone."

Situational tests have been carried out at the entrance to night clubs: a couple comprising two individuals, at least one of whom is of foreign origin or nationality, go to the entrance of an establishment. They are dressed conventionally, have not consumed alcohol, behave very calmly and are over 18. They are followed immediately by another couple (of "European type", similarly dressed and of the same sex as the couple before them). Several such couples present themselves on the same evening at the entrance to the same establishment. The responses they experience are then compared. This method, even though it is relatively crude and long-winded, means on the one hand that the difficulty of collecting evidence can be countered – the second couple act as witnesses – and, on the other hand, if the test shows that, among a number of couples, the only people to be refused are those who appear to be of foreign origin or nationality, the discriminatory nature of the refusal may more easily be demonstrated.

Publicity given to these texts also functions as a useful awareness-raising tool, with regard to the victims and witnesses of such refusals; evidence which could reinforce the validity of the statements obtained by this method of testing.

The method used must in any case be as scientific as possible. However, it must not be qualified by provocation: the testers do not incite the door staff to refuse them admission; they only recreate situations which regularly arise.

With this type of discrimination, it is important to ensure that, once the offence is established, the door staff are not prosecuted alone. They are often obeying rules set by the proprietor of the establishment. If only the door staff are convicted, the proprietor can simply find a replacement who may apply the same admission criteria. A conviction of this type would thus turn out to be ineffective.

Situational tests have been explained here in the context of access to night clubs but this method may also be applied, with some practical adjustments, in the sphere of employment or even of recruitment ("Ethnic discrimination in recruitment" survey carried out on behalf of BIT (*Bureau International du Travail* - International Labour Office), Brussels, 1997).

One of the provisions of the bill on combating discrimination which is currently under discussion concerns situational tests. However, even though it only regulates the civil aspects, with regard to discrimination inspired by racist motives, the wording of the provision could lead to a decline in relation to the current situation regarding the admissibility of situational tests as a means of proof in criminal cases. It effectively stipulates that *the proof of discrimination based particularly on national or ethnic origin* ***may be provided by a bailiff's report by means of a practical test***.

Moreover, the justification for this amendment mentions, among other things, that the possibility of using situational tests ***is limited*** *to cases of discrimination* ***in the civil sphere***.

In criminal law, the proof may be provided by any legal means. The situational test is thus currently admissible in criminal cases. The problem is that neither the public prosecutor's offices nor the civil complainants tend to make use of situational tests. The only advantage of drafting a text mentioning situational tests is to remind those involved in the criminal process of the existence of this option. However, the formulation of the proposed article and its justification run the risk, if adopted with the current wording, of resulting in the removal of the existing possibility of using situational tests in criminal law. Thus, it is not appropriate to condone this restriction to civil cases and, thereby, the exclusion of this means of proof for criminal proceedings.

In addition, this formulation introduces a limitation to the test carried out by a bailiff. It is not currently necessary to apply to a bailiff in either criminal or civil cases in order to establish an act of racism through a situational test. Moreover, there are many situations where a bailiff would not be able to establish a report: for example, in the case of a job interview with a potential employer where there could be no justification for the presence of a third party and therefore of a bailiff.

The proposed text contains further reasons for objection. The text restricts the possibility of carrying out a situational test to public places or non-public places where access is restricted to a certain number of persons.

This restriction might make it impossible to carry out a situational test in cases of accommodation rental or in recruitment for a new job - situations which take place in a completely private environment.

There is also reason for scepticism in the face of the difficulty of the procedure to obtain the involvement of a bailiff (lodging a request). The complexity of the procedure could lead to victims of racist discrimination being discouraged from reporting an instance of discrimination. These same victims might also decide to abandon legal proceedings after having instituted them, feeling it was too difficult to provide proof by means of a situational test which conforms to the procedure set out by the "anti-discrimination bill" (known as the Mahoux bill).

Besides, as it is currently presented, this procedure is not applicable.

In conclusion, applying to a bailiff may prove useful (and so this option should be maintained) but it could also turn out to be detrimental if it were obligatory.

As far as **property rental** is concerned, not many judgements have been delivered. One judge saw a violation of Article 2 in the conduct of an estate agent who put up a notice which stated that a property would only be rented to persons "of Belgian origin".

Several problems arise in the application of Article 2 in such situations. On the one hand, there is the issue of proof because the individuals who are likely to be victims of such discrimination in the housing sector cannot always turn up to visit a property with a witness. In addition, the landlord can always tell the prospective tenant that other tenants have just been found for the property. If the prospective tenant doubts the truth of this response and asks a third party to visit the property subsequently, another tenant could indeed have been found in the time it takes to organise this.

Situational tests can also be used to provide proof of this type of discrimination. The problem is that swift action must be taken before the landlord finds another tenant.

On the other hand, the prospective tenant, who sees that the landlord is unwilling to conclude a rental contract with him or her for the property in question, will

prefer to look for another property rather than get involved, under the pressure of the law, in a conflict relationship with the landlord.

Regarding violations of Article 2 practised by some **housing associations**, the issue of proof is further exacerbated. The admissibility of proof in the form of statistical data must, particularly in this case, therefore be encouraged.

The draft bill on strengthening antiracism legislation expressly stipulates that proof in the form of statistical data is admissible and it contributes to reducing the burden of proof for the victim. Thus the draft bill conforms specifically with Directive 2000/43/EC. The prosecuting authorities and the parties in the proceedings currently already have the option of providing the proof of discrimination through situational tests but they do not often tend to make use of this possibility. Nevertheless, the insertion of a reference to this in the text of the law shows how little use is made of this method of proof.

Article 2 is also applied in cases where there is a refusal to enrol children at a school.

4.2 In the employment sector

The law of 12 April 1994 amended the law of 30 July 1981 by inserting the offence of discrimination perpetrated in appointing employees, professional training, job advertisements, recruitment, employment contracts and the dismissal of employees. This forms Article 2bis of the law of 30 July 1981.

The latest version of the draft law on strengthening antiracism legislation extends the scope of Article 2bis to include groups, a community or its members. If it is adopted, this amendment will allow the punishment of discrimination and segregation perpetrated in the workplace against a group. This would apply, for example, to the establishment of separate changing rooms for persons of foreign origin or nationality or to the collective dismissal of members of staff of a company.

However, the enforcement of the current Article 2bis remains problematic. Few legal decisions are made on this basis. Yet the "Ethnic discrimination in recruitment" survey carried out in 1997 by three Belgian research teams on behalf of the International Labour Office (*Bureau International du Travail*) was able to show how significant this type of discrimination is in the field of employment.

Providing proof of such discrimination incurs major problems.

To start with, the candidate is alone with the employer; he or she cannot come with a witness. Secondly, it is very difficult, except possibly on the basis of surveys such as that carried out by the International Labour Office, to verify whether the reason given by the employer for refusing to employ a candidate is true or not. In addition, it is inherent in the recruitment system that a large number of subjective considerations are involved in the choice by an employer of an employee with whom he or she may conclude a contract of employment. Moreover, very few victims of such discrimination institute legal proceedings as these processes do not necessarily resolve the problem of the refusal by the employer to employ them for the job for which they applied.

As far as providing proof of this type of discrimination is concerned, evidence from persons who work for the company, preferably in human resources, is most valuable. Thus, in January 2001, a former employee of an employment agency communicated to the Centre for Equal Opportunities and Opposition to Racism (*Centre pour l'égalité des chances et la lutte contre le racisme*) information indicating that the job description for certain posts contained the words "of Belgian origin" or "BBB" (Blanc, Bleu, Belge – (White-Blue-Belgian) – a code defining persons of Belgian origin). The case is currently undergoing investigation.

The admissibility of proof by means of statistical data must also be encouraged for cases of this type of discrimination.

One attempt to combat discrimination has, in some sectors, been to conclude non-discrimination codes; this has been done in the HORECA (hospitality) sector and in the field of temporary work. People working for many municipalities have had inserted in their statutes an obligation to refrain from any form of discrimination based on a person's race or colour, descent, national or ethnic origin or nationality.

The draft bill on strengthening legislation to combat racism and xenophobia introduces a new Article 5 quater which gives members of the Labour Inspectorate (*Inspection du travail*) the authority to report, within the framework of their office, violations of the law of 30 July 1981.

In actual fact, there is a provision in the Code of Criminal Procedure (*Code d'Instruction Criminelle*) (Article 29) which obliges them to do this. Any authority, any public servant or public official must give immediate notice to the Public Prosecutor (*Procureur du Roi*) of any crime or offence of which he or she is aware. Similarly, the Social Security Inspectorate (*Inspection sociale*) is bound to inform the public prosecutor of any breach of the anti-discrimination laws which it encounters.

However, this new clause (Article 5 quater) bears witness to the fact that the members of the Social Security Inspectorate do not usually tend to inform the public prosecutor of such breaches. The new Article 5 quater should encourage them to do so. In order for this provision to be effective, it would be useful for the inspectors to receive specific training on combating discrimination.

A clause of the anti-discrimination bill, enforcing Article 3 of Directive 2000/43/EC, protects the employee who lodges a complaint with the Social Security Inspectorate or institutes legal proceedings for violation of the law of 30 July 1981.

Thus, a contract of employment cannot be terminated, unless it is proved that the reasons for dismissal are not connected to the complaint or the legal proceedings. This provision, if it is adopted, could facilitate the process for employees who are victims of discrimination to report the employer responsible for the discrimination.

However, this provision will not improve the working relationship between the employer and the employee who lodges a complaint against his or her employer. One way of resolving this issue would be to allow a witness to make an anonymous statement to a police officer who would present this evidence under oath before the court. If the police officer considers it necessary not to reveal the name of the informant in order to protect this individual and in the interest of justice, he or she may refrain from mentioning this information.

5. Discrimination perpetrated by a public servant or public official in the exercise of his or her duties

Article 4 of the law of 30 July 1981 punishes "Any public servant or public official, any bearer or agent of public authority or of the law enforcement agencies, who in the exercise of his or her duties commits discrimination against a person on the grounds of his or her race, colour, descent, origin or nationality or who arbitrarily denies any person the exercise of a right or liberty that he or she may claim."

Generally speaking, legal opinion considers that the terms "any public servant or public official, any bearer or agent of public authority or of the law enforcement agencies" covers all public officials, that is "all members of staff, of all grades, who work for the public service". This concept also applies to solicitors and to bailiffs.

According to E. Boutmans, the rights and freedoms covered by this article determine the rights which form part of our positive law and to which the person concerned may lay claim in the normal way. It does not only cover the rights and freedoms guaranteed by the Constitution.

Thus, examples of violations of this article include the refusal to conduct a civil marriage ceremony, the refusal to enrol a foreign student at an educational establishment and the refusal to enter a foreigner in the population register (*registre de la population*), although when legal proceedings are taken with regard to this last offence, it is done on a basis other than that of the law of 30 July 1981.

Grounds exist whereby a public official who has perpetrated a racist action may escape punishment. The penalty will be borne by the public official's superior if it can be proved that:

- there is a hierarchical relationship;
- the order comes within the sphere of competence of the superior;
- the public official acted on the orders of his or her superior;

- the order may not be clearly illegal; if the order is disputable, the legal basis of justification may be invoked.

If the public officials accused of having ordered, authorised or facilitated the above-mentioned arbitrary acts claim that their signature was obtained by deception, they are obliged, if necessary by stopping the action, to expose the guilty party. If not, they are prosecuted personally.

The penalties established by the law in the event of the violation of Article 4 are more severe than for the other offences covered by the law.

There are not many court decisions concerning acts of discrimination perpetrated by public officials in the exercise of their duties. Thus, there are numerous examples of victims and associations lodging complaints or constituting themselves as civil claimants on this basis, especially in relation to incidents of illegal recourse to violence and violation of the law of 30 July 1981 by members of the law enforcement agencies.

When such actions are committed, a number of problems arise.

- First, the victim of such actions is alone with several officers; so it is rare for the victim to be able to produce statements from direct witnesses or facts which could counterbalance those of several members of the law enforcement agencies.
- Secondly, in the great majority of these cases, the officers in question lodge a complaint against the individual who has been mistreated, for obstructing an officer in the exercise of his or her duty, insulting the officer or even for assault and battery, on the same day. If the victim does not also lodge a complaint or cannot produce sufficient evidence of the facts, he or she risks, at best, being ordered by the prosecuting authorities to pay a fine for the offence contained in the officers' complaint, failing which a private prosecution may be brought against him or herself, or, at worst, being sentenced to a more severe penalty. Thus, it is in the victim's interests to take action because, even if the complaint ends with the proceedings being dropped, it will be less easy for the victim to be convicted.
- Moreover, if the victim succeeds in such cases in assembling proof of the facts, such as medical certificates issued by the hospital emergency services on the day of the events in question, the racist nature of the assault still has to be demonstrated. If the proceedings are successful and the officer in question finds him or herself before the criminal court, only the prevention of assault and battery will potentially be declared admissible.

The number of cases of such acts of violence and racism perpetrated by members of the law enforcement agencies which are brought to court appears to demonstrate that these officers are invested with a relative feeling of impunity.

When the authorities are informed of such acts committed by public officials, they institute an administrative inquiry and sanctions are taken against those responsible. However, it would be useful to be able to ascertain whether the authorities react in an appropriate manner to complaints lodged regarding racism and discrimination perpetrated by public officials.

The anti-discrimination bill law contains amendments to the law of 15 February 1993 creating a Centre for Equal Opportunities and Opposition to Racism (see below). Some of these amendments aim to ensure that such complaints are allowed. If this text is adopted, the disciplinary authorities should investigate when such actions are reported to them, inform the CEOOR of the conclusions of any inquiry and report actively on any follow-up there may be. These new rights accorded to the Centre were considered by the legislative section of the Council of State to be outrageous in relation to standard law (*loi commun*) (decision 31.132/2).

6. Racist activities in the internet

There are many services which are accessible via the internet, including the web and discussion groups.

In a judgement of 22 December 1999 Brussels Criminal Court punished an internet discussion group participant who had written messages with a racist and xenophobic content. The judge considered that the dissemination of such messages via the internet constituted a press offence, in accordance with Article 150 of the Constitution. The court considered that the internet must be included in the forms of expression of

opinion which the Constitution aimed to protect. This decision was confirmed on appeal. Regarding the imputability of the facts, the court considered that the existence of a signature in the messages and the analysis of the messages was sufficient for the accused to be presumed to have written them.

At least three decisions have been delivered regarding incitement to racial hatred and material on websites which challenges the genocide committed by the German National Socialist regime during the Second World War. It is evident from these decisions that, even if the site is hosted by a foreign server, "the offence is deemed to have been committed if the text was disseminated or the programme seen or heard."

However, there are still major problems in this area, for example, where a site is hosted abroad or if it contains links to sites inciting hatred.

7. Knowledge and utilisation of antiracist legislation by potential victims

In view of our experience at MRAX, it would appear that a large number – indeed the majority – of those consulted are aware of the existence of antiracist legislation, especially the law of 30 July 1981 on the prevention of certain acts inspired by racism or xenophobia. However, fewer people are familiar with the conditions for the application of this law, particularly when acts of discrimination are perpetrated by persons acting as private individuals. Thus, if an individual refuses to provide or offer goods or services or the enjoyment of them for discriminatory reasons, such as refusing to allow entry to a disco or refusing to rent a property to someone because of his or her supposed origin or nationality, many victims would say that the person who expresses this refusal is on their own premises and is therefore free to admit or refuse entry to whoever they want in their own "domain". This comment would also appear to hold true for employers who practise discrimination in the recruitment process. This reaction would appear to be due to poor knowledge of their rights by the individuals suffering this sort of discrimination but it is also due to a feeling of fatalism and a sort of trivialising of day-to-day discrimination.

In contrast, if the racist act is perpetrated by a public official in the exercise of his or her duties, most victims tend to take action and to want to institute legal proceedings, without doubt because the offence is by definition more violent and more provocative; the people suffering the discrimination feel driven to despair. It is then that many of these victims will speak about other instances of discrimination they have already suffered and against which they did not wish to take action.

In addition, many potential victims are discouraged by the legal backlog in Belgium.

8. Difficulties in enforcing the law

The problems of providing proof of discrimination perpetrated for racist reasons have been examined during the course of this report.

The Directive of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin considers that the effective implementation of equal treatment requires the burden of proof to be reversed so that it falls on the defendant. In criminal cases, such a shift would be contrary to Article 6 of the European Convention on Human Rights (presumption of innocence), according to the opinion of the Council of State on this point. However, provision was made in the civil clauses of the anti-discrimination bill for a reversal of the burden of proof. Nevertheless, the burden of proving the discrimination only falls on the defendant if the victim invokes before the competent court facts such as statistical data or situational tests; thus, some proof must already be provided, for there to be a reversal of the burden of proof.

Yet, in spite of many victims being discouraged from instituting legal proceedings, due to the difficulty of making an application to the legal institution, of collecting evidence and of the slowness of the process, others do decide to lodge complaints – but obstacles remain.

Thus, if a complaint is made to the police, there are very few police reports which provide a full and accurate statement of the facts exposed by the person lodging the complaint. It also happens that the individuals entitled to do so refuse to take action over such complaints, regarding them to be unimportant or considering that they would in any case be dropped by the prosecuting authorities.

At this level, many cases are dropped because the prosecuting authorities consider that they do not include sufficient elements establishing the racist nature of the actions reported. Furthermore, the public prosecutors and the judges are often overworked and do not tend to make use of certain methods of providing evidence, such as situational tests or statistical data. Finally, only very few judges organise criminal mediation in order to give the parties the opportunity to engage in dialogue and resolve the conflict. Yet this option also has the advantage that it is a much swifter process.

In the civil sphere, the procedures of the bill on combating discrimination and amending the law of 15 February 1993 creating the CEOOR are also applied to discrimination perpetrated on racist grounds. This bill contains provisions whereby clauses of a contract may be declared null and void, the cessation of an act may be obtained by the competent court or the perpetrator of an offence who does cease may be ordered to pay a fine. These civil procedures are an effective means of combating racial discrimination because they can be instituted swiftly and have a dissuasive effect. In addition, these provisions may encourage the parties to settle their differences out of court and therefore have an educational influence.

9. Associations and institutions which may take part in legal proceedings in order to enforce the antiracism law

Article 5 of the law of 30 July 1981 stipulates that, "…if their statutory objectives are compromised, any registered charity and any non-profit-making association, which has existed as a legal entity for at least five years at the time of the actions in question, with the exception of the Centre for Equal Opportunities and Opposition to Racism which is not bound by this time limit, and which includes in its statutes the protection of human rights or combating discrimination, may take part in legal action in any dispute to which this law might be applied."

In the disputes to which Article 2bis of this law may be applied (discrimination in the field of employment or professional training), organisations representing workers and employers, as well as organisations representing the self-employed, may now also take part in legal action. This article thus complies with Directive 2000/43/EC.

There are several organisations in Belgium which regularly make use of these provisions.

There is the **Human Rights League** (***Ligue des Droits de l'Homme***) which is a member of the International Federation of Human Rights Leagues, Non-governmental Organisation. The League regularly deals with victims of discrimination who have suffered racial discrimination for whom it provides a listening ear, puts together files and, if need be, takes legal action. Apart from producing a large number of publications on the topics it studies, the Human Rights League also publishes a quarterly journal. In-depth work on the issues in which the organisation is interested is also carried out by its committees (for example, the Justice Committee, the Refugee Committee, the Economic and Social Committee and the Prisons Committee).

Then there is the **Movement Against Racism, Antisemitism and Xenophobia** (***Mouvement contre le Racisme, l'Antisémitisme et la Xénophobie***), or MRAX, a non-profit-making association which was founded soon after the Second World War as part of the resistance to Nazism. It was originally called the Movement Against Racism and Antisemitism and for Peace and its aim was to be vigilant against all manifestations of racism. Since the 1960s, the Legal Committee has worked on preparing legislation to punish racist acts (bill tabled by Ernest Glinne in 1966, which became the Moureaux law in 1981). In 1966 the Movement extended its social objectives and changed its name to become the Movement Against Racism, Antisemitism and Xenophobia. Since 1974, MRAX has been constituted as a non-profit-making association and is authorised to take part in legal action, particularly in disputes where these two laws may be applied.

The association comprises several different services: a reception centre specialising in the law as it applies to aliens which informs, directs and provides support; an office for complaints and monitoring in relation to racist acts and discourse which listens to the victims, puts together files and provides support through legal processes; a documentation centre which holds information on all issues relating to racism, antiracism, immigration, integration and refugees; a training and activities service which organises awareness-raising and antiracism information sessions; and a publica-

tions service which is responsible for producing press releases and the monthly newsletter (entitled "Mrax-info"). MRAX also organises cross-sector activities, in particular through its committees and with the help of its members.

Like the Human Rights League, MRAX also undertakes lobbying work with the public authorities in the fields they regularly deal with (for example, antiracism legislation and legislation relating to the rights of aliens)

The **Centre for Equal Opportunities and Opposition to Racism** (***Centre pour l'égalité des chances et la lutte contre le racisme***) is an autonomous public service which was created by the law of 15 February 1993. Its establishment was due principally to the political will of the Parliament and the Government and to the resurgence of extremist tendencies in Belgian and European society. The Centre for Equal Opportunities has a number of objectives including "combating racism and xenophobia and developing integration policies for ethnic minority groups". The Centre's scope is soon to be extended to cover combating other types of discrimination, in accordance with Article 13 of the Treaty of Amsterdam.

This public service provides reception and support at 18 locations across Belgium for victims of racism. It provides information, mediation services and legal assistance. The Centre also organises awareness-raising campaigns and training courses aimed at the police, teachers, the social services sector and the business community. In addition, it co-ordinates the Impulse Foundation, a policy think tank for immigration policy. A documentation service which specialises in issues connected with racism and immigration policy also forms part of the Centre.

Its public service statute also makes it easier for the Centre to be consulted and to put forward opinions and recommendations to the public authorities. Thus, the Centre for Equal Opportunities puts forward suggestions when legislative amendments are being made in relation to issues which come under its sphere of competence (for example, the antiracism law or the acquisition of Belgian nationality), as well as subsequently monitoring the implementation of the decree on "positive discrimination" in education.

The Centre also publishes legal decisions handed down in cases of racism or revisionism in a publication which is available on the Centre's website.

Chapter II
The French system of combating discrimination

(Lucie Brocard, ENAR France)

1. Introduction

The aim of this report is to present an overview of French legislative provisions for combating discrimination and, as far as is possible, to analyse the advantages and disadvantages of these provisions.

In keeping with the transcript of the European Directive of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin[4], this report will deal only with discrimination on the grounds of origin and race, although French law also prohibits other types of discrimination (including discrimination on the grounds of sex, customs and disability).

In addition, the scope of the study will cover discrimination in the broader sense, that it will include both discrimination in the strict sense, which is defined as where one person is treated less favourably than another person in a comparable situation[5], and all other acts, such as abuse, incitement to hatred and defamation. The latter are attacks on the dignity of the individual, which may either accompany an act of discrimination in the strict sense or incite such an act. We felt it would be difficult to talk about one without the other, since the two are so closely linked in reality.

Finally, the terms "racist" and "racial", although they are inappropriate and unreliable and should be used with caution, will be used to facilitate a more fluent reading of the text. However, what we understand by these terms is the expression used in the law which states "**the origin or membership or non-membership, real or supposed, of a specific ethnic group, nation, race or religion**".

Following these preliminary points, the French system of combating discrimination can be divided into two main areas:

- a package of legislation prohibiting and punishing racist and discriminatory acts.
- a package of measures aimed at identifying existing discrimination, recognising the causes and providing support to the victims, to evolve a strategy for combating discrimination.

These two areas complement one another, even though the second has only really developed since 1998, in spite of the fact that the essential elements of the legislation punishing racist and discriminatory acts has been in existence since 1972. This report aims to look at both areas, not just because they are linked and contribute to combating discrimination, but also because the European Directive stipulates that States must establish bodies to promote equal treatment[6]. Nevertheless, the main emphasis will be on the first area, taking into account the still embryonic nature of the second.

The report begins with an analysis of what may be termed the "punitive" side of the system, in that it prohibits and punishes (in criminal and civil terms) racist and discriminatory acts. The next section explores what may be called the "preventative" side, which looks at the different types of conduct in order the better to combat them and provide support to the victims.

2. Anti-discrimination legislation in French law

2.1 The provisions of the Penal Code and the law of 1881[7] (criminal provisions)

2.1.1 Crimes and offences directly linked to the practice of a racist ideology

There are several provisions aimed at punishing conduct related to the practice of a racist and xenophobic ideology.

First, the Penal Code punishes crimes against humanity[8] and participation in a group connected with such crimes.

[4] Directive 2000/43/EC of 29 June 2000

[5] Definition based on the Directive 2000/43/CE of 29 June 2000

[6] Art 13 of Directive 2000/43/EC of 29 June 2000

[7] Law of 29 July 1881 on the freedom of the press

[8] Art. 211-1 to 213-5 of the Penal Code

Secondly, provision is made with regard to a number of other offences:

- the wearing or public display of uniforms, insignia or symbols evoking those of organisations or persons guilty of crimes against humanity9 (punishable by a fine and potentially other additional penalties10).
- the introduction, wearing or display at a sports ground of insignia, signs or symbols which evoke a racist or xenophobic ideology[11] (fine of FFr 100,000 ≈15,000 Euro and one year's imprisonment).
- the justification or defence of crimes against humanity[12] or the denial of such crimes[13]. Provision is made with regard to these two offences in the law of 1881 on the freedom of the press. Consequently, they are subject to special provisions: for an action to constitute one of these offences it must be perpetrated publicly[14] and the period within which action must be taken is three months. It may be noted that there is no provision for punishing conduct of this type if it is perpetrated in private.
- to this provision a further one may be linked, whereby the penalty is increased if an attack on the integrity of a corpse, violation or desecration of graves, cemeteries or monuments erected in memory of the dead is committed because of the membership or non-membership, real or supposed, of the deceased persons of a specific ethnic group, nation, race or religion[15].

Associations which have been legally established for at least five years, with aims related to defending the interests threatened by such conduct, are authorised to act when one of these offences is committed[16].

2.1.2 The crime of discrimination in the strict sense, Art. 225-1 ff. of the Penal Code

The offence

- The Penal Code prohibits discrimination, understood as a distinction between natural persons or between legal entities on the grounds of an arbitrary criterion. However, this prohibition is framed within certain limits. The Penal Code precisely defines the types of discrimination which are liable to be penalised. Since it is a criminal law, it is subject to strict interpretation. This means that it cannot be extended to punish an action for which no express provision has been made.

Thus, in order for an act of discrimination to be punished, the discriminatory criterion must, on the one hand, be one of those contained in the Penal Code, that is **the origin or membership or non-membership, real or supposed, of a specific ethnic group, nation, race or religion**[17]. On the other hand, the act must consist of[18]:

- refusing to provide goods or services
- interference in the normal exercise of an economic activity
- refusing to employ, penalising or dismissing an individual
- subjecting the provision of goods or services to a condition based on one of the categories set out in Article 225-1
- subjecting a job offer to a condition based on one of the categories set out in Article 225-1.

It is only if these two conditions are fulfilled that a conviction – which may be up to two years' imprisonment and a fine of FFr 200,000 (≈30,000 Euro) – may be pronounced against the perpetrator of the discrimination.

- The perpetrator may be a natural person or a legal entity[19].

The sentence is increased if the perpetrator is "an individual who is a representative of the public authorities or responsible for a public services remit", who, "in the exercise or during the exercise of his or her duties or remit",

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9 Art. R645-1 of the Penal Code

10 The penalties applicable to the offences mentioned are the maximum penalties

11 Art. 42-7-1 of Law 84-610 of 16 July 1984 on the organisation and promotion of physical and sporting activities

12 Art. 24, para. 3, of the law of 29 July 1881 on the freedom of the press

13 Art. 24 bis of the law of 29 July 1881 on the freedom of the press

14 Cf below, definition of the word "public" in the context of the law of 1881

15 Art. 225-18 of the Penal Code

16 Art. 48-2 of the law of 29 July 1881 on the freedom of the press, Art 2-4, 2-5 and 2-11 of the Code of Criminal Procedure.

17 Art. 225-1 of the Penal Code

18 Art. 225-2 of the Penal Code

19 Art. 225-4 of the Penal Code

- denies the exercise of a right accorded by law
- impedes the normal exercise of any economic activity[20].

It should be noted that the State[21] and, to a lesser extent, the local and regional authorities, cannot be held criminally responsible. If the existence of discrimination is established within such a legal entity, it must be proved that the discrimination was the action of a natural person and was not the fault of his or her office. In this case, it is not the legal entity which will be prosecuted and convicted but the agent of this legal entity. Yet discrimination is often the action of the services of the State and it is not always possible to identify a natural person who is individually responsible. Thus, it is not necessarily a good thing for an individual to be specifically identified, since this allows a service which has collective responsibility to be exonerated. In such cases, the victim is left frustrated and there is a significant risk that, after the short-term and restricted involvement of the courts, the conduct of the service will not actually change.

- Since discrimination thus defined is an indictable offence (*délit*), action may be taken in the three years following the act of discrimination. The case must be referred to the criminal court.
- Those who may bring legal action are:
  - persons, natural or legal, who consider themselves victims of discrimination
  - the Public Prosecutor[22]
  - associations which have been legally established for at least five years, whose aim is to combat discrimination[23]. In this case they are not required to obtain the consent of the victim.

Evaluation

The statistics relating to convictions registered by the criminal records office show that there are very few convictions, or even none at all, on the basis of the provisions described above.

Thus, in 1999 there were only seven convictions pronounced on this basis, mainly in the field of employment (in recruitment). Concerning the sentences pronounced for these convictions, in some years fines are noted, but there are no sentences of imprisonment, and in 1999 all the sentences were suspended. Between 1994 and 1999 only one conviction was made against a representative of the public authorities, who was required to pay a fine of FFr 1,500 (≈229 Euro).

This result is due to a number of factors.

There are several obstacles which come between the discrimination suffered and the sentence pronounced by a court:

- Defining the offence

As has been mentioned above, the act on the basis of which the victim brings an action must be one of those rendered punishable by the Penal Code. The definition in the Penal Code is sufficiently broad that is covers the majority of cases of discrimination recorded, but not in the field of employment, where not all the situations where discrimination may be suffered are taken into consideration. Yet discrimination in employment accounts for around forty per cent of reported incidents of discrimination.

At the same time, the Penal Code only allows direct discrimination to be punished.

- Making a complaint:
  - The individual who has suffered the discrimination must wish to make a complaint. Yet this process makes some individuals reluctant, for reasons which are related either to a refusal "to take it that far" or to a fear of victimisation. Provisions such as the free phone helpline 114 or the presence of an association are particularly essential in this. They offer a listening ear and advice which is sometimes the only thing the victims (or witnesses of discrimination) ask for. They also allow for consideration of the conduct in question without there being a need to involve often long and uncertain legal proceedings.
  - It must be possible for the complaint to be lodged. Yet, although they have an obligation in this matter, some police stations refuse to register complaints.

[20] Art. 432-7 of the Penal Code

[21] Art. 121-2 of the Penal Code

[22] The magistrates with responsibility for ensuring the enforcement of the law and guarding the general interests of society.

[23] Art. 2-1, 2-6, 2-8 and 2-10 of the Code of Criminal Procedure

- Complaint allowed:
  - The Public Prosecutor, to whom the complaints must normally be passed, has discretion as to whether a prosecution should be brought. He or she may thus decide not to act upon a complaint. This decision does not merely depend on the evidence presented when the complaint is made (which is often insufficient to allow for prosecution), but also on the public prosecutor's awareness of these issues. In this respect, some public prosecutors have a clear penal policy which they make known to the various agencies involved in combating discrimination, thereby allowing actions to be co-ordinated (this point relates first and foremost to Paris where there is a section which specialises in offences of a racist nature). Other public prosecutors, in spite of government circulars which encourage them to act in this way, remain unwilling. However, it should be made clear that the percentage of cases where no further action is taken is more or less the same in the sphere of discrimination as in other spheres. With regard to the discontinuance of proceedings in cases pertaining to discrimination, there is a more universal issue relating to organisation and the resources available to the courts[24].
  - To avoid proceedings being dropped, victims may "constitute themselves as civil claimants". This procedure obliges an inquiry to be opened. However, the victim is required to pay a deposit, the amount of which is set at the discretion of the examining judge (between FFr 1,000 and FFr 15,000 (≈153 - ≈2,300 Euro)). This deposit is aimed at preventing the improper use of the system of persons constituting themselves as civil claimants. However, it is also an obstacle to the respect of rights, especially for individuals who do not have adequate financial resources.

The victim may also use the "private prosecution" (*citation directe*) procedure. This allows the perpetrator of the offence to be prosecuted privately before the court. However, it requires the victim already to have assembled all his or her evidence, even though in other procedures an inquiry is generally conducted - often the only way to collect the evidence necessary for a conviction.

- The issue of proof
  - Once the case comes before the court, proof must be provided not only of the actual act of discrimination but also of the intention to discriminate. It is very difficult to provide this proof, since discrimination is often hidden and diffuse. At the same time, the principle of the presumption of innocence, of particular importance in criminal cases, requires proof such as written evidence or confessions to be provided. Yet the individuals who could testify are reluctant because, in the majority of cases, they are in daily contact with the perpetrator of the discrimination. It appears that this principle of the presumption of innocence cannot be relaxed in criminal cases. On the contrary, the concept is being developed in civil cases as well, particularly under the impulse of the EU. However, the system of proof appears to be more flexible in criminal cases than in civil cases, in that the proof may be provided by any means and the examining judge has more significant powers of coercion.

In conclusion, it can be said that the dissuasive effect, if any, of this law must certainly be due more to the knowledge of its existence and the lack of awareness of the results of its application than to the risks involved in its contravention. Nevertheless, it can be said that the existence of such a law shows society's disapproval, officially at least, of this type of act and that it has an important symbolic value. Its application, which is infrequent and difficult, moreover has a predominantly negative effect on the victims, insofar as it gives rise to the hope of justice which is then immediately dashed by the numerous obstacles which stand in the way of the application of the law. There is thus a source of resentment, the effects of which are hard to measure precisely, but which are certainly not insignificant.

2.1.3 Incitement, abuse and defamation

The offences

The incitement to discrimination, hatred or violence, as well as abuse and defamation "against a person or a group of persons because of their origin or their membership or non-membership of a particular ethnic

[24] Senate information report 513 (97-98), Hubert Haenel, *Les infractions sans suite ou la délinquance mal traitée*

group, nation, race or religion" constitute three types of offence which are criminally punishable.

Defamation is the allegation or imputation of a fact which impugns the honour of a person or a group of persons, while abuse does not contain the imputation of any specific fact.

A distinction is made, depending on whether the offences are perpetrated in public or in private.

- If the incitement, abuse or defamation is perpetrated in public, it constitutes an indictable offence and is subject to the provisions set out by the law of 1881 on the freedom of the press[25].

Public nature of the offence:
An action is considered to be public[26] if it is effected by "speech, slogans or threats expressed in public places or meetings, whether through written or printed material, drawings, engravings, paintings, symbols, images or any other written, spoken or graphic medium sold or distributed, made on air or displayed in public places or meetings, whether by means of posters or placards displayed in public or by any medium of audiovisual communication".

Provisions of the law of 1881 on the freedom of the press:
The law on the freedom of the press institutes specific legal provisions for the offences which it makes illegal.

- The time limit for taking legal action is within three months of the offence[27] or following the day of the last procedural step in the preparation for trial or the last stage in criminal proceedings. This means that every time a stage in the preparation for trial or a stage in criminal proceedings is completed, the time limit of three months begins again.
- The people who may institute legal proceedings are:
  - The victim.
  - The Public Prosecutor, who may institute criminal proceedings themselves. It should be noted here that, in cases of defamation or abuse against a person or a group of persons because of their origin or their membership or non-membership of a particular ethnic group, nation, race or religion, the public prosecutor's office may commence a prosecution of its own motion (that is, without the victim having previously made a complaint), although this is not possible for other cases of abuse and defamation[28].
  - Associations which have been legally established for at least five years whose statutes make provision for combating racism or helping the victims of discrimination, may also institute legal proceedings. However, they must obtain the consent of the victim if the offence was committed against an individual[29].
- The penalties established are up to one year's imprisonment and a fine of FFr 300,000 (≈45,735 Euro). The court, which is the criminal court, may also ordain the posting or dissemination of the decision – a measure which allows action to be taken to raise awareness among the population.
- Provision is made for a right to reply in the publication containing the offending remarks. This right may be exercised by the victim[30] or by an association[31]. However, associations must obtain the person's consent if the case concerns an individual.

The same provision, subject to some slight modification, exists in the case of audiovisual dissemination[32].

- If the incitement, abuse or defamation is perpetrated in private, it constitutes a summary offence (*contravention*) (Penal Code[33]). Such offences are usually punished by a fine (4th or 5th grade). Since they are incorporated into the Penal Code, such offences should follow the provisions of common law (*droit commun*) established for summary offences. However, the case law shows that these offences are subject to the same time limit as when they are of a public nature, that is three months[34].

[25] Art. 24, para 6, 32 and 33 of the law of 29 July 1881

[26] Art. 23 of the law of 1881

[27] Art. 65 of the law of 1881

[28] Art. 48 of the law of 1881

[29] Art. 48-1 of the law of 1881

[30] Art. 13 of the law of 1881

[31] Art. 13-1 of the law of 1881

[32] Art. 6 of law 82-652 of 29 July 1982 on audiovisual communication

[33] Art. R625-7, R624-3, R624-4 of the Penal Code

[34] Civ 2 14 January 1999 appeal no. 97-12.157, Bull II no. 9

Evaluation

- Provisions of the Penal Code (incitement, abuse and defamation of a private nature)

Like all the provisions of the Penal Code described so far, these very rarely lead to convictions and this is for the same reasons (particularly the lack of witness). Between 1994 and 1999 there were only four convictions, all on the basis of incitement, which resulted in penalties of an average fine of FFr 1,500 (≈229 Euro).

- The provisions of the law of 1881 (incitement, abuse and defamation of a public nature)

The number of convictions on the basis of the law of 1881 is clearly higher. In 1999 it rose to 111, of which 82 were convictions for public abuse (with an average of two months' imprisonment and a fine of FFr 4,625 (≈750 Euro)) and 15 were convictions for incitement (with no sentences of imprisonment and an average fine of FFr 11,165 (≈1,703 Euro)). The figures for other years are similar.

The law of 1881 on the freedom of the press is generally considered to provide an effective means of combating the dissemination of racist ideas through the medium of the press. The majority of those involved in combating racism comment that, since the law of 1972[35], there has been a significant decrease in the occurrence of openly racist discourse in the media. It may be noted that there had to be a certain period of adjustment between the promulgation of the law and the situation as it is today. In this delicate sphere, where the principle of freedom of expression must be maintained, it is difficult for judges to find the right balance. In addition, it is sometimes highlighted that the combination of the use of this law and the powers accorded to the Minister of the Interior to prohibit certain foreign publications in France[36] involves the risk of censorship, leading to the prohibition of any non-consensual discourse. There is the danger here, denounced by some in France, that by combating the "intolerant enemy" in this way, one ultimately resembles it[37].

On the other hand, those involved in combating discrimination tend to consider that the time limit is too short, especially since there is the risk that, at any point of the proceedings, the time limit may expire and so constant vigilance is essential. Moreover, this time limit may lead to cases being treated as a matter of urgency, without the victim having had time for reflection. Finally, it is still difficult to obtain the necessary evidence to prove certain offences.

- Combining the provisions of the Penal Code and those of the law of 1881

The distinction which is made between a public and a private offence is explained by the fact that offences which are perpetrated in public are automatically more serious in that they affect more people (this also explains why they are punished more severely). Yet the punishment of these offences is also more dangerous, as this touches on an area where freedom of expression should particularly be protected. However, many people protest against this last argument, considering that the danger to freedom of expression is not so important, even though the fact that these provisions are contained in the law on the freedom of the press is an obstacle to their application (particularly because of the time limit).

On the other hand, judging whether an offence is of a public or a private nature is not always easy. For example, abuse committed made in the corridor of a block of flats might be considered to be public if the building is frequented by large numbers of people, both residents and non-residents. However, if the opposite were true, the offence might be considered to be private. Thus, the difference is crucial. Depending on whether the offence is committed in public or in private, both the punishment and the competent court will be different. Furthermore, if the offence is public, associations may institute legal proceedings[38] (on condition that, if an individual has been targeted personally, his or her consent is obtained), whereas if the abuse, defamation or incitement is private, there is no clause which makes provision for action by an association.

Finally, the fact that these offences are enshrined in the

[35] Law 72-546 of 1 July 1972, which incorporated the main articles on combating discrimination into the law of 29 July 1881 on the freedom of the press.

[36] Art. 14 of the law of 29 July 1881 on the freedom of the press.

[37] *L'antiracisme dans tous ses débats*, edited by Lucien Bitterlin, Arléa Corlet 1996, collection Panoramiques.

[38] *Art. 48-1 of the law of 1881*

Penal Code if they are of a private nature, although they are in a law instituting a specific regime if they are of a public nature, is a source of uncertainty with regard to the applicable regime. For the moment, the case law states that the same time limit applies, but this position could change at any time. Moreover, this does not contribute to clarity of reading which is, however, essential if the law is to be made accessible to all.

To conclude this section on the penal suppression of discrimination, it may be said that, while it is not useless, it still falls short of its ambitions. At the same time, criminal procedure and criminal sanctions are still not fully adjusted. This is why clauses exist which make provision for civil proceedings and civil sanctions.

2.2 Prohibiting discrimination in the sphere of employment

2.2.1 The provisions contained in the Labour Code

There are specific provisions relating to discrimination contained in the Labour Code. They are few and are incomplete but a law which is in the drafting process should reinforce them. These provisions allow action to be brought before an industrial tribunal (*Conseil des Prud'hommes*), in accordance with a procedure which differs from the criminal procedure. The aim of the procedure at the industrial tribunal is not to lead to the criminal conviction of the perpetrator of the offence (with a fine or a prison sentence – a symbol of society's disapproval) but rather to re-establish the rights of the person who has been discriminated against and to award him or her compensation.

Thus, the Labour Code stipulates that, "*No individual may be rejected from a recruitment process and no employee may be penalised or dismissed on the grounds of his or her* ***origin****, (…)* ***membership of an ethnic group, nation or race,*** *(…) or* ***religious convictions*** *(…)*"[39].

The penalty for an action which is contrary to this provision is that the action is declared null and void.

In addition, internal company regulations "*must not include provisions discriminating workers of equal professional ability in their work or employment on the grounds of their (…) origins, opinions or faith (…)*"[40].

It is also stipulated that any industrial agreement concluded at national level must include provisions on the equal treatment of French and foreign employees[41].

At the moment, labour inspectors report offences[42] which involve refusing to employ, penalising or dismissing an individual for discriminatory reasons. They also have certain rights of investigation but this is limited.

Finally, acts of discrimination or racism perpetrated by one worker against another constitute gross misconduct and the offending worker may be dismissed without notice or damages.

2.2.2 Evaluation

The advantage of such provisions in the Labour Code is that they make possible a form of action other than a criminal conviction of the perpetrator of the offence. The victim may choose to go before an industrial tribunal. In certain cases the tribunal, made up of equal numbers of employers and workers, is more suited to judge the events. It is also sometimes more suited to the wishes of the worker who may prefer to be re-integrated into the company or to obtain compensation for unfair dismissal, rather than see his or her employer, often a legal entity, pay a fine.

Statistics on the number of actions brought before industrial tribunals and the resulting judgements are few and far between. Nevertheless, they do show that few proceedings are instituted and still fewer succeed, even though the incidents reported are very numerous.

This may be explained by a number of different factors.

- The law only prohibits discrimination at the time of recruitment, sanction or dismissal. Yet discrimination often occurs even before a person is employed, for example in access to traineeships or internships. It may also appear in other forms apart from sanctions, for example, withholding promotion. Finally, an employer can displace a worker other than by dismissing him or her, for example by sidelining him or her to a post without responsibility. In all

[39] Art. L122-45 of the Labour Code

[40] Art. L122-35 of the Labour Code

[41] Art. L133-5 10° of the Labour Code

[42] Art. L611-1 of the Labour Code

these cases, there is no possibility of taking legal action, even though they all essentially constitute discrimination. A law which is in the process of being adopted should remedy this deficiency. However, even though there have so far been equivalents in the Penal Code of the provisions contained in the Labour Code, the new provisions will only apply to the Labour Code. This will introduce an additional complication because, in certain cases of discrimination, the victim will be able to choose between criminal action or action before an industrial tribunal, while other cases will only be able to be brought before an industrial tribunal.

- Another problem is that, as in criminal cases, it is very difficult to provide proof of the existence of discrimination. This is even more true when the fear of losing one's job, of being held back in one's career or even of seeing one's working conditions deteriorate, takes precedence over defence against discrimination.
- Finally, only the victim may bring legal proceedings, or an association may potentially do so if the employer is to face a criminal prosecution. But the unions, who are nevertheless at the heart of the company and have the resources to obtain the necessary documents to provide the proof, do not currently have the right to bring legal action.

This chapter cannot really be brought to a close without mentioning the issue of "closed employment". These "closed" jobs[43] are those which are reserved by law for French nationals or citizens of the European Union or which are subject to conditions, such as the possession of a diploma, or checks which effectively mean that access to them is restricted for foreigners. While certain restrictions may be explained by the nature of the profession, it appears that there are considerable numbers of posts in France which are more or less reserved for French nationals, without there being any justification for this legal discrimination. Recently, this was estimated to apply to seven million posts, or around thirty per cent of jobs in the labour market. This legal discrimination is so widespread that it is bound to have the effect of encouraging illegal discrimination, since it is no longer perceived as something abnormal which should be outlawed. GED (later GELD), who produced a report on this issue, states that, "*The extremely widespread existence of posts which are closed to foreigners has a more significant effect than has previously been realised on the process of integration and raises direct questions about the effectiveness of anti-discrimination initiatives*".

The proposal has been made to re-examine the legislation relating to each profession, so that access to them is only restricted insofar as appears to be strictly necessary, following clear principles and understood by all.

2.3 Comments on the laws in the process of being adopted

There are currently two laws which are in the process of being adopted. One of them relates specifically to combating discrimination in the field of employment, while the other contains anti-discrimination provisions in relation to employment and housing.

These laws make provision for adjusting the burden of proof in cases of discrimination in the field of employment and in cases of discrimination in housing rentals. The individual who considers that he or she is the victim of direct or indirect discrimination must establish the facts which demonstrate the probability of the existence of discrimination. It is then the responsibility of the alleged perpetrator of the discrimination to provide proof that no discrimination took place. The judge then makes his or her decision. The Parliament is currently seeking a definition which, while facilitating the establishment of the discrimination, does not lead to a substitution of the choices of employers and landlords by the choice of a judge[44].

In the field of employment the powers of the labour inspectors have been extended, the right to bring action has been accorded to unions and associations, and workers who have given evidence or reported incidents of discrimination may not be subjected to discriminatory measures.

These provisions should make legal proceedings more effective, as well as conforming to the European Directive. However, there are still many areas of everyday life which are not covered and these provisions are still lacking in the criminal sphere, at least in relation to employment.

[43] GED Note No. 1, March 2000 *Une forme méconnue de discrimination: les emplois fermés aux étrangers*

[44] Cf parliamentary debates on the draft anti-discrimination bill

This section has shown that the legal route as it is practised in France is not, on its own, satisfactory. It is for this reason that other measures have been taken, in an effort to make up for these deficiencies.

3. Institutional measures which contribute to a discrimination prevention strategy

For a long time there have been associations active in the sphere of combating discrimination. To a certain extent, they have the right to bring legal proceedings and they play an important role as a listening ear, in awareness-raising and in actions other than legal action. In contrast, action by the public authorities has so far been very limited. Recently, structures have been established to try and put a coherent anti-discrimination policy into concrete form. Since they are very recent, it is difficult to draw any general points from these structures in their current form which would be of value for the future.

3.1 GELD (Groupe d'Etude et de Lutte contre les Discriminations – Group for Studying and Combating Discrimination)

The Group for Studying and Combating Discrimination (*Groupe d'Etude et de Lutte contre les Discriminations*) was created in 1999. Its aim is to analyse the discrimination suffered by populations on the basis of their origin, real or supposed, and to formulate proposals to combat this discrimination.

It is overseen by a board of directors made up of representatives from the public services, trade unions and associations. An executive board, composed principally of researchers (sociologists, lawyers and economists), organises working groups and ratifies the content of the work of GELD.

The studies by GELD allow discriminatory phenomena to be better identified. However, GELD is far from being the independent administrative authority which is called for by some, which would have real power, especially in inquiries and instituting proceedings[45].

3.2 The CODACs (Commissions Départementales d'Accès à la Citoyenneté – Departmental Commissions for Access to Citizenship)

The CODACs were set up by the Minister of the Interior in 1999[46]. Their remit, among other things, is to deal with cases of discrimination. They are the local co-ordinators for the free phone helpline 114.

They are set up in each département by the prefect and are made up of representatives of the public services. They are not obliged to include associations, unions and landlords of social housing, even though they are encouraged to do so.

There are widely differing evaluations of the CODACs. While they are very active in some départements, in others they are no more than nominal.

3.3 114

114 is a free phone helpline which may be called by individuals who consider that they have been victims of racial discrimination. When a case of discrimination is reported, the helpline staff send a file to the CODAC in the relevant département. The case may be dealt by the CODAC itself or may be passed on to one of its partners. This partner may be a public service, an association or even a social services worker. The task of the partner is to make contact as soon as possible with the person who has reported the case and to deal with the case.

The evaluation of 114 also differs widely, depending mainly on the follow-up which the caller receives, that is from the partner to whom he or she has been referred.

This institutional system of combating discrimination offers an alternative to the penal solution which, as has been seen, is not always effective. It allows the victim to be offered a form of intervention which can be adapted to suit his or her situation, such as mediation between the victim and the perpetrator of the discrimination or even assistance in the practical resolution of the problem. However, it still falls short of what is provided for by the European "Race and Ethnic Origin" Directive.

[45] The report by Jean-Michel Belorgey for the Minister of Employment and Solidarity "*Lutter contre les discriminations*" ("Combating discrimination"), produced in March 1999, followed these lines.

[46] Circular of 18 January 1999 on the establishment of a Commission Départementale d'accès à la citoyenneté (Departmental Commission for Access to Citizenship).

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Valuable assistance from Malika CHAFI (official representative, GELD), Nicolas GRIVEL (MRAP), Héloïse HEDOUIN (legal expert, MRAP), Haoua LAMINE (legal expert, Femmes de la Terre), Sophie LATRAVERSE (official representative, GELD), Patrick QUENTIN (lawyer, LICRA), Bruno QUEMADA (legal expert, LDH), Muriel QUENTIN-BRODER (LICRA), Sophie PISK (legal expert, MRAP)

Chapter III
Equal treatment in the Netherlands

(Dick Houtzager, LBR, Landelijk Bureau ter Bestrijding van Rassendiscriminatie)

1. Introduction

This paper discusses the experience with anti-racist legislation in the Netherlands in the context of the recent developments in the European Union. The changes in the EC Treaty, brought about by the Treaty of Amsterdam, notably the adoption of article 13, placed anti-racism and non-discrimination within the scope of the European Communities. In the Netherlands, specific non-discrimination legislation has been in force for a number of years and there is substantial experience with the enforcement of these laws. The changes in Dutch law, required by the Council Directive implementing the principle of equal treatment between persons irrespective of racial or ethnic origin (2000/43/EC; hereinafter called the Racial Equality Directive), will probably be less drastic than in some other EU Member States.

Section 2 analyses the existing legislation in the Netherlands. It will give an overview of criminal law, civil law and administrative law. Much attention is given to the Equal Treatment Act, a comprehensive law to fight various forms of discrimination in a number of fields. In section 3 the implications of the Directive for Dutch legislation are briefly highlighted. Section 4 closes the paper with some concluding remarks.

2. Existing legislation

2.1 Constitution

In 1983, with the revision of the Constitution, the principle of non-discrimination and equal treatment was adapted to the views of the late twentieth century. Article 1 of the Constitution states that "*all persons in the Netherlands shall be treated equally in equal circumstances. Discrimination on the grounds of religion, belief, political opinion, race or sex or on other grounds shall not be permitted*". Through the adoption of this provision, the state has a legal duty for equal treatment. At the same time, it gives citizens the right to be different from others, but still be treated equally in equal cases.

Article 1 cannot be invoked between civilians. The constitutional system necessitates the transposition of fundamental rights into specialised legislation.

The first law to include specific provisions on racial discrimination was the Penal Code (1971). After that, the Equal Treatment Act was adopted in 1994 under the civil legislation. In order to promote the opportunities of ethnic minorities on the labour market, also in 1994, an Act was introduced which requires employers to reach a proportionate representation of ethnic minorities in their workforce. This act was repealed in 1998 and replaced by the Act on the stimulation of labour participation of ethnic minorities.

2.2 Criminal law

2.2.1 Penal Code

Effects of ICERD

As a result of the ratification in 1971 of the International Convention on the Elimination of all forms of Racial Discrimination (ICERD), the Dutch government introduced a penal sanction on public insult based on race, religion, belief or sexual orientation. The Penal Code was the first law in the Netherlands to address racial discrimination. Apart from insult, the incitement of others to hatred or discrimination was made punishable, as well as the publication and dissemination of racist material. Participating in or supporting activities aimed at discrimination was made punishable. Finally, discriminatory acts performed in a profession or trade or in public service were also made punishable.

The definition of discrimination, as laid down in the Penal Code, follows the text of the ICERD. It defines discrimination as "any distinction, exclusion, restriction or preference 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". This definition includes both direct (the purpose) and indirect (the effect) discrimination.

In 1976, the Dutch Supreme Court confirmed that the wording as used in the ICERD was applicable in the Netherlands[48], thereby including colour, descent and national or ethnic origin into the concept of race. The Supreme Court dealt with a case of an extreme right-wing party, whose leader had distributed leaflets in the run-up to local elections. In the leaflets, non-white people from Surinam and Antillean descent were described in foul terms. The accused was defended with the argument, that the text of the Penal Code only mentioned "race" as the base on which insult could be grounded. It was argued that by mentioning persons from Surinam and the Antilles in the leaflet, he did not refer to 'race'. The Supreme Court, however, ruled that the word 'race' should be interpreted according to the apparent meaning of the definition of article 1 of the ICERD, where besides 'race', colour, descent and national or ethnic origin are also mentioned. The reference to persons from Surinamese or Antillean origin was therefore considered to be racist under the definition of the Penal Code.

In a recent judgement, the Supreme Court decided that asylum seekers, residing in an asylum centre, also fall under the protection of the ICERD[49]. Refusing them admittance to a discotheque constitutes indirect discrimination, because they do not only jointly live in the asylum centre, but they belong to a race under the definition of ICERD also through colour, national or ethnic origin, cultural or geographic descent.

In 2000, for the first time a suspect was convicted for publication of hate speech on the internet.

Prosecution

The prosecution of discrimination cases by the police and the public prosecutors in the Netherlands tended to be lax and haphazard. There were many complaints by victims of racism about the lack of cooperation by especially the police and the public prosecution. Police were often unwilling or unable to process a complaint and to conduct investigations. The public prosecutor often found there was not enough evidence to bring a case before the court and dismissals of discrimination cases were frequent. This led, amongst other reasons, to a distrust of the police by victims.

The number of reported violent racist incidents has been an average of 245 per year[50]; in 1998 the number of incidents was 313 and indications are that the numbers have increased over 1999 and 2000. Most of the incidents concerned violence against property (racist graffiti, smashing of windows etc.), but violence against persons (threats, bodily harm) constituted a significant part. It is estimated that the real number of incidents has been much higher, which is accounted for by the phenomenon of underreporting. Underreporting exists on two sides: the majority of victims does not report an incident to the police, and those incidents which are reported, are not sufficiently compiled in a central database.

Currently, plans are being developed to establish a national expertise centre, which should support local police forces to more efficiently deal with racist and discriminatory crimes.

In order to tackle racist incidents more efficiently, in 1993 the Ministry of Justice issued a discrimination guideline. The guideline, updated in 1999, tells the public prosecutors how to deal with discrimination cases, with the objective to create a consistent policy of prosecution in the whole country. It states that, because of the seriousness of racist crimes, in principle all cases should be brought before the court. The introduction of the guideline has led to better results and a more consistent policy. The establishment of the National Expert Centre on Discrimination in 1997, as a part of the public prosecution office, has increased the knowledge and expertise among public prosecutors.

Sanctions to be increased

In order to combat structural and organised expressions of racism more efficiently, the government sent a proposal to parliament to increase the penalties for racial insult, incitement to racism, the publication of racist material, and racism committed in profession or trade in 2001. The maximum penalty for the former two crimes will be doubled to two years imprisonment, the latter to one year imprisonment. In the pro-

[48] Judgement of 15 June 1976

[48] Judgement of 13 June 2000

[48] An average from 1994 to 1998. Source: J. van Donselaar, "Monitor racisme en extreem rechts, derde rapportage", Leiden: Universiteit Leiden, 2000, p.15

posal, the maximum fines are increased from 4550 Euro to 9100 Euro. Besides the increased penal sanctions, the public prosecutor will receive more legal powers to investigate suspects. One of the objectives of the increased penal sanctions is to demonstrate that structural forms of discrimination are intolerable and constitute a danger to the democratic institutions.

2.3 Civil law

2.3.1 Civil Code

Winding up racist organisations.

The Civil Code carries an article (2:20) which, at the request of the public prosecutor, provides for the winding up of an association whose activities are against the public order. The article had been included in the Civil Code in order to fight professional criminal organisations such as used by drug dealers. In 1998, this article was successfully used to counter racism, when an extreme right-wing party was wound up by the court. The members of the board of the party had personally been convicted for a number of racist crimes such as racial insult, incitement to hatred and the publication of racist materials. The party as a legal entity had been found guilty on criminal charges, too. These facts added together were reason for the prosecutor to request the winding up of the party. The court followed the requisition and wound up the party. It must be noted, however, that the LBR and other anti-racist organisations for many years had urged the public prosecutor unsuccessfully to use his powers against this racist party. The fear to harm democracy by winding up a political party prevailed, until the fact that the party was sheer racist became too clear to deny any longer.

2.3.2 Equal Treatment Act

Introduction

In 1994, the Equal Treatment Act (ETA; Algemene wet gelijke behandeling) was introduced[51]. The adoption of this general law on equal treatment followed previous legislation, which was exclusively aimed at the equal treatment of men and women in the labour market.

After years of debate in parliament, the Act finally came into force in September 1994. The debate mainly centred around the demand of churches and religious institutions to keep the possibility to refuse gays and lesbians to work in their institutions. The solution was found in the formulation that the Act should not infringe on "*the freedom of an institution founded on religious or ideological principles to impose requirements which, having regard to the institution's purpose, are necessary for the fulfilment of the duties attached to a post; such requirements may not lead to discrimination on the sole grounds of political opinion, race, sex, nationality, heterosexual or homosexual orientation or civil status*".

The "sole grounds"-criterium is interpreted in such a way, that the single fact that someone is homosexual, cannot be a reason not to hire him or her. As a simplified example it can be said that a cleaner in a catholic school could be gay, but not the social science teacher, because he/she could discredit the school's foundations.

One of the main objectives of the Equal Treatment Act is to bring about social change. By recognizing that socio-economic structures maintain an unequal division in society, the ETA was introduced to supply minority groups with a tool to reach equality. The Act therefore is not a "neutral" one.

For the enforcement of the Act, the Equal Treatment Commission was established. Its functioning is discussed below in section 2.3.3.

Discrimination grounds

The discrimination grounds which fall under the Act are religion, belief, political opinion, race, sex, nationality, heterosexual or homosexual orientation or civil status. It may be noted that two grounds which are mentioned in the framework directive (2000/78/EC), handicap and age, are not listed. For these two discrimination grounds, separate acts are being developed.

Closed system

The ETA is built upon a closed system: exceptions to the general prohibition of unequal treatment are only possible in those cases which are explicitly mentioned in the text of the Act. Also, the discrimination grounds are limited, as well as the scope of the prohibition.

[51] For the English translation of the act, see: www.cgb.nl/act_frameset.html

The choice for a closed system was made in order to create certainty for civilians. It was argued that, if the norms are clearly listed in the Act, people will know which activities are permitted and which are prohibited. The system of objective justification of direct discrimination, as applied by the European Court of Justice, was deemed to be too rigid and not in agreement with the Dutch Constitution.

The Act distinguishes between direct and indirect discrimination. Direct discrimination is allowed only in a number of exceptions, which are limited to those listed in the Act. Indirect discrimination is defined as "*discrimination on the grounds of other characteristics or behaviour, resulting in direct discrimination*".

In cases, where indirect discrimination has been established, there may be objective justifications for the unequal treatment. The criteria for these justifications have not been explicitly named in the Act. However, the criteria applied by the European Court of Justice have been adopted by the courts and the Equal Treatment Commission, the body which looks after the enforcement of the ETA. The criteria used are: the unequal treatment is applied in order to serve an objectively justified goal; the chosen measures are appropriate and necessary to reach this goal, and the goal cannot be reached in any other way than by applying the unequal treatment.

Scope

The ETA covers three main fields. It includes the employment sphere: advertisements and selection procedures, hiring and firing of employees in both the public and the private sector, the terms and conditions of employment, employment-related education and training and promotion. Secondly, discrimination with regard to the self-employed is prohibited, and thirdly, the public supply of goods and services, concluding, implementing or terminating agreements are included. This section addresses private persons, public services as well as institutions which are active in the field of housing, social services, health care, cultural affairs and education.

Sanctions

The ETA names only two sanctions. The first is the protection against termination of an employee's contract. The Act states that an employee cannot be fired on the grounds that he or she has started proceedings against the employer on the basis of discrimination, which is meant to be a protection against victimisation. In a case handled in 2000, the Commission ruled that someone who is a witness of discrimination, without being a target him-/herself, can file a complaint and is able to invoke the protection against victimisation[52].

The second sanction is that all provisions in contracts, which are in conflict with the ETA, are null and void. There are no other specific sanctions against persons who are found to have acted against the ETA.

Positive action

The Act allows positive action as an exception to the general prohibition of unequal treatment. It states that the prohibition shall not apply if the discrimination is aimed at putting members of ethnic and cultural minorities in a privileged position, in order to eliminate or reduce *de facto* inequalities. This preferential treatment has to be reasonably proportionate to that aim, and it should be abolished when equality is reached.

In the case law of its rulings, the Equal Treatment Commission has established that institutions which want to hire persons belonging to an ethnic or cultural minority on a preferential basis, can only invoke the exception of positive action, if this is laid down in a written and publicised policy, and if the unequal position has been determined.

Where ethnic and cultural minorities are concerned, the Commission distances itself slightly from the case law of the European Court of Justice in cases of positive action for women[53]. The Commission issued rulings in two similar cases, where a city council asked explicitly for members of ethnic minorities to apply for jobs as social workers. People from Dutch origin could not apply. On the complaint of a Dutch citizen, the Commission ruled that the preferential treatment of ethnic minorities was allowed. Although the ETA holds the principle that positive action for women and ethnic minorities should be implemented in the same way, the Commission was of the view that this principle does

[52] Ruling 2000-73

[53] Notably the Abrahamsson case: ECJ 6 July 2000, case C-407/98

not need to be effected in the same way. The effectuation of positive action depends, according to the Commission, on its legal and social context. In this regard, the Act on the stimulation of labour participation of ethnic minorities (Wet SAMEN, see below), had to be taken into account. The Wet SAMEN requires organisations to reach a proportionate participation of ethnic minorities in their staff. Because the Wet SAMEN is an implementation of section 2.2 of the ICERD, the Equal Treatment Act needs to be interpreted in conjunction with this Convention. This meant, according to the Commission, that the criteria for positive action should not be interpreted too narrowly. The objectives of the various laws include reaching de facto equality of minority groups on the labour market.

Whether this point of view will hold before the European Court of Justice, remains to be seen.

Burden of proof

Although the ETA does not specifically provide for a shift in the burden of proof, the Commission has accepted this principle since its inception in 1994. A shift in the burden of proof is accepted in other fields of civil law, such as in medical conflicts. It generally involves cases where an individual is confronting an institutional opponent. Considering the fact that the institution has at its disposal the necessary information, it is sufficient that the complainant brings a motivated request before the court (or the Equal Treatment Commission). It is then the institution, which has to prove its stand. With the implementation of the Racial Equality Directive based on article 13 of the EC-Treaty, an explicit stipulation about the burden of proof will have to be adopted (see also below, section 3).

2.3.3 Equal Treatment Commission

Introduction

The Commission was established as an independent body and acts as a semi-judiciary court. Its objective is to interpret the Equal Treatment Act and to promote its enforcement within the legal framework.

The nine members of the Commission and its nine deputy members are appointed for six years by the Minister of Justice. The Commission has a supporting staff of around forty employees.

The Commission has three chambers; one dealing with gender-based discrimination, one dealing with race and nationality and one with the remaining discrimination grounds.

The tasks of the Commission comprise four main issues: to investigate complaints on the request of a complainant and give a ruling; to investigate an issue on its own initiative and give a ruling; to give recommendations in addition to the rulings and to bring cases before the courts.

Since its inception, the Commission has focused on the first task: the investigation of private complaints. The other tasks have not received as much attention, a fact the Commission wants to change in the future[54].

The Commission's rulings are non-binding. With the adoption of the ETA, the choice was made not to give a binding status to the rulings. The main reason was that the Commission was intended to be a body with a low threshold, with a more or less informal procedure. Binding rulings would increase the threshold and it was feared that fewer people would apply for the Commission's ruling. In order to ensure the enforcement, however, the possibility was created for the Commission to bring cases before a court of justice. Besides, the quality of the rulings, the authority of the Commission and the active investigation powers are elements in the impact of the Commission's rulings.

A number of writers and organisations, among which the Equal Treatment Commission itself, have asked to reinforce the status of the rulings, without undermining the accessibility of the Commission. A proposal has been put forward to make it compulsory for courts which pass judgements on cases which have been handled by the Commission, only to deviate from the Commission's ruling if they explicitly motivate their disagreement with the ruling. Up to now, courts may decide whether or not they take the Commission's ruling into account or even whether they want to refer to the ruling at all.

[54] Commissie gelijke behandeling: Gelijke behandeling in beweging. Evaluatie van vijf jaar Algemene wet gelijke behandeling. Utrecht, 2000, p. 51

Rulings

In 2000, the Commission received 193 complaints, which is less than in previous years. In the years 1998 to 2000, a quarter of all cases concerned race and nationality. This is less than in previous years, when an average of one third concerned these grounds. In 2000, 54 requests concerned race and nationality. Of these requests, 44 ended in a ruling by the Commission. The cases where no ruling followed, were withdrawn during the procedure. The majority of cases were labour-related: complaints about recruitment and selection, a difference in salary and harassment on the shop floor. Outside the labour sphere, the Commission looked into various complaints. A number of people complained about the conditions applied by telecom companies for the use of mobile telephones. Immigrants with a specific temporary residence permit (a D-document) were excluded from getting a mobile connection; the Commission ruled that this constituted indirect discrimination[55]. Also the requirement to show additional identification papers before a mobile connection was issued, was termed to be indirect discrimination; people with a place of birth in the Netherlands were not asked to show additional papers.

Despite the fact that the rulings are non-binding, many parties against whom a ruling was directed, follow the Commission's observations and act according to the ruling[56]. However, victimisation is common, especially where the complaint concerned the employment. Almost half of the complainants who submitted a complaint against their employer, said to have encountered disadvantages at work[57] and a third changed jobs because of the complaint.

Effectiveness of the ETA

Although the general support for the principle of equal treatment is high, the knowledge about the Equal Treatment Act in society is low. The group of professionals, who are best aware of the Act, are personnel officers[58]. They are most likely to be confronted with the Act.

The general public does not seem to be aware of the existence of the ETA; the number of complaints (54 complaints about race and nationality in 2000), compared to the number of ethnic minorities of non-western origin in the Netherlands, 1.48 million[59], may be seen as an indication of the lack of knowledge. Of the complainants, a large number is assisted in the procedure by anti-discrimination bureaus[60]. This indicates that many persons from ethnic minorities do not know about the existence of a procedure with the Commission.

Procedures at the Commission often have the result that an organisation changes its policy or its internal procedures; a procedure therefore can affect more persons than just the individual complainant.

2.4 Administrative law

2.4.1 Labour market

The labour market is one of the areas where discrimination occurs on a large scale. Data compiled by the national organisation of anti-discrimination bureaus show that the largest proportion of complaints concern employment. Issues are the selection of candidates for a job, harassment on the shop floor and the termination of contracts.

Administrative law has only few provisions which are aimed at combating racial discrimination. The main instrument is labour related: the Act on Stimulation of Labour participation of Ethnic Minorities (*Wet SAMEN*). The Act was introduced in 1998 and succeeded a previous act which had the same goal: to achieve a proportionate representation of ethnic minorities in the workforce. The Acts are seen as the implementation of article 2.2 of the ICERD. Both the public and the private sector fall under the scope of the Act.

The Act is not specifically aimed at combating racial discrimination, but it is a useful tool to reduce discrimination in the labour market. It requires companies and other labour organisations of over 35

[55] Rulings 2000-28 to 2000-32

[56] Asscher-Vonk, I.P. and C.A. Groenendijk (eds.); *Gelijke behandeling: regels en realiteit*, Den Haag: SDU Uitgevers, 1999, p. 447. The book is the result of a study into the legal and sociological effects of the Equal Treatment Act.

[57] Asscher-Vonk and Groenendijk (1999), p. 526

[58] Asscher-Vonk and Groenendijk (1999), p. 524

[59] on a total population of 16 million inhabitants

[60] Anti-discrimination bureaus are established in most towns and cities; they are generally subsidised by the local authorities and support victims of racism and discrimination.

employees to strive for a workforce which is representative of the population in the region where the organisation is established. The organisation has to keep a staff record which indicates the number of members of ethnic minority groups and to write an annual report in which measures are described to increase the number of ethnic minority employees. This annual report has to be submitted to the regional labour authority.

The Act does not put severe sanctions on non-compliance. In the event that an employer has not submitted a report or has not lived up to other requirements of the Act, the labour authority may send a warning notice. If there is no response, the authority can inform the company's employees council, the trade unions and the employers' organisations. Civil organisations are also intended to play a role in the enforcement of the *Wet SAMEN*. Non-governmental organisation, whose aim it is to promote the interests of minority groups, can commence legal proceedings under the general provision of collective action[61]. So far, this opportunity has not yet been used.

Although the intentions of the *Wet SAMEN* are widely appreciated, the implementation is seriously flawed. One of the weaknesses is the registration of ethnic minorities: registration is not compulsory and many employees refuse to state their origin. A reliable picture is therefore difficult to obtain.

A report published by the National Bureau against Racial Discrimination (LBR) in 1999[62], concludes that the number of reports being submitted is low and that the quality of the reports, i.e. the presented measures to reach proportionality, is also low. An evaluation by the Ministry of Social Affairs, published in March 2000, concludes that around half of the organisations submits an annual report. Of these organisations, the majority lists measures to increase the number of ethnic minorities.

The effects of the Act are rated low; the only significant effect was that the awareness about the requirements of the Act increased. However, few organisations changed their policy of recruitment and selection.

2.5 Codes of Conduct

Self-regulatory practices with regards to discrimination have developed in the Netherlands over the last decade. Research into discriminatory practices or a series of complaints have been the starting point for the development of codes of conduct. These codes usually contain guidelines for management and staff regarding ethical conduct within the organisation; non-discrimination is one aspect. Codes usually focus on the recruitment and selection procedures (as with temporary employment agencies) and they generally contain provisions on staff behaviour and treatment of members of ethnic minorities. Some codes of conduct provide for a complaints board with a confidential procedure.

Although the self-regulatory effect of these codes should not be underestimated, much depends on the proper implementation. Experience has shown that many codes of conduct lie unused in the management's drawers, only to be taken out when the company is confronted with discriminatory practices, in order to show to the outside world their willingness to combat discrimination.

3. European law: article 13 EC Treaty and the Racial Equality Directive

The adoption in 2000 of the Racial Equality Directive[63] meant that the Dutch non-discrimination laws have to be adapted to the requirements of the directive.

Most of the changes will occur in the Equal Treatment Act, but other acts will be affected as well. Following is a summary of the main changes as foreseen by various writers. At the time of writing, the Government has not yet indicated which laws and regulations will be amended.

3.1 Indirect discrimination

With regards to the concept of indirect discrimination, the terminology and the practice in the Netherlands legal system require the use of statistical material to prove that indirect discrimination occurred. According to the Racial Equality Directive, the use of statistics is not necessary.

[61] Article 305a, Book 3 of the Civil Code

[62] "Samen verder, notitie over de naleving van de Wet SAMEN", Rotterdam: LBR, 1999

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

3.2 Scope of the directive

Under current Dutch law, the social security and social benefits fall outside the scope of the Equal Treatment Act. Provisions in the ETA or in social security laws are needed to implement the directive.

3.3 Harassment

Dutch legislation does not have a provision regarding harassment. However, in the case law of the Equal Treatment Commission, the right not to be harassed at work has been treated as an essential condition of employment. Therefore, in practice, Dutch law has a certain degree of protection against harassment. According to a number of writers, however, it should be explicitly incorporated in the Equal Treatment Act.

3.4 Engagement of organisations in the defence of rights

According to the Racial Equality Directive, member states shall ensure that organisations which have a legitimate interest in ensuring that the principle of equal treatment is complied with, may engage in enforcement procedures, with the approval of the complainant. The Equal Treatment Commission has granted the right to associations to file a complaint. However, the text of the ETA does not explicitly provide for such actions, and amendment of the text is necessary.

3.5 Shift in the burden of proof

As mentioned above, in the practice of the Equal Treatment Commission, a shift in the burden of proof has been accepted. Because the Equal Treatment Act does not regulate this explicitly, it should be amended in order to comply with the Racial Equality Directive.

3.6 Victimisation

In current Dutch law, protection against victimisation is restricted to dismissal from employment. The requirement of article 9 of the Racial Equality Directive means that the protection against victimisation should be applicable on a wider scale.

3.7 Body for the promotion of equal treatment

The Racial Equality Directive calls for the establishment of a body or bodies for the promotion of equal treatment of all persons without discrimination on the grounds of racial or ethnic origin. The competences of these bodies should include providing independent assistance to victims of discrimination in pursuing their complaints about discrimination, conducting independent surveys concerning discrimination and publishing independent reports and making recommendations on any issue relating to discrimination. The text of the Directive is quite weak and Member States are not required to establish independent bodies[64]. The Equal Treatment Commission satisfies the requirements of the Directive. The Commission enjoys even wider powers for investigation than the Directive requires. Article 19 of the ETA states that each person is required to give all information and to submit all documents as deemed necessary by the Commission, thus reinforcing the Commission's status as a semi-judicial court.

3.8 Sanctions

The Racial Equality Directive requires sanctions to infringements to be effective, proportionate and dissuasive. As was noted above, the current sanctions in the ETA only apply to the termination of an employment contract and the invalidity of conditions in contracts which are against the ETA. It seems that this is not sufficient and stricter sanctions should be introduced.

4. Conclusions

Anti-racist legislation in the Netherlands covers a range of fields in criminal, civil and administrative law.

The Penal Code provides for sanctions against racially motivated crimes. Its provisions are used regularly. The enforcement, however, leaves much to be desired. Especially the police needs to adopt a more effective approach to deal with victims of racist incidents. The introduction of guidelines for the public prosecutors has shown a gradual improvement in the prosecution policies. It is expected that the proposed increase of the penal sanctions will improve the effectiveness of criminal law.

[64] See also Mark Bell: *Meeting the challenge? A comparision between the EU Racial Equality Directive and the Starting Line*, in: Isabelle Chopin and Jan Niessen (eds.): The Starting Line and the incorporation of the Racial Equality Directive into the national laws of the EU member states and accession states, Brussels/London: Migration Policy Group and Commission for Racial Equality, 2001, p. 47.

The main instrument in civil law is the Equal Treatment Act. The ETA was enacted to be a tool for minority groups to fight against inequalities in a number of spheres, notably the labour market and the supply of goods and services. The ETA and its enforcement body, the Equal Treatment Act, play a useful role. The awareness about procedures under the ETA among ethnic minorities could be improved. For the implementation of the Racial Equality Directive, a number of provisions will have to be amended. Issues such as the definition of indirect discrimination, the scope of the ETA, harassment, the shift in the burden of proof, protection against victimisation and the application of sanctions should be changed.

Although not specifically aimed at combating racial discrimination, the Act on stimulation of the labour participation of ethnic minorities (Wet SAMEN) could be an important tool to improve the opportunities of ethnic minorities on the labour market, a field where discrimination occurs on a large scale. The implementation and enforcement of the Act are causes for concern.

Chapter IV
Implementation of antiracist legislation in Sweden

(Paul Lappalainen, JD, JK)

1. Introduction and historical background

1.1 CERD and criminal law

During the 1960s Sweden became a signatory to and ratified the UN Convention on the elimination of all forms of racial discrimination (CERD).

In 1970, as part of its efforts to fulfill CERD's requirements Sweden adopted § 16:9 of the Criminal Code forbidding unlawful discrimination, among other things, by merchants in the provision of goods and services. The timing and formulation of the ban on ethnic discrimination indicate that the Swedish parliament at the time did not consider this to be a major social issue. Discrimination was presumably considered to be a phenomenon that occurred in other places that had problems with "real" racists, ie South Africa or the southern states in the US. To the extent there was a problem in Sweden it was related to small minority of extremists and not a broader societal issue. A number of other European countries adopted similar criminal code provisions at about the same time. At most it was expected that 16:9 would only be needed in exceptional cases in Sweden.

1.2 Gender discrimination

In 1980 the Equal Opportunities Act concerning a ban on gender discrimination in the workplace was adopted. This ban, rather than following the criminal code model relating to unlawful discrimination, was instituted as a part of civil labour law with damages as the primary legal sanction. The Gender Equality Ombudsman (JämO) was instituted as the supervisory authority in relation to the Act. The JämO was given the authority to represent individual claimants in court. Since this was not a part of criminal law, but civil law, the burden of proof was lower than in criminal law which in part led to this Act being relatively more effective. Civil law also allows for negotiated settlements in a manner that is not possible under criminal law. This act was later amended and today covers indirect discrimination, allows for affirmative action to achieve greater gender equality and requires larger employers to develop annual written gender equality plans.

During the following years there was some pressure on various governments to develop legislation against ethnic discrimination in the workplace. A number of proposals were made but the government finally ended up adopting a 1986 law against ethnic discrimination which was limited to the establishment of the office of the Ombudsman against ethnic discrimination (DO). The mandate was broad but very limited in terms of power. The mandate covered ethnic discrimination within society, but the power of the office was limited to the power of persuasion. The DO was given the power to try to talk people into refraining from discrimination. A case for damages could not be brought by the DO or the victim against an employer or anyone else, no matter how much proof concerning discrimination was obtained. Given the limited powers of his office, Peter Nobel, the first holder of the office, is considered to have been a relatively effective advocate against ethnic discrimination in the workplace as well as in other spheres of society. Nonetheless the moral weight of the office was considered to be an insufficient deterrent to discrimination.

1.3 UN criticism leads to new law in 1994

Sweden was criticized during these years by the UN due to the fact that workplace discrimination on the basis of race or ethnic background was not illegal. For many years Sweden had argued that the parties on the labour market (the unions and the employers) acted to ensure that ethnic discrimination does not occur. Finally, a government enquiry was appointed in the early 1990s to a large extent due to the UN's criticism.

The government enquiry finally proposed a law that would allow for civil damages if a high burden of proof could be met. The Equal Opportunities Act concerning gender discrimination was not a used as a model for the 1994 Ethnic Discrimination Act in Working Life. Among other things a higher burden of proof was required concerning ethnic discrimination.

The relative similarity, at least in terms of the legal tools that could be used, between gender discrimination and other forms of discrimination, particularly ethnic discrimination, was simply not acknowledged. This manner of thinking led to the adoption in 1994 of a law against ethnic discrimination that was even weaker than the already comparatively weak Equal Opportunities Act concerning gender discrimination.

By 1996 Sweden was suffering from unprecedented rates of unemployment, and the unemployment rate of immigrants was three times as high as that of "native" Swedes. Politicians started realizing that something had to be done to avoid a social crisis while at the same time there was increasing public criticism concerning the ineffectiveness of the 1994 Act.

1.4 A modern act is finally adopted in 1999

A new government enquiry was appointed with the task of analyzing the work of the Ombudsman Against Ethnic Discrimination (DO) in relation to the 1994 Act, as well as proposing an effective law against ethnic discrimination in working life if this was found to be necessary. This enquiry (SOU 1997:174) proposed a new law. The enquiry's proposal was basically adopted by the Government and presented in a slightly modified form to the Parliament. The proposal was adopted and resulted in a new law that went into effect on 1 May 1999 – the Act on Measures Against Ethnic Discrimination in Working Life (hereinafter the 1999 Act).

At the same time a new act concerning the Ombudsman against ethnic discrimination was adopted. Again the DO was given a broad mandate in relation to ethnic discrimination within society in general along with the more specific mandate in working life specified in the above 1999 Act.

Also at the same time that the new act concerning ethnic discrimination in working life was adopted the Parliament adopted separate acts prohibiting discrimination in working life on the basis of disability as well as sexual orientation. These three new laws had used the Equal Opportunities Act basically as a minimum foundation upon which improvements were added that were inspired by, among others, the anti-discrimination laws and principles of the EU, the Netherlands and England. There are some differences between these laws, but they have the same basic structure. They all included the same improvements in comparison with the rules related to gender discrimination. Naturally, this resulted in political pressure to amend the Equal Opportunities Act in order to include those same improvements.

1.5 A legal framework for countering discrimination on different grounds

These four laws concerning working life along with § 16:9 of the criminal code, form the relatively uneven foundation of Swedish anti-discrimination law. In addition there are four anti-discrimination ombudsmen – one for each of the grounds of discrimination. The mandates of these ombudsmen vary somewhat but they all have the right to represent individuals in workplace discrimination cases.

It should be pointed out that there is currently a government enquiry that has the task of determining what changes are going to be required due to the two directives adopted by the EU concerning discrimination last year. The government has also indicated in its recently adopted Action Plan Against Racism that it is considering the possibility of combining several or all of the different anti-discrimination laws into one act as well as the possibility of joining together the various anti-discrimination ombudsmen.

2. Swedish legislation relevant to race and ethnic discrimination

2.1 General legal framework

Protection for the principle of equal treatment can be found both at a constitutional level as well as the level of national legislation. The constitution lays down the principle of equal treatment, both directly and indirectly. However, the practical implementation of the principle basically has to be looked for in the various specific laws against discrimination in Sweden.

2.2 Constitutional provisions

Chapter 2, Article 15 of the part of the Swedish Constitution called the Instrument of Government (IG) (Regeringsformen 2 kap. 15 §) provides that no one may be treated unfavourably inter alia on grounds of race, colour or ethnic origin in any piece of legislation. The provisions of the IG in principle govern only

the relationship between the individual and the state. In regard to employment in the public sector there is a constitutional requirement (Regeringsformen 11 kap 9 §, IG Chapter 11, Article 9) that decisions regarding an offer of employment shall be based solely on objective grounds, such as skills and merits, and it is therefore never justifiable to treat any job applicant unfavourably on the basis of ethnic background or other irrelevant factors. This applies directly to employment with the state as well as indirectly to employment by local governments.

Article 2 of Chapter 1 of the Swedish Constitution requires the State to respect "the equal worth of all and the freedom and dignity of the individual". More specifically, paragraph 4 of this provision calls on the public authorities to promote the cultural development of ethnic, linguistic or religious minorities. It should be noted, however, that these requirements have no specific normative force: they are basically recommendations to the legislature.

On the other hand, the various fundamental rights embodied in Chapter 2 of the Constitution like Article 15 are enforceable in law. However, this safeguard, which also applies to foreigners (Article 20, Chapter 2), is of only limited effectiveness: a court or an administrative authority may set aside a law or regulation as a violation of a fundamental constitutional right only if the violation is manifest. This limitation, that the law adopted by the Parliament not only violates, but is a manifest violation of the Constitution, means that as a practical matter this issue is rarely brought up in Swedish courts.

It should also be noted that The European Convention on Human Rights has been incorporated into national legislation.

2.3 National laws against ethnic discrimination

Criminal code § 16:9, unlawful discrimination (olaga diskriminering)

According to Chapter 16, Article 9 of the criminal code (16 kap. 9 § brottsbalken) which has been in force since 1970, discrimination based on racial or ethnic origin or religion is unlawful if carried out by a natural person representing an enterprise or organisation performing an economic activity or employed by such an or enterprise or organisation. If that person discriminates against another person on grounds of race, colour, ethnic origin or religious belief by not giving that person access to goods, facilities or services in her or his business activities on the same conditions that the enterprise or organisation applies to other persons, unlawful discrimination has occurred. The sanctions are fines or imprisonment for a maximum of one year.

The provision also covers discrimination in the public sector by officials and elected persons as representatives of public authorities and local governments. It also covers discrimination in access to public events.

It does not cover private relations between individuals (for example, a person who lets a room in her home). Nor does § 16:9 apply to employment relationships.

Naturally complaints concerning violations of the criminal code are to be submitted to the police and the prosecutors and they are in turn responsible for investigations and prosecutions. The role of the DO (discussed later) in regard to enforcement of this law is informal. The DO provides information to the public and others concerning which types of cases fall within the law. The DO also tries to follow the work of the police and prosecutors concerning individual cases in order to promote a proper handling of the complaints.

The case law is limited but some examples of the various cases appealed to the Supreme Court are presented below.

One fairly recent case (NJA:1999 s. 556) involved a shopkeeper's ban on entrance into his store by persons wearing wide, long and heavy skirts. The ban was determined to be discriminatory since it was formulated in such a way that it was directed at and affected basically exclusively women of a Finnish rom (gypsy) background. The sanction imposed was a criminal fine of SEK 1800 (≈194 Euro). In addition, civil damages of SEK 5000 (≈540 Euro) were ordered due to the violation of personal integrity involved.

During the same year a case involving a landlord in Uppsala (NJA:1999 s 639) was appealed to the Supreme Court. It was not established that the landlord had made a definite decision to not rent out the

apartment to the complainant even though it was established that the landlord had made somewhat negative statements concerning problems with a previous tenant with an Iranian background. The landlord was thus found not guilty.

One important Supreme Court case that shows the difficulty in proving that ethnicity was the decisive factor in the treatment received involved three men of African background who were denied entry into a restaurant in Stockholm (NJA:1996 s. 768). The three men were refused entry by the door guard. It is not entirely clear why – there were some references to the fact that the place was full and/or that table reservations were needed. The situation was also filmed by a Swedish news team. They (both were of Swedish background) were allowed into the restaurant without being stopped soon after the three men were refused entry. Originally the guard had told the police that the issue had been that there was some special event that evening. The guard later changed his story. He basically stated that he could not remember what his motivation was, but at the same time asserted that he never discriminated. The restaurant manager testified that minorities were frequent guests and that they would fire personnel who discriminated. The court found the guard not guilty since it was not proven that the ethnic background of the men was the decisive factor in the guard's decision to refuse entry. The Court concluded that some factor other than their ethnicity might have resulted in the guard's decision.

In a 1994 case (HD 1994-09-12, Mål nr. B 555/94, NJA 1994 s. 511) a landlord refused to rent out an apartment once he found out that the applicant's cohabitant (boyfriend) had an African background. This case resulted in a criminal fine of SEK 35000 (≈3.783 Euro) (75 day-fines times SEK 500 (≈54 Euro) per day).

The idea that discrimination may be a legal defense if it is good for the victim, or if it is intended to avoid ethnic concentrations, was rejected by the Supreme Court in a 1985 decision (NJA 1985 s. 226). In this case a public housing company refused to rent an apartment to a person with a rom (gypsy) background in a particular area. It was said by the defense that there was already a concentration there. It was probably not good for people of a similar background to move into such a concentration. On the other hand an offer was made concerning an apartment in a different area. The Court stated that the law cannot be interpreted in such a way that it would be all right to treat a person from a particular ethnic group less favourably by referring to the idea that in the long run it will benefit the group in question. This even applies when the purpose is to counteract ethnic housing concentrations. The conviction from the lower court was allowed to stand. The fine amounted to SEK 750 (≈81 Euro).

The Act on measures against ethnic discrimination in working life adopted in 1999

Concerning working life Sweden adopted the Act on measures against ethnic discrimination in working life in 1999 (Lagen (1999:130) om åtgärder mot etnisk diskriminering i arbetslivet). The Ombudsman against ethnic discrimination (DO) is the main supervisory authority concerning this law. The act (1999:131) that defines the mandate of the Ombudsman was also adopted in 1999.

These two laws were adopted because it had been determined that the previous law concerning ethnic discrimination was ineffective. There were two cases brought under the old law to the Labour Court. The defendant employer won both of them (AD 61/1997 and AD 134/1998). Among other problems the level of specific intent that had to be proved was similar to or higher than that in many criminal cases. There were also relatively few successful settlements of discrimination claims.

The new law provides among other things for a shifting of the burden of proof once certain objective factors are shown by the victim. These are basically that there is a difference in ethnicity and that the complainant has better qualifications than the person who got the job. Thereafter it is up to the employer to explain his decision. The law also covers the entire employment process (and not just the decision to employ) as well as individualising the damages that can be demanded. This law also gave the employer a responsibility to prevent ethnic harassment that was brought to her or his attention. Finally, the law requires employers to actively promote ethnic diversity in the workplace.

In regard to employment discrimination an individual complainant can be represented by the DO, her or his union or a private attorney. Under the Act the unions are given a primary responsibility for representing their members. The DO's responsibility in such cases is subsidiary to the unions. One important advantage with representation by the DO or a union is that the individual does not have to bear the legal costs.

Although a number of cases have been filed with the Labour Court, they have all thus far been withdrawn - basically due to settlements of the cases. This means that there is no formal case law concerning the 1999 act. However, the increase in the number of settlements since the new law went into effect represents a positive trend. Although the formal case law is lacking apparently employers are choosing to not test its limits. Instead they are settling the cases. This is also positive in general for the individuals involved since negotiated settlements can provide something the court does not have a right to award, i.e. employment. The courts can only award damages.

It could be said that an informal case law is developing through the settlements that have been achieved thus far. These have primarily involved cases where the DO or a union has represented the complainant. Since the new Act went into effect on 1 May 1999 there have been about 40 settlements. The following selection of settlements may be of interest in this regard. The number in brackets is the DO's case number.

In Dnr 593-2000 a complaint was filed with both the DO and the Equality Ombudsman for gender issues (JämO) against a company for ethnic discrimination, sexual harassment and retaliatory actions related to discrimination claims. She claimed that she had been improperly given a notice of dismissal. The settlement resulted in compensation of SEK 100 000 (≈10.807 Euro) for the complainant as well as her acceptance of the dismissal.

In Dnr 460-2000 a woman with a Russian background filed a complaint against her former employer. She received SEK 70 000 (≈7.565 Euro) as compensation. She had been working for eleven years in a home for the care of the elderly. In the fall of 1999 she was accused by her employer of failing to exercise due care in her treatment of the patients. She asserted instead that the issue involved harassment and ethnic discrimination on the part of others in the unit. She was finally moved against her will to a care unit far away from the home. The DO concluded that she was discriminated against in that the employer would not have treated a similarly situated person of Swedish background in the same manner. In this case the union refrained from representing its member.

In Dnr 88-2000 a librarian complained to her union concerning ethnic discrimination when she applied for a job at the Uppsala Metropolitan Library. She was finally offered and accepted a permanent position with the employer.

The Swedish National Immigration Office recently gave SEK 60000 (≈6.484 Euro) in compensation to a job applicant (Dnr 964-99). The job applicant asserted that he had been discriminated against in connection with a recruitment procedure by the Office. The settlement resulted in the withdrawal of the case from the Labour Court.

In Dnr 998-1999 a union safety representative was subjected to ethnic harassment by his employer. The employer made comments like "why don't you go back to where you came from", "you and your strange Arab country", and "you don't understand Swedish work methods". The employer also pushed the representative and told him to return to his work station when he was carrying out his union duties. After negotiations with his union the representative agreed to leave the workplace and received a compensation package amounting to about SEK 250 000 (≈27.018 Euro).

In Dnr 834-1998 it was asserted that a muslim woman was discriminated against by the County Dental Service. The focal point was on comments that had been made concerning her wanting to wear her headscarf if she got a job with the County. The settlement provided her with damages as well as an 8 month part time employment as a dentist within the Dental Service. The Service also agreed to arrange special training sessions for all of the clinic supervisors concerning the anti-discrimination law.

In Dnr 422-99 a Scottish woman was given a permanent teaching position as well as SEK 10000 (≈1.081 Euro) as damages. The woman was passed over even

though she was the only job applicant who fulfilled the employment criteria. She was denied the job because the employer felt that she lacked sufficient communicative ability. According to the complainant and the DO, she was passed over for the job because she spoke Swedish with an accent.

Many consider the fact that there is no formal case law to be a problem. Naturally, it would be good if there was some case law that could be referred to. Nonetheless, the settlements being reached today are a positive indication concerning the effectiveness of the new law. The cases are basically being brought and won. They are just not being decided in the courts - yet.

3. The Ombudsman Against Ethnic Discrimination and the National Integration Board

3.1 The Ombudsman Against Ethnic Discrimination

The DO is an independent government agency that was first estabilished in 1986. The current Ombudsman, appointed for six years at a time, is Margareta Wadstein. She has substantial experience as a judge as well as with work on human rights issues. She was also the head of the government enquiry that was the basis for the new law concerning ethnic discrimination in working life adopted in 1999. The agency has about 15 employees of whom most are attorneys.

According to the Act (1999:131) on the Ombudsman against ethnic discrimination, the DO is to counteract ethnic discrimination in both working life as well as other area of society. The term ethnic discrimination is defined as a situation where a person or a group of persons is treated less favourably in relation to others, or is in some other way subjected to unfair or offensive treatment, due to their race, skin colour, national or ethnic origin or religious faith.

The DO's work is to be carried out through the provision of advice and support to those subjected to ethnic discrimination in order to help them realize their rights. The DO can also take the initiative in regard to various measures against ethnic discrimination through meetings with government authorities, companies and organisations, as well as through the influencing of public opinion and the provision of information.

It is important to note that the DO's mandate does not cover other discrimination grounds. Furthermore, the DO cannot change legal judgments or issue sanctions. The mandate of the DO outside of working life, in relation to individuals, is limited to providing advice concerning how persons subjected to ethnic discrimination can exercise and assert their rights.

Through the Act on measures against ethnic discrimination in working life (1999:130) adopted in 1999 the DO has a specific mandate that allows the DO to assist individuals in cases under that law, which may include representing them before the Labour Court. Under this Act the DO also has the mandate of ensuring that employers actively attempt to promote ethnic diversity in the workplace.

This is how the DO works with complaints concerning working life

A complaint can be in regard to a person who, for example, considers herself to have been bypassed for a job, or feels he or she was subjected to harassment by an employer or by other employees, and that this treatment was due to his or her ethnic background.

If the person making the complaint is a union member, the DO must ask if the union is willing to take the case. If the union decides to not take the case, the DO can investigate the complaint. Some cases are resolved through settlements as a result of communications between the DO or the union and the employer. The complainant is not required to pay for the legal costs involved in cases brought by the DO to the Labour Court.

The requirement of active measures in the workplace

According to the law an employer also has a duty to undertake concrete measures to promote ethnic diversity in working life. A person who feels that an employer is not fulfilling his duty can submit a complaint to the DO. If the DO agrees the Ombudsman may respond with proposals concerning which measures should be undertaken. The DO can also take the initiative on its own in regard to bringing up such

issues with employers. (Today even the unions have a possibility of bringing up this issue directly with employers.) If the employer is not willing to accept the DO's proposals, the DO can turn to the Board against discrimination which can require the employer to undertake the measures under penalty of a civil fine.

The DO's work with ethnic discrimination outside the field of working life

The DO has the task of working against the occurrence of ethnic discrimination in all areas of social life. However, outside the field of working life, the DO cannot bring cases to court. Some protection against ethnic discrimination in fields of society other than working life is found in Chapter 16 § 9 of the Criminal Code. The crime is called unlawful discrimination and is to be investigated by the police. Among other things, the DO provides information to complainants about this law.

In addition to reacting to individual complaints the DO can also undertake initiatives on its own. When a number of individual complaints show a pattern of ethnic discrimination or when the DO obtains knowledge about discrimination in another manner, the DO can take the initiative in regard to meetings with government authorities, companies and organisations in order to try to prevent discrimination and bring about the necessary changes. The DO can also propose changes in relevant laws to the government as well as other measures needed for the prevention of ethnic discrimination in society.

3.2 The National Integration Board

The National Integration Board was established in 1999. The Board is a government agency that has been assigned the three overall goals for Sweden's integration policy by the government and Parliament. The Board has been given the task of getting these goals across to the general public. The goals are:

- *Equal rights, obligations and opportunities for all*, irrespective of their ethnic and cultural background.
- *A sense of community* based on diversity in society. Diversity must be reflected both in the shaping of policies and in the way they are pursued.
- *A form of community development* characterized by mutual respect and tolerance.

The task of the Board has been officially defined by the Government and Parliament as follows:

The National Integration Board shall

- monitor and evaluate developments in society from an integration policy perspective.
- promote equal rights, obligations and opportunities for all irrespective of ethnic and cultural background.
- prevent and combat xenophobia, racism and discrimination (where such issues are not dealt with by some other public authority).
- further ethnic and cultural diversity in the various spheres of public life.
- seek to ensure that local authorities are properly prepared and equipped to take in people in need of shelter or people granted asylum or residence permits on humanitarian grounds, and where required to help out with municipal settlement.
- seek to ensure that newly-arrived immigrants´ need of support is properly met as well as their need for specially-tailored community information.
- be the decision-making body in respect of government grants to local authorities and county councils.
- provide funding for organizations active in the integration field.
- ensure that appropriate statistics are compiled.
- generally promote a closer understanding of the issues in the integration policy field.

In promoting equal rights, obligations and opportunities the Board works in cooperation with other public authorities, organizations and those active in the community life, in order to spotlight obstacles, anomalies and shortcomings and to seek to eliminate them. The goal is that everyone in the community shall have equal rights, obligations and opportunities irrespective of their ethnic and cultural background. The Board collaborates in particular with the DO in relation to structural discrimination, but the DO alone is responsible for dealing with individual complaints.

4. Knowledge of the legislation by potential plaintiffs

Recently the DO along with the National Integration Office commissioned a study of the current level of

knowledge concerning the Act on measures against ethnic discrimination in working life and the crime of unlawful discrimination. Employers, local union representatives, businesspeople and the general public were interviewed. This study was carried out in the fall of 2000 and is expected to be repeated in the fall of 2001.

The study showed that there was a relatively high level of knowledge within the general public about the existence of laws against ethnic discrimination. About 79% of those interviewed knew that there was legal protection against ethnic discrimination in the workplace, whereas only 43% knew that there was protection against ethnic discrimination even outside the workplace. However, knowledge about what the laws mean in practice and who you should turn to with complaints was significantly lower.

Members of the general public were interviewed for this study, which means that these statistics may not say much about the general level of knowledge concerning the laws and their enforcement mechanisms among the most likely victims of discrimination. Nonetheless the study will provide, at a minimum, a basis for comparison over the years.

Concerning potential victims of ethnic discrimination it would be surprising to find a great level of faith in the laws, especially among those who know of their existence and their enforcement mechanisms. As indicated above almost all complaints concerning the crime of unlawful discrimination are dismissed by the police and prosecutors. For many the idea of submitting a complaint to the police is a waste of time.

In regards to ethnic discrimination in working life, there is also skepticism and pessimism among potential victims based to a large extent on the lack of effectiveness of the 1994 law. The number of complaints submitted to the DO has increased since the adoption of the new law in 1999. In addition, the increasing number of settled cases is an indication of the effectiveness of the new law and the work of the DO. Hopefully, as knowledge grows about the increased effectiveness of the new law adopted in 1999, those subjected to discrimination will be more and more willing to assert their rights.

5. Concrete difficulties in relation to implementation

5.1 Crime of unlawful discrimination

The effectiveness of § 16:9 as a means of preventing discrimination by merchants and others in the provision of goods and services is highly doubtful. Of the vast number of complaints submitted annually very few are brought to trial. There is seldom more than one conviction per year. In order to obtain a conviction, a confession of some sort is normally a prerequisite. Then, even if there is a conviction, the sanctions actually imposed are minimal. Prison has never been ordered, and the fines usually involve a few thousand Swedish crowns at most.

Since this has been the prevailing situation for many years, the victims of discrimination naturally question the value of bringing their complaints to the police. The problems with the law are multiple. The burden of proof is in some ways even higher than that in normal criminal cases – since the specific nature of the motive must be proved. Some claim that there is a problem of lack of interest, or worse, by the police and prosecutors. The authorities quite often refer to their own lack of resources for such time-consuming cases. Another issue is the path of least resistance. If the cases are time consuming and difficult to prove and win, there is going to be a tendency by the police and prosecutors to devote more time to the cases that can be proved and won.

Sweden seems to be moving in the direction of considering the use of a civil law structure on this issue. A government enquiry recently recommended that this possibility be explored further. The EU equal treatment directives also provide a stimulus in this direction since they are focused on counteracting discrimination through the use of civil law. This may be natural as there seem to be more legal decisions indicating that discrimination existed in countries relying on civil law. This would seem natural in that there is a lower burden of proof, as a rule, in civil law as opposed to criminal law. Another psychological factor that is possibly of relevance is the increasing realisation and acceptance of the idea that discrimination is not something carried out by those who are inherently bad (racists or extremists), but that discrimination is a

relatively common human behaviour. In some ways this can make the civil law alternative more interesting. Criminal law is basically an all or nothing structure. Civil law, for example, would allow for the working out of settlements between the parties. Another advantage is that if it is easier to obtain a court decision, other related issues may come into play. For example, a restaurant that knows that it risks losing its liquor license if it discriminates will presumably act to seriously avoid discrimination in its operations - if there is a real threat that a court decision can be obtained. On the other hand, there is extremely little risk that a conviction can be obtained today as long as the perpetrator denies acting on the basis of ethnicity.

5.2 The Act on measures against ethnic discrimination in working life adopted in 1999

Since this is a relatively new law, the difficulties concerning implementation are somewhat unclear. The law uses the modern concepts that can be found in the anti-discrimination laws of the EU, the Netherlands and England, particularly concerning the burden of proof. It should also be kept in mind that laws in this field seem to take a number of years to work their way into the social fabric. At least in England and the US it took a number of years before the anti-discrimination laws on the books were considered to be relatively effective.

This is the stage that Sweden is at now. The law can naturally be improved in some ways but the real challenge is going to be in turning it into a meaningful part of life in Sweden. The relative success that the DO and the unions have had thus far in achieving settlements with employers will probably continue. Thus more and more employers will realize that there is substantial risk that discrimination can occur even within their own companies. The work of the DO and the unions in following up the active measures to promote ethnic diversity established by employers will play an increasing role in coming years. The efforts of the DO, the National Integration Office, the unions and others to increase the general knowledge concerning ethnic discrimination and the law will continue.

Discrimination is probably still considered by most Swedes to be something carried out by evil people rather than being a fairly common and human way of behaving that needs to be changed. This type of thinking is quite common. It also makes it easy to deny the occurrence of ethnic discrimination. The major challenge is going to be in convincing, among others, employers, judges, unions, government bureaucrats and the police that discriminatory acts occur, that evil intentions are not a prerequisite and that these acts violate the law.

6. Need to adapt the existing legislation to situations not yet covered

If a minimalist approach is used concerning transposition, it can be argued that the existing structure for counteracting ethnic discrimination in Sweden to a large extent fulfils the requirements specified in the race directive, and that only minor adjustments are needed. The burden of proof has been shifted in terms of ethnic discrimination in the workplace. Damages can be awarded. Indirect discrimination is covered. There is an independent agency, the DO, in place. There is also the National Integration Board with its broad mandate to counteract racism and discrimination and promote equal rights on a societal level. Discrimination in other areas of society is to some extent, in theory at least, covered by criminal code § 16:9 on unlawful discrimination concerning the provision of goods and services. Certain issues clearly need to be dealt with such as discrimination protection in relation to unpaid trainees and school trainees in working life. Also, the protection concerning discrimination must be expanded to cover legal persons.

Sweden has fairly wide coverage in terms of satisfying the requirements of the Directive establishing a general framework for equal treatment in employment and occupation. Discrimination in working life on the grounds of disability and sexual orientation is already provided through specific laws, while religion is specified within the protection provided against ethnic discrimination. However, there is no similar protection concerning age discrimination.

The government has appointed a government enquiry to examine the extent to which Swedish law must be amended in order to ensure compliance with the Directive implementing the principle of equal treatment between persons irrespective of racial or ethnic

origin and the Directive establishing a general framework for equal treatment in employment and occupation (dir 2000:106 / Utredningen om ett vidgat skydd mot diskriminering, The Enquiry into an expanded protection against discrimination).

The government, as part of its Action plan against racism, has also stated its interest in a broad review of the various anti-discrimination laws with a view toward establishing a broad anti-discrimination law that covers all or most of the various discrimination grounds. There are similar intentions concerning the different anti-discrimination ombudsmen. Various political parties have also been promoting such an approach.

Another government enquiry (Ett effektivt diskrimineringsförbud - Om olaga diskriminering och begreppen ras och sexuell läggning, SOU 2001:39 / An effective ban on discrimination – About unlawful discrimination and the concepts of race and sexual orientation) has recently recommended the examination of the possibility of developing an effective civil law damage-based regulation of discrimination that could eventually replace the today's ineffective criminal code ban on discrimination in the provision of goods and services.

It is thus likely that these factors, among others, will result in the enquiry analysing the equal treatment directives being given an expanded mandate within the near future. One of the risks in the current situation is that a minimalist approach will be used. The result will then be that the various unsatisfactory parts of the rather broad but uneven and inconsistent puzzle that make up the Swedish anti-discrimination system are left to be dealt with at a later time. The ideal would be if the government enquiry is also given the goal of proposing a broad-based, effective and consistent anti-discrimination system. In this manner the enquiry would be focusing on what Sweden needs, in addition to fulfilling the requirements of the directives.

There are other ideas developing in the field that such an enquiry should also be taking into account. As can be seen in the various cases it is possible that the sanctions related to the discrimination laws are not very effective in those few cases where they are applied. Paying damages of about SEK 80000 (≈8.644 Euro) to a discriminated job applicant is not necessarily going to change the behavior of a larger company. At the same time, providing extremely large damages awards is probably too large of a step within the European legal system. One idea though that is circulating is the introduction of anti-discrimination clauses into public contracts. Presumably the risk of losing public procurement contracts would help convince larger employees of the benefits of complying with the anti-discrimination laws. The public procurement market in Sweden amounts to 350-400 billion Swedish crowns (≈38-40 billon Euro). It can also be noted that a parliamentary enquiry recently concluded that such clauses, if properly constructed, are legal both in terms of Swedish law and the EC public procurement directives.

Chapter V - Combating racial discrimination in the United Kingdom

(Sarah Isal, The Runnymede Trust)

1. Introduction

Legislation to combat racism and racial discrimination was introduced in the UK in the 1960s through the Race Relations Act 1965 which prohibited discrimination in places such as hotels, theatres, restaurants, public houses and any place maintained by a public authority. This legislation was reinforced through the Race Relations Act 1968 and the 1976 Race Relations Act (RRA). This 1976 RRA, and particularly its implementation was severely challenged in the 1990s following the murder of Black teenager Stephen Lawrence by five white racists at a London bus stop in April 1993. Stephen Lawrence's parents, Neville and Doreen, embarked on a struggle to get recognition that the police had not only neglected the inquiry but were themselves guilty of institutional racism whilst handling the case. This has led to the official acknowledgement by the Government that the police was institutionally racist. The Stephen Lawrence Inquiry Report[65], in publishing the outcome of the public inquiry into the murder of Stephen Lawrence confirmed the presence of institutional racism in the way most public authorities operate. This supported recommendations to amend the RRA, since it did not cover sectors such as the police in all their activities. These recommendations were subsequently incorporated into the Bill passed to make the RRA more effective, and what is now the Race Relations Amendment Act (RR(A)A) came into force in April 2001.

The new legislation makes substantial positive changes:

- It extends the protection against racial discrimination by public authorities (including the police)
- It places a new enforceable positive duty on public authorities.

These changes will hopefully resolve a number of problems which are linked to the poor record of protection from racial discrimination, particularly by public bodies. Since this legislation has only been in force in April 2001, it is difficult to predict the positive changes that it will produce. One can only envisage that this reinforced legislation will have an impact and try to assess the impact of the positive duty on public authorities. However, despite these positive amendments, a number of aspects of the new RR(A)A still cause concern, especially the lack of protection against religious discrimination, the exemption with regards to immigration and asylum and the fact that the full force of the RR(A)A does not apply to the private sector.

First, this paper will highlight the shortcomings of the Race Relations Act before its amended version came into force in April 2001 and the reasons which led to the Race Relations (Amendment) Act. Second it will go over the main changes and the positive implications of this new Race Relations (Amendment) Act for the implementation of legislation and the encouragement of a society free from racism. Third, it will examine the RR(A)A's failure to address certain specific issues such as religious discrimination and discrimination faced by immigrants, refugees and asylum-seekers. Finally, it is important to highlight the impact of legislation in the devolved regions of Northern Ireland, Scotland and Wales.

2. Need for better implementation: from the Race Relations Act to the Race Relations (Amendment) Act

2.1 Main features of the Race Relations Act – 1976

The Race Relations Act (RRA) was established in 1976 under a Labour government. Amongst its provisions, the Act outlawed racial discrimination in employment and training, the provision of goods, facilities and services, education and housing. The Act permitted a certain degree of positive action in favour of minority ethnic communities without however resorting to quotas or "affirmative" action. The Act also introduced the notion of indirect discrimination. Furthermore, section 71 of the Act encouraged local

[65] Often referred to as the Macpherson Report after its Chair, William Macpherson

authorities to "have regard to the need to eliminate unlawful discrimination and to promote equal opportunity"[66].

In the 1976 RRA, direct discrimination consists of treating a person, on racial grounds, less favourably than others are or would be treated in the same or similar circumstances. Indirect discrimination consists of applying in any circumstances covered by the Act a requirement or condition which, although applied equally to persons of all racial groups, is such that a considerably smaller proportion of a particular racial group can comply with it and it cannot be shown to be justifiable on other than racial grounds.

One of the most significant measures introduced by the RRA was the establishment of the Commission for Racial Equality (CRE), a publicly funded non-governmental body set up to ensure adequate implementation of the anti racial discrimination law. The CRE operates in two main ways:

1° It provides assistance and legal representation occasionally to any person who thinks that he/she has been the victim of racial discrimination (provided it falls within the scope of the RRA);
2° It conducts formal investigations of companies and organisations where there is evidence that there might be discrimination. If the inquiry proves that discrimination has occurred, it has the power to enforce changes in the company or the organisation's policies and practices to ensure that these follow the law.[67]

The CRE is also responsible for promoting racial equality and diversity through campaigns and advertising.

2.2 Limitations of the RRA

The major inadequacies of the RRA were:

1° It did not apply broadly enough to government departments and public authorities. The latter had to observe the Act in relation to some of their practices (employment, housing, provision of certain services, etc…) but not in all their activities. This meant for instance, that the "stop and search" practice carried out by the police (which evidence has shown was often discriminatory towards black and minority ethnic individuals) did not fall within the scope of the RRA.
2° The duty under section 71 to eliminate racial discrimination was not enforceable. Its compliance was therefore "uneven and inconsistent"[68]. As mentioned in a recent report (*the Future of Multi-Ethnic Britain*), the RRA in general and the duty under Section 71 in particular seemed more "concerned with negative duties"[69], that is, with avoiding discrimination rather than promoting racial equality.

In addition to these flaws in the law itself, implementation of the Act has proven difficult. First, knowledge of the law was not very widespread and procedures were long, time-consuming and costly for any individual. Second, there was a feeling across the country that there was no real political will among public authorities to implement the legislation. This is particularly true at local level where, although local authorities are expected to respect the duty under section 71, there is no real enforcement. On the contrary, local authorities were often perceived as the least respectful of the RRA's provisions. Indeed, there was no real control by central government of breaches in legislation by local authorities[70].

Regarding the CRE's role, it could not embark on formal investigations unless prior evidence of discrimination could be found, that is if an individual (or various individuals) made a complaint about the organisation to be investigated. This made the investigations very difficult to carry forward.

The CRE, also in charge of assessing the effectiveness of the RRA, submitted reviews of the Act to the Government in both 1985 and 1992 but without success. It submitted its third review of the Act in April 1998 to the newly appointed Labour Home Secretary. The review included nearly 50 proposals to make the RRA more effective. This third review coincided with the Stephen Lawrence Campaign which led to the Stephen Lawrence Inquiry.

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[66] The Lord Lester of Herne Hill QC(1997), p.10

[67] http://www.cre.gov.uk/about/legalpow.html

[68] Commission for Racial Equality (2000), p.3

[69] Runnymede Trust (2000), p. 219

[70] UKREN, 2001, p.14

2.3 The Stephen Lawrence Inquiry

The murder of young black teenager Stephen Lawrence in London in 1993 and the campaign that followed obvious mishandlings of the case by the police led to a radical change in Race Relations in the UK. The then Home Secretary Jack Straw ordered an independent judicial inquiry into matters arising from the death of Stephen Lawrence. Straw stated that the report coming out of this inquiry, referred to as the Stephen Lawrence Inquiry report, would "identify the lessons to be learned from this case which will be relevant to the future handling of racially motivated crimes by the criminal justice system"[71]. The Stephen Lawrence Inquiry report increased the pressure for new legislation by effectively identifying and defining institutional racism, thus giving more weight to the CRE's claims that the RRA needed to be changed in order to tackle the evident institutional racism identified by in the report. The Stephen Lawrence Inquiry report came up with 70 recommendations, a number of which concerned changes in the legislation. The Stephen Lawrence Inquiry adopted the following definition of institutional racism:

"The collective failure of an organisation to provide an appropriate and professional service to people because of their colour, culture, or ethnic origin. It can be seen or detected in processes, attitudes and behaviour which amount to discrimination through unwitting prejudice, ignorance, thoughtlessness and racist stereotyping which disadvantage minority ethnic people."

While the Stephen Lawrence Inquiry report focused heavily on the police, it also stated clearly that institutional racism existed in all public authorities. The report therefore recommended that: "the full force of the race relations legislation should apply to all police officers and that chief officers of police should be made vicariously liable for the acts and omissions of their officers relevant to that legislation"[72].

The fact that this now forms part of the The Race Relations (Amendment) Act 2000 (RR(A)A) which came into force in April 2000 was therefore the result of constant pressure from the CRE to review the legislation, a change of government that saw Labour come to power, and the Stephen Lawrence Inquiry.

3. Implementing the Race Relations (Amendment) Act (RR(A)A)

As mentioned in the introduction, the RR(A)A has only just come into force (April 2001). It is difficult as yet to assess what will be the impact of this new reinforced legislation will have on black and minority ethnic communities.

3.1 Main provisions of the RR(A)A

3.1.1 Extended protection against racial discrimination by public authorities.

The Stephen Lawrence Inquiry report's recommendations were specifically directed at resolving institutional racism in the police. However, the RR(A)A targets all public authorities. Whereas before, all public authorities fell under the scope of the RRA in relation to certain activities (employment practices, housing, service delivery…), under the RR(A)A, "it will be unlawful for any public authority to discriminate on racial grounds – directly or indirectly or by victimisation – in carrying out any of its functions"[73].

It has to be noted that at first, the government had thought it unnecessary to make indirect discrimination unlawful in the new provisions of the RR(A)A. However, after months of campaigning by the CRE and anti-racist organisations and activists, the government agreed to extend indirect discrimination to the expanded scope of the Act. If this had not been the case public authorities could still discriminate indirectly when carrying out all the functions that have been introduced in the RR(A)A. This would have made it particularly difficult to fight against institutional racism, given that the latter often takes covert and indirect forms.

In addition, as a direct result of the Macpherson Report's recommendation, chief police officers are responsible for the potentially racist and discriminatory behaviour of any officer working under their command (unless they can prove that they took all the "reasonable steps"[74] to prevent discrimination).

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[71] "Inquiry into the death of Stephen Lawrence", p.12

[72] Macpherson, William, *The Inquiry into the death of Stephen Lawrence*, Recommendation 11

[73] Commission for Racial Equality Briefing Note (2000), p.2

[74] Ibid, p.2

The definition of public authority is very broad and covers "anyone whose work involves functions of a public nature" (local and central government, National Health Service, police, education watchdog). Significantly, the RR(A)A also covers any private or voluntary agency undertaking a public function (such as running prisons or immigration detention centres). This broad definition of public authorities will therefore make a substantial difference in relating the law to the function of the enforcement agencies who were the main concern of the Stephen Lawrence Inquiry report.

There are other substantial changes to the RRA such as the possibility for complaints of racial discrimination in education to be brought directly before the county or sheriff courts without, as now, having to be referred first to the Secretary of State for Education or the limitation of the circumstances in which "safeguarding national security" can be used to justify discrimination.

3.1.2 New enforceable positive duty on public authorities

Another major change in the new legislation is the introduction of a positive duty on public authorities to promote racial equality. This is extremely significant as it is a direct response to institutional racism and could provide an effective way of countering it. This provision not only requires public authorities to eliminate unlawful discrimination but to "have due regard to the need to […] promote equality of opportunity and good relations between persons of different racial groups when performing their functions"[75]. A list of public bodies subject to the positive duty was appended to the RR(A)A but can be extended at any time by the Home Secretary. At present, the list includes the following bodies:

- All ministers and central government departments
- Local authorities, regional development agencies and enterprise networks
- Police authorities
- Health authorities, health boards, National Health Service trusts and primary care trusts
- Governing bodies of maintained schools, colleges and universities
- The Housing Corporation, Scottish Homes, housing action trusts.

In addition to this general duty, The Home Secretary can impose specific duties on certain bodies for them to comply better with the general duty. The specific duties can vary according to the body that they are directed to. A national consultation on the content of the specific duties has recently been completed and the specific duties will come into force shortly.

This new general duty is different to the old duty under section 71 of the RRA in a number of ways. First, it is a proactive duty: rather than asking public authorities to avoid unlawful discrimination, it requires them to prevent discrimination in a positive manner by promoting equality. Second, and most significantly, the positive duty in the RR(A)A is enforceable (as opposed to the duty under section 71 of the RRA). This means that if the CRE considers that a public authority does not comply with its duty it can serve a compliance notice. The CRE will then be in charge of monitoring the measures taken by the authority once it has received a compliance notice. The CRE can also ask the county court or the sheriff court to order the authority to comply with the duty. This reinforcement of the CRE's powers is welcome. As mentioned earlier, before the Amendment Act came into force, the CRE could embark on formal investigations only when it received complaint from an individual to prove that there had been discrimination. With the RR(A)A, the CRE is less restricted in its crucial enforcement role. Furthermore, the RR(A)A allows the CRE to issue Codes of Practice in relation to any aspect of the duty to promote race equality (previously, they could only issue statutory codes in the fields of employment and housing). The codes of practice will provide guidance to public authorities on ways to implement the positive duty (both general and specific duty). CRE's codes of practice will also be expected to include examples of good practice.

3.2 Implementing the positive duty

As the RR(A)A came into force only in April 2001, its impact on race equality remains to be seen. The Government launched in February 2001 a consultation aimed at outlining its proposals for implementation of the RR(A)A and seeking views of the various actors in the UK on the implementation of the specific duties[76]. Looking at the new legislation, there are very encou-

[75] Home Office publication (2001) p.15

[76] Home Office publication (2001)

raging new developments: all public authorities are subject to the RR(A)A in carrying out all their functions and the positive duty is bound to be more effective than the previous duty under section 71, as it is enforceable. However, further to the Government's proposals for implementation of the positive duty, a number of points that could lead to a more successful implementation are worth highlighting.

First, it can be argued that no public body should be exempt from the general duty to promote race equality. Indeed, the government itself stressed that the general duty was the minimum standard required to ensure positive implementation of the legislation. At present, judicial bodies and quasi-judicial bodies are excluded from the list. The governmental justification for this is the fact that "to allow civil action against judges would interfere with the concept of judicial immunity. Immunity is an extension of the concept of an independent judiciary, a key feature of the British Constitution"[77]. However, as pointed out in The Future of Multi-Ethnic Britain, the courts and the criminal justice services are influenced by the "day-to-day experiences of professionals throughout the criminal justice system, and by their relationships and interactions with each other." As a result "[r]igorous monitoring and constant vigilance will be necessary to ensure that actions flowing from the new initiatives do not reflect and perpetuate racist stereotypes, and that the end result of their implementation is to sustain and strengthen the safety and confidence of all parts of society"[78].

Second, the government lists four features of an organisation promoting race equality as follows:

- Monitor workforce
- Assess how policies affect ethnic minorities, identify potential adverse effects and take remedial action if necessary
- Monitor implementation of polices and programmes to meet black and minority ethnic needs
- Has a publicly stated policy on race equality.

Whereas these features are welcome, it might be argued that consultation needs to be added as a fifth key feature for any body promoting race equality. In the case of education for example, effective consultations that involve teachers, parents and pupils, particularly those from black and ethnic minority communities, not only lead to apposite local policy formulations, but also help to create a sense of inclusion among the community. This experience can be extended to all public bodies.

Third, in its consultation document, the government recommends three separate specific duties for various public bodies. The most extensive duties are for large public bodies; educational bodies have separate requirements; finally, there is a list of bodies for which no specific duties are required. Some bodies currently listed in the last section, with no specific duties, should however be moved to the first list for which the full range of duties ought to apply. This would make for more effective implementation of the positive duty to promote race equality[79].

Fourth, whereas the CRE and the Secretary of State's enforcement powers are a positive development in filling a significant gap in the 1976 RRA, it might be argued that plans for remedial action by public bodies would be an additional and effective way to ensure that the goals of race equality do not fail. Remedial action for public bodies would mean that such bodies would have had to consider the consequences of repeated failure to meet the race equality objectives – a matter of importance for any body committed to race equality.

4. Gaps in the RR(A)A

The RR(A)A significantly fills gaps left by the 1976 RRA: the extension of scope to all public bodies and the positive duty should, when implemented, increase the protection of black and minority ethnic communities, in particular with regard to institutional racism. However, some areas of crucial importance not dealt with in the RR(A)A need to be highlighted. These include definitions of indirect discrimination and victimisation, religious discrimination and exemptions in relation to immigration and asylum policies.

4.1 Definitions of indirect discrimination and victimisation

As mentioned earlier, the CRE, in its third review of the 1976 RRA[80], made a total of 50 recommendations

[77] Home Office publication (2001), p.39

[78] Runnymede Trust (2000), p. 138

[79] Home Office (2001), Appendix I, p.33

[80] http://www.cre.gov.uk/publs/dl_revs.html

to the government in order to strengthen legislation to combat racism. Although the government responded positively to the recommendation on a positive duty for public bodies, it has to be said that there were a number of recommendations that were not accepted by the government. Two significant points were the definition of indirect discrimination and victimisation.

In the review, the CRE argues that the 1976 RRA definition of indirect discrimination should be changed to the following:

"Indirect discrimination occurs where an apparently neutral provision, criterion, practice or policy which is applied to persons of all racial groups cannot be as easily satisfied or complied with by persons of a particular racial group, or where there is a risk that the provision, criterion, practice or policy may operate to the disadvantage of persons of a particular racial group, unless the provision, criterion, practice or policy can be justified by objective factors unrelated to race"81. The CRE argued that this was important as it would allow the applicant to prove indirect discrimination without having to rely on statistics or "establish a suitable pool for comparison"[82]. However, this was not adopted by the Government in the RR(A)A and the definition of indirect discrimination remained the same as the 1976 RRA.

Similarly, the CRE recommended a wider application of the definition of victimisation but this was also rejected by the government.

4.2 Religious discrimination

There is great concern in the new RR(A)A that religious discrimination is not covered as a ground for discrimination. This concern has been highlighted by various bodies. The European Commission against Racism and Intolerance of the Council of Europe stressed the importance of extending the RR(A)A to cover discrimination on the grounds of religion and belief, both as a protection instrument and as a way to raise awareness[83]. This is particularly relevant to Muslim communities who may be targeted for racial, cultural and religious reasons. This issue was also well documented in the Runnymede Trust publication, *Islamophobia. A challenge for us all.* This reports highlights four main reasons why the law should be reformed to prohibit religious discrimination in the areas covered by the RR(A)A:

- Religious discrimination is an inefficient business practice, for it denies jobs, promotion and other opportunities to well qualified individuals, and allows prejudice to result in a waste of talent to the detriment of the public interest at large.
- Enactment of the Fair Employment (Northern Ireland) Acts 1976 and 1989, which outlaws religious discrimination in Northern Ireland, creates an embarrassing anomaly with religious discrimination being unlawful in only one part of the UK (see part III, D of this paper)
- Anti-discrimination laws represent key markers of public policy and to put religion on par with race, sex and disability would convey the important message that religious identities are valued and respected throughout British society and that frequent proud assertions of a tradition of religious toleration in this country are buttressed by explicit legal safeguards.
- Reform can be justified on the basis of moral arguments centred around current notions of equality, fairness and justice[84].

It is therefore to be feared that the exemption of religion as a ground for discrimination in the RR(A)A might constitute a major flaw in the achievement of race equality in Britain.

4.3 Exemption in relation to immigration and asylum policy

The *Commission on the future of multi-ethnic Britain* highlighted very clearly the problems raised by the exemption in relation to immigration and asylum policy of the RR(A)A:

"Following the Stephen Lawrence Inquiry, the government took action to bring all activities of central government, including the police and immigration service, within the ambit of the Race Relations Act. This targets both direct and indirect discrimination, and will allow individual immigration officials to be challenged if they

81 http://www.cre.gov.uk/publs/dl_revs.html

82 Ibid

83 ECRI (2000)

84 Runnymede Trust (1997), p.57

apply official policies in a racially or ethnically discriminatory way. However, there is an exemption for immigration, nationality and asylum law, which allows the Home Secretary himself to discriminate on grounds of nationality, or national or ethnic origin, or to authorise his officials to do so by way of guidelines or instructions. Immigration law by definition discriminates on grounds of nationality, of course. But the exemption goes farther than this, for it specifically permits discrimination on grounds of ethnicity or national origin, without the need to justify differential treatment. It permits instructions to be issued to officials to examine the claims of people from certain backgrounds more closely or sceptically, or to target them for detention or enforcement action. Arguments that it is necessary to provide protection for certain ethnic groups, such as Kosovar Albanians as opposed to Kosovar Serbs, are unfounded. It is the fact of persecution, not ethnicity itself, which motivates an asylum claim. If necessary this could be made clear in the statutory provisions.

It will be unlawful for the police to act upon perceptions that certain ethnic or national groups might be disproportionately involved in criminal activity, yet lawful for the immigration service to be instructed to act on such perceptions in relation to immigration control. A vicious circle will be set in motion, and will be legitimised by the new legislation – a high degree of official and ministerial suspicion of certain ethnic and national groups will lead to a high rate of refusals, and this in turn will lead to greater suspicion."[85]

It is therefore to be recommended that the exemption in the RR(A)A permitting discrimination on grounds of ethnic or national origin in relation to immigration and asylum policy should be removed.

4.4 The RR(A)A and the private sector

The RR(A)A came into force partially as a result of the Stephen Lawrence Inquiry report's highlighting of institutional racism in public authorities and was therefore designed primarily to counteract racism in the public sector. The provisions of the 1976 RRA apply to the private sector as well. However, the new provisions of the RR(A)A which extend protection against racial discrimination, do not apply to the private sector. This has been highlighted by the Trades Union Congress (TUC), which is "critical of the fact that the legislation applies only to the public sector and regards the notion that the public sector can drive race equality to change in the private and voluntary sectors as overtly optimistic". The TUC adds that "there is no evidence to suggest that the private and voluntary sectors will make the necessary changes to comply with the legislation unless they are required to do so and the requirement can be checked and, if necessary, enforced"[86].

4.5 Impact of the RR(A)A on devolved regions & at local level.

When examining the impact of the RR(A)A on the achievement of race equality in the UK, it is important to look at the variations between the regions. This is particularly relevant in Northern Ireland where a separate set of legislation exists to fight racial discrimination.

Northern Ireland has a separate legislation through the Northern Ireland Act 1998. In this Act, Section 75 states that public authorities must have "due regard" to the need to promote equality of opportunity between different individuals and groups. The major difference with the RR(A)A is that the grounds for discrimination in the Northern Ireland Act 1998 include religious beliefs, political opinions, racial groups, age, marital status or sexual orientations, sex and disability. However, the RR(A)A still needs to be extended to Northern Ireland to include all public authorities in all their activities. The RR(A)A could also serve to strengthen Section 75 of the Northern Ireland Act 1998.

Although the RR(A)A will apply to both Scotland and Wales, it remains unclear as to the responsibilities of the Scottish Parliament and the Welsh Assembly in implementing its provisions. Although the central government stated that the devolved parliament and assembly will be responsible for implementing the positive duty in Scotland and Wales (after consulting with them), concerns have been raised in the devolved regions, in particular by Non Governmental Organisations, that the implementation process might suffer from this unclear situation. It will therefore be important to ensure that implementation and monitoring are made effective in both Scotland and Wales.

[85] Runnymede Trust (2000) p. 217-218

[86] "Boost for race equality" (2001), p.18

Before the RR(A)A came into force, one of the main problems relating to the implementation of the 1976 RRA was the fact that legislation was not being adequately enforced at local level by public authorities. The Government's consultation document cited earlier in this paper cites research which noted that only 35% of Local Authorities were monitoring as expected. The new RR(A)A should therefore be adequately implemented at local level and implementation should be thoroughly monitored in order to address the serious shortcomings and failures of local authorities to implement the Act. The perception by Non Governmental Organisations is that there is a lack of accountability in particular by local authorities and Race Equality Councils to implement the legislation in relation to their own practices. This will remain a problem unless central government is more effective in monitoring the extent to which the positive duty is adequately implemented at local level.

5. Conclusion

The implementation results that led to the adoption of the Race Relations (Amendment) Act yet remains to be seen. The government has certainly gone a long way towards combating institutional racism in the public sector through this new legislation. However, it is worth mentioning that there is a substantial debate going on both in Great Britain and Northern Ireland at present on the relevance of introducing more comprehensive equality legislation that would cover not only race and ethnic origin but also other grounds such as nationality, religion and belief, disability, age and sexual orientation. This would allow for a more coherent, harmonized anti-discrimination legislation that we do not have in the UK at present. Indeed, it is unlawful to discriminate on grounds of religion and belief in Northern Ireland and not in Britain; similarly, the police are subject to the full force of the RR(A)A in Britain but not in Northern Ireland. Introducing a single equality act could help simplify the implementation process as well.

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Conclusions

(Maria Miguel Sierra, Deputy Director of ENAR)

On reading the national reports, what immediately becomes clear is the difficulty of effectively enforcing legislation against racial discrimination.

There are a number of different problems, some of which are due to the requirements or deficiencies of the law itself. For example, the obligation to provide proof of racist motivation leading to discrimination, an unsatisfactory definition of discrimination or a field of application which is too restricted. Other problems relate to the complexity of the procedures. This is particularly true of criminal procedures, procedures which are long and costly, difficulties in providing proof of the offence charged and the inadequacy of sanctions, where there are any. In addition to this, there is the lack of interest and will apparent among the different institutions involved. In practice this translates as police officers refusing to register complaints, the inertia of public prosecutors and the large number of complaints lodged where proceedings are subsequently discontinued.

Over the years, most countries have amended their legislation with the aim of making it more effective and adapting it to reality, or have developed measures and practices aimed at achieving greater respect for the principle of equal treatment.

Thus, faced with the lack of co-operation by the police and the prosecuting authorities in the treatment of complaints about racial discrimination, the Ministry of Justice in the **Netherlands** issued a guideline, the aim of which was to explain to the public prosecutors how cases of discrimination should be dealt with, in order to create a coherent policy for prosecution throughout the country. Following this, a National Expert Centre on Discrimination was established within the public prosecution office, which has increased expertise among public prosecutors.

In the **United Kingdom**, the report of the inquiry which was held following the tragic death of the young black teenager, Stephen Lawrence, clearly established proof of institutional racism within the majority of public authorities. Legislation has been amended with the aim of extending protection against racial discrimination perpetrated by the public authorities. From now on, chief police officers will be responsible for the racist and discriminatory conduct of any officer under their command, unless they can prove that they took all reasonable steps to prevent such conduct. Another major change is the introduction of the obligation for the public authorities to promote equal opportunities and good relations between individuals from different ethnic groups during the exercise of their functions. In the event of this obligation being breached, the CRE (Commission for Racial Equality) can issue the authority concerned with a compliance notice or can ask the court of first instance to order the authority to comply with its obligation.

Faced with the difficulty of providing proof of instances of discrimination, **Belgium** has introduced the practice of situational tests. This method consists of comparing the attitudes of those providing goods or services, depending on whether they are requested by an individual of foreign origin or not. In addition, the draft bill (avant-projet de loi) on strengthening antiracism legislation stipulates that proof in the form of statistical data is allowable.

The world of work is particularly affected by discrimination and, in order to compensate for the problems associated with the application of the law, some countries have introduced codes of good conduct. This is the case in the **Netherlands and Belgium**. In spite of the fact that their application may still leave something to be desired, these practices should not be underestimated.

In **Sweden**, although a new law on the measures for combating ethnic discrimination in the working life came into force in 1999, it appears that the complainants prefer to negotiate an arrangement with their employer rather than resorting to the courts. Sweden seems to be moving towards a remodelling of the various anti-dis-

crimination laws, with the aim of having a single legislation which covers all types of discrimination.

It is clear that racism can only be combated through sanctions. This is why **France** has set up a strategy for preventing discrimination. Recently, structures have been put in place which aim to bring about a more coherent policy for combating racial discrimination. These structures include the Group for Studying and Combating Discrimination (Groupe d'Etude et de Lutte contre les Discriminations), the remit of which is to analyse the discrimination experienced by people because of their origin and to formulate proposals to combat this discrimination. In addition, there are the CODACs (Commissions Départementales d'Accès à la Citoyenneté – Departmental Commissions for Access to Citizenship). These are the local contacts for the free phone number "114" (for individuals who consider themselves victims of racial discrimination) and they are responsible, among other things, for dealing with cases of discrimination which are reported to them.

In each of the countries studied here, the fight against ethnic and racial discrimination is less than fully successful. The compliance process for the Directive implementing the principle of equal treatment between persons irrespective of racial or ethnic origin should provide the opportunity to make improvements to the national legislation of each country. The majority of the countries of the EU are currently in the process of examining the legislation in force and some are already discussing concrete proposals. Beyond the amendments which will be made to the texts, it is essential that the compliance period is used as an opportunity for thorough and serious reflection on the issue of racism in each of the Member States. This period of reflection should be supported first and foremost by the organisations which represent the victims of racism and those which are active in combating racial discrimination. Moreover, this reflection should lead to real policies which aim to guarantee equal treatment.