

Commission of the European Communities

Legal instruments to combat racism and xenophobia

Comparative assessment of the legal instruments implemented in the various Member States to combat all forms of discrimination, racism and xenophobia and incitement to hatred and racial violence

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Employment, Industrial Relations and Social Affairs

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Preface

The resolution of the Council and of the representatives of the Governments of the Member States, meeting in the Council of 29 May 1990 on the fight against racism and xenophobia, noted that the Commission was to make a comparative assessment of the legal instruments implemented in the various Member States to combat all forms of discrimination, racism and xenophobia and incitement to hatred and racial violence¹ and that it would help to improve dissemination of information on these legal instruments.

In order to implement this action, the Directorate General for Employment, Industrial Relations and Social Affairs invited tenders in March 1991² whereby the Commission tried to assure that organizations competent to do the research would participate.

Twelve national reports have been provided by the rapporteurs³ chosen among the bidders.

On the basis of these national reports, the International Institute of Human Rights in Strasbourg wrote up the present report.

The fight against racism and xenophobia is to be viewed in the framework of the protection of fundamental rights⁴, confirmed in the preamble to the Single European Act⁵ reminding the Member States "to promote democracy on the basis of the fundamental rights recognized in the constitutions and laws of the Member States, in the Convention for the Protection of Human Rights and Fundamental Freedoms and the European Social Charter, notably freedom, equality and social justice" and recalling the responsibility incumbent upon Europe "in particular to display the principles of democracy and compliance with the law and with human rights to which they are attached".

¹ OJ No C 157, 27.06.1990.

² OJ No C 84, 28.03.1991.

³ See Annex I.

⁴ See especially the Joint Declaration on the Protection of Fundamental Rights in the European Community. OJ No C 103, 07.04.1977.

⁵ OJ No L 169, 29.06.1987.

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I. Introduction

Racism and xenophobia, producing acts of discrimination and violence, are not new phenomena in European history, nor are efforts to combat them. Slavery, colonialism, anti-semitism, and extreme nationalism can be seen across centuries and countries. Also evident are egalitarian and universal religions, political movements, and laws. In the modern period, much attention has been devoted to ending slavery and eliminating racial discrimination. Far less common have been challenges to xenophobia or to arbitrary discrimination, in law and practice, based upon the foreign nationality of individuals lawfully resident within a country.¹

It is commonly accepted and generally legal that preferential treatment or certain rights should be afforded citizens only. International human rights instruments and national laws that denounce discrimination on the basis of race, sex, language, religion or ethnic origin, widely retain traditional distinctions based upon nationality and often explicitly exclude lawfully resident aliens from some or all established guarantees. At the same time, arbitrary or invidious discrimination against aliens is prohibited and can be considered a manifestation of xenophobia although, in general, the latter term does not appear in legal instruments concerned with discrimination.

Irrespective of the status or identity of the victim, nonetheless, attacks against foreigners increasingly are reported.² Due to the fact that most aliens also belong to racial, ethnic, religious, or linguistic minorities the motivation for illegal discrimination may be due as much or more to the latter status as to the former. However, the motivation of attackers is not always clear, thus complicating the reliable and systematic identification of unlawful discrimination.

In addition to problems linked to the recent European immigration of people of color and other cultures, there remain in most countries long-standing problems of ethnic minorities, especially gypsies. There are also some serious problems of what has been referred to as "monochromatic racism" in *Northern Ireland*, and discrimination in some regions of linguistic or ethnic division, such as *Belgium, Denmark, Greece and Italy*. The gravity of some of these situations has led to the adoption of unique measures for different regions. In particular, in the *United Kingdom*, separate laws apply to Northern Ireland.³

The present report, based on national studies prepared in each of the Community member states, reviews and analyses the legal measures existing within Community states to combat all forms of discrimination, racism and xenophobia, as well as incitement to them. While differences among national laws and their implementation are discussed, no attempt is made to fully describe the various legal systems of the twelve states.

A summary is provided at the beginning of each section of the report.

¹ Throughout this report the term foreigner or alien refers to foreign nationals lawfully resident within a country, unless qualified by the work clandestine or illegal. The term immigrant is used for naturalized citizens. Immigration refers to the influx of all foreign nationals, whether or not they seek to acquire the nationality of an EC member state.

² The rising level of violence and discrimination in EC member states is discussed more fully below; at this point it may be noted that in 1991 there were 2,386 attacks in *Germany*, representing a ten-fold increase from the previous average of 200-250 a year. Seventy-five percent of the attacks took place in the western part of Germany, primarily in rural towns and villages where 70% of asylum-seekers are directed.

³ The *United Kingdom* is unique in that it consists of three separate legal systems served by one legislature. The three components are England and Wales, Scotland, and Northern Ireland. Parliament generally adopts separate legislation for each of them, although some laws may be made expressly applicable in more than one of the jurisdictions. Each component has a separate judicial system, but share, at least in civil matters, a common ultimate court of appeal, the House of Lords. "United Kingdom" refers to all three parts, while the term Great Britain refers to England, Wales and Scotland.

II. Demographic and Socioeconomic Status of Minorities in Europe

Summary: Europe has become multicultural and multiracial in an unprecedented way. Although figures differ from one country to another concerning the rate of immigration and percentage of racial or ethnic minorities, the general trend seems to be toward growing demands for political asylum. The major aspect of post-war immigration, however, has been the shift in the countries and regions of origin of those entering Europe. This shift has produced larger groups of identifiable racial and ethnic minorities, whose economic and social situations generally are unfavorable. There is widespread poverty, yet a perception exists among many in the majority population that minority individuals threatened employment and social norms. The result is rising levels of racism, racial discrimination and xenophobia.

A. Immigration to Community Member States

In the post-war period, most countries in Europe seem to have experienced the introduction of increased and increasing numbers of new groups, particularly foreign workers and refugees coming from different regions and cultures. On the other hand, in some countries it is clear that the numbers have not substantially increased; instead the major demographic change has been the cultural and racial diversity of those immigrating. Long term immigration patterns in France, for example, indicate that the proportion of foreigners has not dramatically grown. In fact, although there was a steady progression in the number of foreigners after 1954, the percentage found in 1982 was virtually identical to that found 60 or even 150 years ago: about 6.8% of the total population compared to 5.2% in 1931. Since 1975, the level of immigration not only has stabilized, but appears to have slowed. The major change has been a shift in the origins of alien arrivals: from central and eastern Europe to the Maghreb and sub-Saharan Africa. Long term statistical analysis in other countries could indicate whether this is a general phenomenon.

In the meantime it appears that due to conflicts and repression elsewhere, and to North-South economic disparity, there has been a large increase in the number of persons seeking refuge in *many* parts of Europe. On average, the number of requests for political asylum in Community Member States tripled between 1987 and 1991. *Belgium* and *The Netherlands* both conform to the average: *Belgium* had an increase from 5100 in 1988 to 15,200 in 1991 (the latter group coming from 99 different countries), while in *The Netherlands* the number increased from 7,500 in 1988 to 21,600 in 1991. In other countries the number of requests is below the average: in *France* it rose from 24,800 in 1987 to 60,000 in 1989 and then fell to 46,300 in 1991; in *Denmark* fell from 4,700 in 1988 to 4,600 in 1991. Other states have confronted a much larger increase. Among the latter group, an explosion in the number of applications for asylum can be seen in the *United Kingdom*, with a rise from 5,200 in 1987 to 57,700 in 1991, and in *Germany*, where demands for asylum rose from 57,400 in 1987 to 256,100 in 1991. Currently sixty percent of all refugees in the EC are in *Germany*. Although the majority of asylum requests are refused in the first instance under German law-- only 7 percent are granted refugee status -- it is estimated that a significant percentage of the applicants denied a legal status remain in illegal residence after notification of the denial of refugee status, while others subsequently are allowed to stay on the basis of recognition under the less strict criteria of the Convention on the Status of Refugees of 1951.

A large part of immigration has been to the former colonial states of Belgium, France, The Netherlands, and the United Kingdom. Migration within Europe has centered in Germany and especially in Luxembourg, which currently has the highest percentage of foreign workers--more than 27% of the total population. Mediterranean countries--Greece, Spain, Portugal and Italy--traditionally have been sites of emigration (Portuguese nationals constitute the largest group among Luxembourg's foreign worker population). Only recently has Southern Europe faced an influx of persons coming from Africa, the Middle-East and other regions. In many cases, particularly the *United Kingdom*, individuals coming from former colonies have been afforded citizenship or residence while differences of color and customs have created a "racial" identity different from the majority, with concomitant racism. In contrast, *Germany* and *Denmark*, without colonial immigration, first invited and subsequently attracted many "temporary" workers from other regions whose primary right remains return to their country of origin. However, a large majority of them have remained long term, with the intention of permanent residence, and have established families in minority communities.

B. Current Demographics and the Problem of Racism in EC Member States

Overall, it is estimated that about 16 million of the 320 million residents of the twelve member states of the European Community originate from outside the Community, that is, about 5% of the population. However, the number may be much higher taking into consideration undocumented or illegal aliens. Of the estimated 16 million non-European residents, some 13 million can be classified as belonging to an "ethnic minority" in the sense that they have a different culture from the majority of the population of the country where they live, and about 8 million can be considered as non-white according to the color of their skin or other physical characteristics. The geographic origins of these aliens are very diverse, but for the most part recent arrivals come from former European colonies in Africa, Asia and the Caribbean. Whereas in Germany about two-thirds come from Eastern Europe. In sum, Europe today is both multicultural and multiracial.

With the large influx of immigrants and migrant workers into EC member states, or at least the perception of such movement, there has been a corresponding rise in levels of racism, discrimination and xenophobia. Nearly all countries report increased numbers of racist incidents and attacks on foreigners and individuals belonging to ethnic, racial or linguistic minorities. Underlying this common problem, however, are quite different situations in each country in regard to the number and origin of foreigners and racial or ethnic minorities. In half the EC Member States, immigration and minority issues are closely linked to a colonial past. In the other states, minority groups exist due to the historical resolution of boundaries (i.e. *Denmark*, *Germany*, *Greece*, *Italy*) or as a result of attracting foreign workers, as in *Luxembourg*. In nearly all cases, problems are reported of clandestine entry and residence.

Looking first at former colonial countries, the percentage of aliens among the total population of *France*, 6.8%, is somewhat above the 5% EC average, but the rate of immigration has slowed since 1975. However, during this time there has been the shift in composition of those entering from male workers to an increasing number of women and children (a 1984 opinion poll found that 68% of those questioned were in favor of limiting family unification.) Until 1989, the number of racist threats and discriminatory acts remained stable at about 100 a year; then, in spite of decreasing immigration there were 2237 incidents reported. Approximately 80% of the victims were from the Maghreb. It is estimated that a far larger number of cases are never

made public. In 1990, a poll conducted by the Consultative Commission of Human Rights found that 42 percent of French people considered themselves to be a little or somewhat racist. Seventy-six percent believe there are too many Arabs, 24 percent too many Jews and 54 percent consider both groups a burden.

In *Spain*, as of 1989, there were between 400,000 and 550,000 foreigners legally resident and approximately 300,000 clandestine aliens, 80% coming from countries with which Spain has historic ties: Latin American countries 37%, Moroccans 22%, Filipinos 15% and Guineans 4%. However, the figures are estimates, because official documents do not record the racial or ethnic group to which persons belong. In addition to aliens, Spain has a gypsy minority that has suffered from discrimination in law and in practice. Each year since 1985 there have been incidents in which parents have refused to send their children to schools in which gypsy children are present, or have prevented the latter from attending school.

Conceding a localized problem with the gypsies, a 1990 survey by the government of Spain nonetheless concluded that it was not a racist society. Public surveys in 1990 and 1991 were deemed to demonstrate little support for the notion that the phenomenon of racism was spreading or a cause for alarm. These surveys also were the basis for concluding that xenophobia is not a severe problem in Spain. In the report, consecutive percentages of 68% and 69% supported the idea that the government should promote actions to equalize living conditions of foreign workers and 69% thought that foreigners with residence and work permits should have the same political and social rights as Spaniards. Viewed from the opposite direction, just under one-third of those surveyed did not support equal rights for foreign workers.

In contrast to the government report, the non-governmental Pro-Human Rights Association asserted in a 1989 report that in the last five years a policy of increased repression has been practiced with respect to non-Community foreigners; the number of police detentions tripled to nearly 33,000 in 1989, and the number of expulsions quadrupled due to government decisions often based on the notions of internal security, the use of the "undesirable" label applied as part of a policy of quick expulsions, and the indiscriminate use of the term "clandestine underground". Amnesty International issued a similar report.

In *Portugal*, in spite of diverse origins, the population of the country is generally integrated. The absence of strongly differentiated minority groups is said to explain the absence of a legal tradition of protection for minority rights. Portugal is also an emigrant country, with movement in particular to northern European countries. Nonetheless, during the early half of this century there was considerable racial discrimination against the relatively limited number of non-whites in Portugal. The makeup of the population began to change towards the end of the 1960s, with immigration growing rapidly after 1974 when Portuguese African colonies became independent. However, the overall number of foreigners resident in Portugal remains relatively small, even though it continues to grow at about 7% a year. Yet, statistics are unreliable because they report only legal residents. It is estimated that more than 100,000 illegal aliens arrived from Portuguese-speaking African countries in 1990. A recent annual report on internal security of the Prime Minister of Portugal to Parliament identified as a main area of concern "the emergence of revengeful, radical racist or xenophobic groups and the commercialization of firearms by certain ethnic groups." However, in a 1991 survey, 71.7% of the population considered themselves "absolutely not" racist.

The Netherlands, United Kingdom and Belgium are countries that, like *France, Spain and Portugal* have drawn most of their minorities and alien population from former colonies. The *Netherlands* has experienced four large waves of immigration involving Indonesians and Surinamese, as well as residents of the Netherlands Antilles--still part of the country. It also has drawn workers from Turkey and

Morocco. The Netherlands minority groups constitute 5.3 percent of the population, less than a 6 percent target established by government policy. Registration of an individual's ethnic origin in order to monitor government policy on ethnic minorities is under discussion.

The percentage of foreigners in *Belgium* is somewhat higher than that in *The Netherlands*, approaching 9% of the total population. Of these, 61% originate in EC countries. About one quarter of all foreigners are Moroccan or Turkish. There are also large numbers of North Americans and Japanese. It is estimated that there also exist another 1% of foreigners who are in the country illegally.

As noted earlier, *Germany* has drawn most of its immigrants and foreign population from foreign workers, although recently it has faced an enormous increase in the number of asylum-seekers, which matches the number of so-called Aussiedler (nationals of Eastern European countries who claim to be of German origin.) In addition, there are significant numbers of ethnic minorities. A poll in Germany in 1989 found that 79% of the population believed there were too many foreigners in the country. Between 1990 and 1991 the number of racist criminal offenses increased by tenfold, with 900 attacks in the month of October 1991 alone. The legal framework itself may be considered discriminatory; only those German minority groups who are citizens are deemed to belong to a recognized minority group, including 95 percent of the Danes and one-third of the Jewish population. The almost 100,000 Sorbs living in the former East Germany were granted a special minority status under the German Unification Agreement, which includes protection of their right to use their own language. They do not, however, have political representation on the national level. The Sinti and Roma, numbering around 50,000 and 60,000, experience the most discrimination of the recognized German minorities. They were considered peoples in the 1989 CERD report, but not as having the same rights as Danes and Sorbs. Germans of African origin, estimated at 20,000, also endure discriminatory treatment.

Like Germany, the *Italian* population of 57 million includes several linguistic minorities, the largest of which are German-speaking. Slovenian and Albanian minorities also exist, and French is an official language of one northern region. Almost 90% of the resident aliens originate in non-EEC countries, the majority of whom come from Morocco, Tunisia, the Philippines, Yugoslavia, Senegal, Egypt and China. An estimated 15% of all aliens are clandestine. Recently enacted legislation, including Decree 193 of February 1992, reflects a fundamental change in attitude towards aliens, who are now seen as affecting public order. A new citizenship law makes it more difficult for aliens to become citizens. Also revealing, legislation to broaden protection for citizens belonging to linguistic minorities provoked strong Parliamentary debates. Apart from legislative developments, during 1990 there was an increase in the number of violent racist attacks.

Although 95 percent of the population of *Greece* is of Greek origin, the region of Thrace contains a Muslim minority consisting of about 115,000 persons composed of three different ethnic and linguistic groups: Turkish (50%); Pomaks (35%) and Gypsies (15%). The term Muslim is applied to all three groups, who are protected by the 1923 Treaty of Lausanne as a religious minority. There is a trend toward linguistic domination by the Turkish group. In general, the situation of the Muslim minority has been effected significantly by strained relations between Greece and *Turkey*. There exist gypsies in other parts of the country, and a recent increase in the number of foreign workers and refugees. It is estimated that there are about 250,000 foreigners, only 70,000 of which are declared and legal.

Denmark's minority population is principally the result of its geography and is reflected in its Aliens Act which divides foreign nationals into three main categories: Nationals from other Nordic countries who number around 23,000, nationals from countries belonging to the European Community who approximate 27,000, and the

more than 100,000 nationals from "third" countries. Pursuant to the Register Acts, it is prohibited to register persons on the basis of race, religion or ethnic characteristics. Consequently, registration has been based on nationality. As public authorities did not find the traditional statistics sufficiently accurate, a Committee of Experts was established in 1990 which proposed the term, 'second generation immigrants' and urged that more attention should be given to nationals of 'less developed countries'. According to this definition, there were an estimated 190,688 immigrants, compared with the estimated 160,641 foreign citizen definition. In total, there are approximately 230,000 immigrants in Denmark including 39,368 second generation immigrants.

"Monochromatic" racism can be seen in the discriminatory treatment reported against those travelling throughout the country (gypsies or travellers) in *Ireland*. It is the only country in the EC without a significant racial minority or immigrant population. In contrast, *Luxembourg* currently has the highest percentage of foreign workers in the region, 27%, most of whom come from other EC countries, especially Portugal.

C. Social and Economic Situation of Minorities

In general, the economic situation of minorities and foreigners is characterized by unemployment and poverty at one extreme or high professional positions at the other. Across Europe, immigrant or temporary workers often occupy badly paid unskilled labor positions refused by the majority of society. They are economically disfavored and marginalised. Paradoxically, many aliens are increasingly integrated at the moment when they find themselves most rejected. New generations, born in Europe, find the situation increasingly unacceptable. At the same time, many in the majority group view minorities as a threat to employment and social norms. The result is resurgent racism and xenophobia founded on culture and nationality, as well as on color.

An indication of the two extremes in regard to socioeconomic status, aliens or immigrants in *Portugal*, mostly of African origin, are predominantly employed as unskilled workers. However, there also is a significant percentage (23) of foreigners trained in technical and administrative posts, coming primarily from Community member states. The latter group has diversified in recent years with a growth in immigration from Brazil. Similarly, in *Belgium* immigrants and foreign workers occupy either the lowest unskilled labor jobs or highly skilled professional positions. The first group suffers from insecurity and unemployment in addition to difficulties in regularizing their state. It is stated that the level of unemployment among Turkish workers is 94% and for Maghrebins 91%. In *Spain*, for some groups housing, support, health and wages are alleged to be particularly poor, bordering on slave-like conditions. In the Netherlands, the rate of unemployment among ethnic minorities is 37 percent compared to 9 percent for the general population. This is due to factors including employment discrimination, the state of the economic sectors in which they dominate, low educational achievement and difficulty of access to some business sectors. Unemployment statistics for 1990 indicated that 80% of the Moroccans in *The Netherlands* were unemployed, and approximately half the Turks, West Indians and Surinamese were also unemployed. In *France*, where foreigners represent 6.5% of the workforce, the level of their unemployment is nearly double that, close to 12.4%.

In general, there appears to be widespread poverty among immigrants and ethnic minorities. In *Portugal*, a rather large percentage (33%) of Cape Verdians live in rudimentary lodging such as shacks or tents. Fifty percent of the remaining group, who live in regular housing, are in poorly equipped spaces. In general, more than half of all Portuguese-speaking African immigrants and aliens are living in

overcrowded conditions. Their economic and social situation is difficult, characterized by poor conditions of lodging, health, work and social security. In turn, due to these poor conditions, immigrant and alien children experience a higher level of educational problems. In *The Netherlands*, educational attainment among minority groups, especially for Moroccan and Turkish girls, commences to decline at a very early age, resulting in low completion rates.

Throughout Europe, most aliens and minorities tend to settle in large urban areas and one can argue that many of the social problems faced by them are structural and social problems of urbanization. In *The Netherlands*, 40 percent of all minorities live in the four largest cities, 24.8 percent in Amsterdam alone. In the cities they are subject to policies of concentrated or dispersed housing placement and poor housing conditions. In *Portugal*, the large majority of both legal and illegal aliens and immigrants reside in the capital (62% in Lisbon). Similarly, in *Belgium*, the level of urban concentration is reflected in the number of foreign students in Brussels schools: 44.5%; in Charleroi, 25%, Liege, 21.5% and Mons, 18%. In 22% of the Brussels schools, the level of foreign students is over 80%.⁴ In *France*, 60% of all foreigners live in three regions (Ile-de-France, Rhone-Alpes and Provence-Alps-Cote d'Azur), while ten regions of 22 contain 85% of the foreign population. In *Denmark*, according to the Ministry of Education, the number of school children who have a foreign mother tongue has nearly tripled in the past ten years. 86% are concentrated in 45 of the 275 municipalities; 29% are of Turkish origin and 12% Pakistani. The Chairperson of the Teachers Association of Copenhagen has expressed the opinion that there is a "white flight" to private schools.

The effect of urban concentration on racism and xenophobia is not clear. In the past, studies have found that frequent intensive contact with ethnic minorities tended to be a cause of xenophobia. However, a poll conducted in March 1992 in the Netherlands produced opposite results. While over 70% of all respondents agreed that no more immigrants should be allowed into the country, those living in "mixed neighborhoods" were more tolerant than those in exclusively Dutch ones.

⁴ In total, there are over 90 nationalities represented in the school population of Belgium.

III. General Policies of EC Member States on Legal Measures to Combat Racism, Discrimination and Xenophobia

Summary: Most legal texts do not define racism, racial discrimination or xenophobia. In fact, most legal texts do not mention xenophobia. Defining the scope of the problem is as difficult as regulating it, in part because racism and xenophobia are beliefs or attitudes. In general, efforts are made in law to prohibit manifestations of hatred or preference based on race, color, descent, or national or ethnic origin. Positive measures may also be taken to promote tolerance or integration. States are split over the issue of recognizing group rights, while nearly all have taken or are considering taking measures to restrict immigration and the influx of illegal aliens.

A. Issues of definition and scope of problem

Racism and xenophobia are attitudes or beliefs, based upon stereotypes or irrational fears of "the other". A dictionary defines racism as "a belief that race is the primary determinant of human traits and capacities and that racial differences produce an inherent superiority of a particular race."⁵ Similarly, xenophobia is "fear and hatred of strangers or foreigners or of anything that is strange or foreign."⁶ Together, as noted in the French national report, the two concepts are part of a more general phenomenon of heterophobia, fear of those that are different.

Beliefs and prejudices are difficult, if not impossible, to change through law, although legislation can and sometimes does strive to promote tolerance and harmony through teaching and other promotional measures. Instead, in general, existing legal standards aim to combat the manifestations of racism and xenophobia, that is, acts of or incitement to discrimination or violence motivated by fear or hatred of foreigners or other groups. French legislation in fact defines racism as any manifestation "of discrimination, hate or violence in regard to a person or a group of persons by reason of their origin or their belonging to or not belonging to a particular ethnic group, nation, race or religion." Similarly, the most widely accepted definition of racial discrimination in European law, found in article 1 of the United Nations Convention on the Elimination of All Forms of Racial Discrimination targets behavior. It governs:

any distinction, exclusion, restriction or preference based on race, color, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social cultural or any other field of public life.

Apart from France most states have not attempted their own legislative definition. *Belgium* legislation and The *Netherlands* Criminal Code use the definition contained in the Racial Convention. *Italy* defines discrimination in general only in a recent gender discrimination statute, but the Constitutional Court has indicated in a decision that the term refers to differences such as race, upon which the adoption of a policy or

⁵ Webster's Ninth New Collegiate Dictionary, p. 969.

⁶ *Id.*, 1364.

law based on differential treatment cannot be justified. In addition, definitions can be found in Italy's legislation addressing particular situations, such as the workplace. In other countries there is no legislative definition. For example, discrimination as a term of art is only used in the Employment Equality legislation in *Ireland*, and there are no legislative provisions relating to racial discrimination.

In regard to race and racism, the Irish Prohibition on Incitement to Hatred Act 1989 applies to "hatred against a group of persons in the State or elsewhere on account of their race, color, nationality, religion; ethnic or national origins, membership of the travelling community or sexual orientation." A Commission of Experts proposed a draft bill suggesting penal provisions in which they examined the definition of racial discrimination with reference to article 1 of CERD. Race was defined as the classification of human beings in anthropology, on account of hereditary characteristics. Ethnic origin was considered a classification based on cultural traits. National origin is a person's former nationality or origin in the population of a nation, not necessarily the equivalent of citizenship.

Danish legislation, as well, does not use or define this term. A Committee of Experts in *Denmark* pointed out that, consistent with article 3 of CERD, it should be a criminal offence to spread ideas based on ideas of racial superiority, a reference to nazi theory of aryan superiority and apartheid. The Danish Language Council was asked to give their interpretation based upon everyday language uses. In response, they referred to nazi race theory and anti-semitism, white versus black conflict, and an identification associated with perpetrators of discrimination. The conclusion from both criminal and civil cases in Denmark is that the definition of racism and racist is related to the belief in racial superiority.

In *The Netherlands*, the Supreme Court decided in 1976 that the term "race" should be defined in light of the Racial Discrimination Convention. It rejected a biological definition of race proposed by the defendant, who argued that the plaintiffs had lost their racial distinction because their blood had been mixed. In government policy, the concept of ethnic minorities refers to groups identified in the official Dutch minorities policy, operative since 1983. This includes categories of ethnic groups, aliens as well as nationals, residing legally in the Netherlands, recognized as target groups because of their deprived position. Groups not included must then rely upon their discretionary inclusion by local authorities under a local minorities policy.

Racism is not a legal term in the *United Kingdom*. Racial hatred is only mentioned in the criminal law; the Race Relations Act opts for "racial grounds", "racial group", etc. Section 3(1) of the Race Relations Act defines "racial grounds" as grounds of color, race, nationality, or ethnic or national origins. The fact that a racial group is comprised of two or more distinct racial groups does not prevent it from constituting a particular racial group. Nationality, including "citizenship", was included within the definition in order to reverse a decision of the House of Lords. The concept of equality is not a constitutional term of art either; "equality of opportunity", used in the Race Relations Act 1976, apparently indicates the absence of discrimination. To date no litigation has turned on the phrase.

In *Belgium*, parliamentary documents refer to "an ethnic group which is distinguished from others by a set of physical and hereditary characteristics representing variations within the human family."

In spite of common elements, racism and racial discrimination must be distinguished from xenophobia and arbitrary discrimination against aliens. Racism and racial discrimination are universally condemned and illegal under international and national law. In contrast, the status of xenophobia is less clear; it is not a term that appears in legal instruments. However, the legislative debates in *Belgium* have focused on aliens, defining xenophobia as "the effect of a manipulation of the instinctive reactions of individuals in regard to those whose different customs, traditions or behavior distinguishes them as foreigners, that is threatening, during periods of

crisis." In contrast, the concept of xenophobia is not known in *Danish, English, Scots or Northern Irish* law. In addition, although xenophobia can include elements of racism or ethnic hostility, it more generally is founded on notions of national privilege and identity, with concomitant rejection of all things foreign. In less extreme forms these notions have wide acceptance and distinctions based on nationality are perfectly legal. Thus, although exaggerated hostility and certain acts of discrimination towards foreigners may be condemned--in particular, harassment or violence--nonetheless national law and international law traditionally permit states to make numerous lawful distinctions on the basis of citizenship.

Each state in its discretion determines conditions of admission, residence and nationality, as limited by ratified international instruments on the status of refugees and providing there is no discrimination against any particular nationality in regard to naturalization and citizenship.⁷ Furthermore, political rights, some civil rights and employment opportunities may be restricted to nationals. *Belgium* is typical in this regard: the residence of an alien in the country remains temporary in the sense that legislation regarding the presence of aliens leaves open the possibility that, no matter how close the ties to Belgium, the alien may be expelled; apart from nationals of EC Member States, no alien, except as granted a work permit, has the right to participate in the economic life of the country, neither as a worker, or as an independent; foreigners are excluded from certain provisions in regard to social security; and, finally, political rights are not granted to foreigners.

France and Luxembourg are unusual in having taken steps to extend considerably the rights and freedoms of aliens, to a large extent removing the traditional distinctions between citizens and foreigners.

In *Greece* the situation is significantly more complex and difficult for aliens. For Greek citizens, as well as non-citizens, legal distinctions are made between those who are of Greek "origin" and those who are not. Greek origin is an ethnic concept, based upon "Greek national conscience" linked to language, religion, national traditions and historical affiliation. Foreigners not of Greek origin can be forbidden to settle in certain border areas⁸ and there is differential treatment with regard to entry into the country and acquisition or loss of citizenship. Certain constitutional rights are limited to all citizens: public functions, equality, the right to freely enter and leave, and probably social rights, although opinion is divided. In addition, the civil code restricts certain rights to nationals; foreigners have no right to be members of the family council of a national, guardians of a minor national, nor witnesses to a will. According to one interpretation of article 12 (1) of the Constitution, only Greeks have the right of association. In any case, the Civil Code provides that all those who administer associations should be Greek citizens. In some cases it is permitted to have up to half the council composed of foreigners. In all cases, associations with a foreign orientation are subject to control.⁹ The law also restricts certain jobs and professions, including lawyers and notaries, doctors, dentists,

⁷ Article 1(3) of the United Nations Convention on the Elimination of All Forms of Racial Discrimination prohibits the latter. Provisions on the acquisition of citizenship in *Italy* and *Greece* provide for preferential treatment of those of Italian and Greek descent, respectively, and could raise questions of compatibility with the Convention. *Spain* and *Portugal* provide preferential rights of immigration for certain nationalities according to their laws.

⁸ The restrictions were eased with Law 1892/1990. The prohibition of residence in the frontier area can now be lifted by special permit. For Greek citizens the permit is given by a committee at the Prefecture; foreigners may receive their permit from the Minister of national defense. The definition of a border area is determined by presidential decree.

⁹ A judgment of the Court of Cassation (1729/1987, 4th section, *Journal des Juristes Grec*, 1988, p. 9902), approved the dissolution of an association called the Union of Young Turks of Komotini, on the grounds that its purposes and statute, employing the words Turks and Turkish, "which characterize not only persons belonging to another nation, speaking an other language and practicing an other religion, but also and above all foreign nationals," created confusion in regard to conditions of inscription and the nationality of its members. In these circumstances it was judged that the association was contrary to Greek public order.

veterinarians, midwives, and certain financial positions. For private language courses, the recruitment and employ of foreigners is permitted in the ratio of one foreign professor for each ten Greeks. Particularly strict are the rules regarding participation of foreigners in the Greek merchant fleet and certain provisions on financial investment.

Some of the distinctions cited could be considered as arbitrary discrimination. In addition, lawful state distinctions may undermine efforts to combat xenophobia among the public. For example, in *The Netherlands*, private persons and businesses have claimed that their acts of discrimination on the basis of nationality are legal, citing the right of the State to make its own distinctions in law. In one case, at Nedlloyd, only aliens were (unlawfully) dismissed from employment. In another case involving a Dutch charter company, the company illegally refused to sell a ticket at the normal tariff to a Turkish national, claiming the right to discriminate on the basis of nationality.

It is important that measures intended to combat racism and xenophobia not contribute to the problem instead of to a solution. One of the leading responses to increasing multiracial and multicultural societies in Europe has been the enactment of laws to restrict immigration and expel those found to be residing illegally in the country. Such measures can be an important aspect of combatting racism, discrimination and xenophobia by demonstrating that the government is taking action to control access to limited national resources and to preserve a sense of national identity. The appearance of control often alleviates fears and reduces tensions between minorities and the majority. However, at an extreme, the measures can violate the human rights of individuals under both national and international law and contribute to a climate of xenophobia.

In this regard, there are controversial and questionable proposals to "encourage" legal repatriation of immigrants. In some cases laws exist and are enforced that provide for deprivation of citizenship from citizens belonging to minority ethnic groups. In *Greece* for example, as noted above, article 19 of the Code of Greek Nationality (KEI) distinguishes between Greek citizens of Greek origin, who belong to the Greek "nation" according to their sentiments and national consciousness, and citizens of non-Greek origin. The latter can be deprived of their nationality if they leave Greece without intention to return. The decision is taken by the Ministry of Foreign Affairs after a study by either the Alien Service or Greek consular authorities. The same deprivation can occur to Greek citizens of non-Greek origin who are born outside Greece and fail to demonstrate an intent to live in Greece (article 19[2] of KEI). Deprivation of nationality has been applied most frequently to Muslims (mostly of Turkish ethnic origin) who leave for Turkey or Germany in order to find work. It also has been applied to Jews. According to the Foreign Ministry, 628 persons lost their Greek nationality under article 19 during 1990-1991. A number of appeals were filed, of which the large part were judged meritorious due to the absence of sufficient evidence of a lack of intent to return.¹⁰

Other examples may be cited. *Italian* legislation now permits the immediate expulsion of aliens, with no suspension during appeal. Italian attorneys see the measure as creating problems of discrimination in the enjoyment of fundamental due process guarantees.

¹⁰ CE 1397/1990, 1398/1990, 1743, 1989.

B. Summary of Legal Instruments and Policies to Combat Racism, Racial Discrimination and Xenophobia

1. Summary of legal instruments

Nearly all countries have constitutional provisions on equality or non-discrimination and have adopted some form of legislation implementing the relevant provisions. For example, *France* in 1972 and *Belgium* in 1981 adopted comprehensive legislation aimed at combatting racism and discrimination and have taken subsequent measures to control immigration. Lacking a written constitution, the *United Kingdom* was the first state to adopt legislation, enacting Race Relations Acts in 1965, 1968, and 1976, along with tightening the rules for entry into the country. In addition to having a basis in constitutional law, most anti-racism or anti-discrimination legislation in Community member states draws substantial inspiration and often detailed provisions from the United Nations Convention on the Elimination of All Forms of Racial Discrimination, as well as more general human rights treaties such as the European Convention on Human Rights.

2. General policies toward equality and discrimination

A part from the important distinction between the treatment of nationals belonging to racial or ethnic minorities and the treatment of foreign residents or domiciliaries, Community Member States' laws and policies concerning racism and xenophobia generally reflect one of three different approaches to the issue: (1) assimilationist, or individualistic; (2) pluralistic or (3) rejectionist (denial that a policy is needed). The first approach, adopted in *France*, opposes the idea of recognizing existing minority groups, instead specifically relying on the recognition and enforcement of individual rights and equality for each person as a means of combating racism, discrimination and xenophobia. While society may acknowledge the existence of various cultures and groups, e.g. Corsicans or Moroccans, the recognition in law is consciously and purposefully denied.

In contrast, *Germany*, *Italy* and *Belgium* are to a certain extent pluralist in orientation. The principle of equality and equal protection of the law include protection of linguistic minorities and the recognition of a special status and significant autonomy for certain regions. The three states, if not all federal in structure, at least provide a significant measure of local control. *Germany's* legal system is based upon the principle of equality of citizens. The official position is that Germany is not an immigrant country, although it has over 6 million immigrants, the majority of whom are migrants and refugees who have alien status. As non-citizens, they are not considered part of the state population, resulting in their exclusion from consideration in Germany's periodic report to international human rights bodies such as the International Committee on the Elimination of All Forms of Racial Discrimination (CERD). The German government also denies the existence of widespread racial discrimination and xenophobia, rendering special anti-discrimination legislation unnecessary.

The Netherlands, *Denmark* and to some extent *Luxembourg*, express a mixed policy, both individualistic and pluralistic. In 1983 and 1991, the *Dutch* government established a policy in a Memorandum on Minorities wherein it stated "minorities policy is directed towards the achievement of a society in which its minority groups are given an equal place in society and full opportunities for development, both as individuals and as groups." Government policy on ethnic minorities does not, however, include all minorities; it excludes such groups as Indonesians, Chinese and

Pakistanis. For those minorities to whom the policy does apply, it is designed to improve access to areas such as education, employment, housing, health care and social welfare by adopting measures to enable them to benefit on an equal footing with all others. When minority participation in a sector of social life is proportional to the groups' representation in society as a whole, the sector is assumed to be sufficiently accessible. Where participation is not proportionate, the causes are investigated and measures are taken as appropriate to remedy the situation. The policy aims at equal treatment of minorities and the rest of the population, including an improved legal status for aliens, elimination where possible of distinctions in legislation and official regulation of relations between minorities and the majority. Conforming to the regional trend, *The Netherlands* also has adopted a restrictive immigration policy limited to fulfilling its international obligations under the Convention on the Status of Refugees of 1951 and permitting family reunification. Less than 5 percent of applicants are granted an indefinite residence permit.

Denmark in general has been a homogenous society. Its policy is influenced by its geographic proximity to *Germany* and its Nordic neighbors. Due to close cultural and linguistic links among the Scandinavian countries, unrestricted movement of persons is permitted among the nordic countries. No ethnic, religious or linguistic group other than the German minority has been granted wide-ranging minority rights. The German group has been granted linguistic rights, ownership of schools and media, participation in local elections, and continued religious and cultural connections with Germany to ensure against assimilation into Danish society. Guest worker programs and liberal family reunification rules promote immigration to Denmark, giving rise to the a policy based on the phrase "integration into Danish society", as stated by the Minister for Internal Affairs in 1983. The official government policy is based on integration, although a certain level of pluralism is recognized.

In addition to *Spain*, which generally denies there exists a problem of racism or discrimination, *Ireland* reflects a rejectionist policy in light of its relatively small population of non-EC nationals. Its Constitution contains a bill of rights based on a particular Christian orientation, reflecting a predominately Roman Catholic population. A 1991 report of the Committee of Enquiry into Racism and Xenophobia quoted an Irish member of Parliament as stating that "Ireland has been remarkably free of such (racism) problems as there is not a large presence of foreigners." There are no legal quotas for immigration purposes, and the number of persons seeking asylum and refugee status is small, only 48 applications in 1990. However, the number and percentage of those admitted is also small (seven of the 48 applicants in 1990). A recent report of the European Commission considered these statistics reflected an official restrictive policy. Moreover, those travelling throughout the country (gypsies or travellers) remain victims of acts of racism; according to the Committee of Enquiry, they constitute the single most discriminated against ethnic group. In addition to general ignorance regarding this problem, the feeling in Ireland, according to the report, is that racism only occurs where the targets of the hatred or discrimination are foreigners, hence no legislation has been adopted to date.

Reducing immigration while combatting discrimination is the principal immediate policy in most European countries, with the long term aim of full educational integration and revival of the urban zones in which most immigrants live. Apart from attempting to combat racism through restricting immigration, a general review of policies in EC member states reveals an emphasis on prescriptive ("negative") measures, i.e. prohibiting discrimination, while less attention is given to promoting racial or ethnic harmony and integration of immigrants. The emphasis is partly characteristic of all law, for it is usually the case that prohibitions are easier to draft and enforce than are programmatic measures. The former also are widely viewed as less restrictive of individual liberty: a prohibition denies permission for one type of conduct, leaving other possibilities open, while a programmatic measure commands

a single course of action. In addition, there is a particular difficulty in the area under study: affirmative legal measures often are viewed by the public as a form of reverse discrimination favoring minorities. Even in law there may be problems. For example, in *Germany* Article 3(3), the constitutional anti-discrimination provision also bars preferential treatment on grounds of race is seen to prohibit the establishment of positive programs.¹¹ However, this does not generally prohibit special measures from being taken for the purpose of securing adequate advancement of racial or ethnic groups or individuals. The contrary is true in *Italy*, where the constitution calls for formal equality and removing obstacles to it. However, funding is regional or local for many social programs and lack of resources can hinder their implementation.

Representing a typical middle position, *Belgian* law prohibits discrimination on the basis of race, color, ethnic or national origin, and descent, and the Constitution provides that Belgians are equal before the law, but the law lacks affirmative statements on equality of opportunity regardless of race. While there is no direct obligation to promote good race relations, recently opened a new center for such programs. *France* and *The Netherlands* are stronger in affirmative action. *France* recently created a new Ministry of Social Affairs and Integration while *The Netherlands'* 1983 Memorandum on Minorities, discussed in more detail below, calls for positive measures to combat discrimination and prejudice. In some cases, programmatic measures may be limited to a single group or area. For example, a statement issued in 1991 by the Prime Minister of *Greece* called for the consolidation of "absolute equality": equality before the law and equality of civil and political rights for all inhabitants of Thrace, an area containing several ethnic and religious minorities.

Clearly, numerous legal measures have been and are being taken by European countries, particularly in regard to racial discrimination. Nonetheless, there remains discrimination in law and in practice, while remedies often prove inadequate due to procedural barriers, problems of proof and lack of resources. Some of the difficulties in securing a remedy are not unique to the subject under study, but rather reflect general problems of judicial procedure.

¹¹ The United Nations Convention on the Elimination of All Forms of Racial Discrimination explicitly permits special measures to be taken for the purpose of securing adequate advancement of racial or ethnic groups or individuals. See Article 1(4).

IV. Constitutional Provisions to Combat Racism, Racial Discrimination and Xenophobia

Summary: All EC member states with written constitutions have general constitutional expressions of equality for all individuals, or at least all citizens.¹² In addition, most countries have specific provisions prohibiting discrimination on the basis of race, ethnic origin, or other criteria. Those that do not, generally claim that proclamations of individual equality are sufficient to combat racism, racial discrimination and xenophobia. In general these same states emphasize protecting individual rights and exclude recognition of the existence of minorities or groups (France). In contrast, states such as Belgium in regard to language and cultural groups, base their constitutional structure specifically on the group. As an additional measure, only the Portuguese Constitution explicitly addresses the subject of racism, racist organizations and xenophobia. In turn, jurisprudence liberally applying constitutional protections demonstrates their utility in providing an effective guarantee against acts of racism, racial discrimination and xenophobia.

A. Statements of Equality

The *French* Constitution is characterized by three elements: the principle of equality, the refusal to recognize minorities, and the tendency to erase the criterion of nationality in respect to the exercise of human rights and freedoms. Because most of the French Constitution of 1958 concerns the governmental structure--separation of powers--only one article expressly refers to equality. Article 2 provides that France "is an indivisible, secular, democratic and social republic. It assures equality before the law to all citizens without distinction as to race or religion. It respects all faiths." A July 1991 decision of the Conseil d'Etat confirmed for the first time that, in addition to this provision, the more extensive Declaration of Rights of 1789 and the Preamble to the Constitution of 1946 provide legal norms regarding individual rights. Jurisprudence of the Constitutional Council has given these provisions a broad interpretation to protect against racial, ethnic or national discrimination. At the same time, it has held firm to the principle that France is organized on the basis of individuals and does not recognize minority groups.

The Constitution of *Spain*, article 14, addresses discrimination from the perspective of absolute equality for all Spaniards, which constitutes one of the principal values of the legal order. It mandates the correction of social inequality. It not only does not permit racism or xenophobia, but it also prohibits any conduct contrary to the basic principle of equality. Article 9.2 concretizes the definition of the Spanish state as a social state requiring all public authorities to promote conditions in which freedom and equality of individuals, and the groups to which they belong, are real and effective; to remove all obstacles which may impede or interfere with the complete enjoyment of these rights and; to facilitate the participation of all citizens in political, economic, cultural and social life. Constitutional jurisprudence, and that of ordinary courts, condemn any discrimination on prohibited grounds.

In *Luxembourg*, the constitution establishes the principle that aliens living in the territory enjoy equality with Luxembourg citizens. The provision is broadly interpreted under established case law with the result that, apart from access to public office and the right to vote, aliens in Luxembourg enjoy the same rights as

¹² The United Kingdom has no single written document setting out the framework of governmental powers and duties. While there are enactments of historical importance such as the Magna Carta, the Bill of Rights of 1688 and the Acts of Union, Parliamentary Supremacy is the primary constitutional doctrine.

Luxembourg citizens. Luxembourg is virtually unique in this regard, as other Constitutions explicitly limit their guarantees of equality to citizens. Human rights provisions are combined in a single chapter in *The Netherlands' Constitution*. The principle of equal treatment and non-discrimination applies to every person residing in the Netherlands under the formulation of article 1, which states that 'persons shall be treated equally in equal circumstances.' Discrimination - a distinction made on grounds of irrelevant qualities or characteristics of persons, like religion, belief, race, political opinion, etc.-- is not justified in any circumstance. While no explicit prohibition against discrimination exists the *Italian Constitution*, article 3 not only guarantees formal equality to citizens but it also indicates that the objective to be reached is substantive equality, even if positive discrimination is required. As a result, the law must treat identical situations in the same way and differences of sex, race, language, religion, or political opinions cannot justify differential treatment. Article 6 grants special protection to linguistic minorities, and article 2 guarantees the recognition of fundamental human rights. A prohibition against discrimination based on language derives from article 2 and from the special status granted to specific linguistic minorities within the territory of regions benefiting from a "statuto speciale." Article 19 fully recognizes individual religious freedom, and article 8 the freedom of all religions, while express provision is made for the possibility of agreements with the Catholic Church and other religions. Such agreements exist allowing, for example, Jews and Seventh Day Adventists to abstain from work on Saturdays.

B. Equality and Non-Discrimination Provisions

The *Belgian Constitution* establishes three linguistic regions and three cultural communities. It provides in article 6 that all are equal before the law. It also explicitly states that the rights and liberties afforded in Belgium are guaranteed without discrimination. The latter provision is important in extending non-discrimination guarantees beyond those contained in article 14 of the European Convention. For the latter to be violated, the discrimination must occur in regard to a right specifically protected by the Convention. The Belgian non-discrimination clause protects against all discrimination. The Constitution also explicitly recognizes equal rights in education (article 17[4]). However, these provisions do not apply to distinctions based on nationality; according to the Constitution, all foreigners enjoy the guaranteed rights, "except as provided by law" (article 128).

Similarly, article 3.3 of the *German Basic Law* prohibits discrimination based on origin, race, language, belief, religion or political belief. Article 3.1 of the federal Constitution of Germany states that "all persons shall be equal before the law." This provision guarantees general equality between Germans and foreigners, but there are specific rights that other Constitutional provisions explicitly limit to citizens. The Federal Constitutional Court has held that distinctions on the ground of nationality are not contrary to Article 3(1), if the distinction is not arbitrary. In addition, Article 3(3) prohibits racial discrimination. Article 3 of the German Basic Law does not bind private persons directly.

Because *Germany* is a federal state, it is also necessary to consider the constitutions of the component states. The German state of Schleswig-Holstein allows Danes and Friesen the choice of identification as a national minority and gives Danish parents the right to send their children to the schools of the Danish minority. In addition, self-reliance and political cooperation of national minorities and peoples is protected by the state and communities. The states of Bavaria (Bayern), Berlin and Bremen guarantee freedom of assembly to all without consideration of citizenship, in contradiction to article 8.1 of the federal constitution. However, despite the supremacy of federal law to state law which requires state law to guarantee the

minimum federal rights, some rights are more restrictive in German state legislation. For example, Bavaria limits the right of petition to citizens of Bayern, while the federal constitution grants this right to all persons.

In *Greece*, the 1975 Constitution begins with a statement of equality in the enjoyment of the civil and political, economic, social and cultural rights that it guarantees (article 2); article 4 separately concerns equality among citizens and article 5(1) provides for human rights of life, honor and liberty without discrimination on the basis of nationality, race, language, religious or political belief. Article 5(1) applies to "all those who are found on Greek territory." In addition, in Greece the issue of religious liberty can be linked to racism, racial discrimination and xenophobia. As noted earlier, anti-semitism often is considered as a manifestation of racism; moreover, the largest minority groups in Greece are protected by the Treaty of Lausanne as a religious minority, although they also may be considered as ethnic, national or linguistic minorities. Thus, the provisions of Greek law concerning religious liberty must be noted when they appear to reflect a certain discrimination or efforts to combat discrimination. In this regard, article 13 of the Constitution guarantees religious liberty for all "known religions (religions connues)" that do not offend public order, good morals and on condition that they do not proselytize. The Constitution expressly forbids the latter.

There are several provisions in the Constitution of the Republic of *Ireland* concerning equality, and the prohibition of discrimination, but only on the basis of religion. Given Ireland's history, most concern religious liberty and non-discrimination on the basis of religion. However, article 40 generally provides that all citizens, as human persons, shall be equal before the law; a phrase which has been a limiting factor in the applicability of the article. In general, the terms "citizens" and "persons" are used interchangeably throughout the Constitution. Although these provisions are expressed in terms of protection for "citizens", the government has stated as a matter of policy that it will not argue that non-citizens are excluded.¹³ In one case, however, the government retreated in part from this statement, requiring a particular injury to the individual to avoid broad attacks on government policy.¹⁴

It is not clear what distinctions remain, because the courts seem willing to afford all fundamental constitutional rights, except political rights, to aliens as well as citizens. As for non-discrimination, article 44.2 provides that "Freedom of conscience and the free profession and practice of religion are, subject to public order and morality, guaranteed to every citizen", and that "The state shall not impose any disabilities or make any discrimination of the ground of religious profession, belief or status." There are no specific provisions regarding racial or ethnic discrimination or xenophobia.

Denmark's statement of equality is found in section 70 of its Constitution, which prohibits the state from depriving any individual of civil or political rights because of the individual's religious conviction or origin. In addition, section 71 of the Danish Constitution ensures that no citizen can be deprived of personal liberty on grounds of political or religious conviction, or origin. At the time of the Constitution's adoption, the term which today means 'citizens', also contemplated all resident persons in the country, including foreigners. Therefore, unless there is a positive basis for their exclusion, the principle of equality in Denmark also applies to non-citizens. In general, it is accepted that the guarantees contained in the Danish Constitution apply to non-citizens, except provisions directly referring to "Danish citizens."

¹³ *The State (Nicolau) v. An Bord Uachtala* 1966 IR 567.

¹⁴ *McGimpsey v. An Taoiseach* 1990 IR 110.

C. Bans on Racist Expressions and Organizations

The *Portuguese* Constitution, article 13, establishes a principle of non-discrimination and equality before the law, providing that no one may be privileged, favored, disadvantaged, deprived of a right or excused of a duty by virtue of *inter alia* ancestry, race, language or place of origin. This provision structures the entire field of fundamental rights especially in prohibiting discrimination. In addition, the principle of equality is reaffirmed in articles establishing equality before the courts (art. 20), before the public administration (art. 266(2)) and in regard to the entire catalogue of rights and liberties guaranteed. The result is a complete prohibition of all discriminatory treatment not only in governmental conduct towards Portuguese citizens, but also in private relations between the latter. The Portuguese Constitution, article 46 paragraph 4, also expressly prohibits fascist organizations and those that advocate racial hate or xenophobia. The Portuguese Constitution specifically protects workers against discrimination based on race, nationality, country of origin, etc. However, section III of Act 21/27 of 1965 does not treat Portuguese workers and foreign workers employed in Portugal on the same basis "unless the legislation of the country in question grants equal treatment of Portuguese workers". In addition, foreign workers employed by a foreign enterprise and whose right to compensation is recognized under the legislation of their own country are excluded from the scope of the Act unless they are temporary workers and such exclusion is provided for in a special agreement. Finally, article 15 guarantees that aliens and stateless persons enjoy the same rights and are subject to the same duties as Portuguese citizens, except in regard to political rights, the performance of public duties that are not predominately technical, and rights and duties confined to citizens under the Constitution and the law. However, there remains discrimination among foreign nationals, as those coming from Portuguese-speaking countries may be granted preferential status among aliens.

The Constitution of the German state of Bavaria prohibits incitement of racial hatred. Similarly, the Constitution of Berlin imposes a duty on the state to legislate to make incitement to racial hatred and expressions of national or religious hatred punishable. Berlin prohibits acts of xenophobia as well.

No express prohibition against racism or xenophobia is found in other EC Member State Constitutions. However, the *Italian* Constitution, article 6 guarantees the recognition of fundamental human rights. In addition, article 21, concerning freedom of expression, is limited according to criminal defamation laws and penal provisions criminalizing incitement to violence, apology of crimes, and subversive propaganda, etc. The Constitutional Court has held that freedom of expression (article 21) ends where expression takes the form of concrete incitement to violent action.

D. Jurisprudence Interpreting and Applying Constitutional Norms

In general, case law in EC Member States has given broad application to constitutional protections of equality and non-discrimination. In *Portugal*, a decision of the Constitutional Commission was delivered on 15 May 1980, and sustained by Resolution of the Conseil de la Revolution. The decision concerned a 1920 decree on the subject of gypsies. The law provided for close supervision of the activities of gypsies with a view to preventing their "frequent anti-social activities" of theft, deceit, fraud and fires on properties they passed through. In view of non-discrimination laws, the special police regulations were struck down as unconstitutional. A revised special law, referring to close supervision of "nomads" was upheld as being based not on race but on the lack of habitation. Other decisions have interpreted article 13 (2) of the Constitution to require not purely formal

equality, but as a principle of material equality which, according to the formulation of the Constitutional Court consists in equal treatment for equal situations and unequal treatment for unequal situations.

The Constitutional Court of *Spain*, in a decision of November 1991, affirmed that "neither the exercise of freedom of thought or speech can shield manifestations or expressions intended to disrespect or generate feelings of hostility against designated ethnic groups, foreigners or immigrants, or religious or social groups." A November 1991 decision of the Constitutional Court recognized a violation of the right to one's honor based on an magazine article concerning nazis. The article denied the existence of concentration camps and the use of gas chambers. This decision against the author and magazine affirmed the right of not only the victim, but also the rights of any member of the offended group to bring a cause of action, thus extending the right to recourse action to all natural or legal persons who invoke a legitimate interest in the claim. Organic Law 7/85 regulating the rights and liberties of foreigners in Spain, was subject to judicial review by the Constitutional Court resulting in several of its articles being declared unconstitutional.

In some instances, judicial interpretation has overridden an express provision limiting guarantees to citizens. The Constitutional Court of *Italy* has ruled that despite the reference to citizens in article 3 of its constitution, the provision equally applies to aliens whenever the protection of fundamental rights is in question. Lower courts recently have held that there is no requirement of reciprocity in the treatment of Italian nationals in the state of origin in order for the alien to be guaranteed equality in the exercise of fundamental rights. Concerning the prohibition of discrimination based on race, the Constitutional Court upheld the validity of statutes based on article 3 (the principal of equality), which provided for reparations in favor of Jews who had been subjected to discrimination under legislation enacted during the fascist government in Italy. The Constitutional Court also has held that, so long as freedom of all religions is fully guaranteed, differences in treatment between them may be justified according to their relative weight in the State.

The Supreme Court of *Ireland* has held that the Constitutional principle of equality is directly applicable to private as well as state action.¹⁵ It may be inferred that article 40 gives a right to equal treatment, providing a potential constitutional underpinning for legislation against racist acts. However, some scholars suggest courts will take the view that the equality clause should not overly interfere with private relations. A case in 1972¹⁶ concerned the Ministerial Order exempting proprietors of kosher meat stores, primarily Jews, from compliance with restrictive sales hours. The Supreme Court found a conflict between the state obligation to not impose any disabilities or not to discriminate on religious grounds, and the guarantee of religious freedom. The Court ultimately invalidated the Order of exemption as overly broad. This case was decided on the basis of the provisions of the Irish Constitution concerning religious freedom and freedom from state discrimination. A particularly important case decided in 1965 established that the people also enjoy fundamental rights not enumerated in the Constitution, on the basis of natural law which is antecedent to the Constitution.

There seems to be no jurisprudence in *Denmark* concerning sections 70 or 71, the constitutional guarantees of equality. However, there have been a number of cases concerning discrimination against foreigners in relation to vacation homes in Denmark. The actions complained of were found to not to be discrimination within the European Community rules or the domestic norm of equality.

The *French* Constitutional Council, while giving broad application to the protection against discrimination, has judged that the principle of equality does not forbid

¹⁵ Meskill v. CIE.

¹⁶ Quinns Supermarket v. A.G. 1972 IR 1.

different treatment of those in different situations. Moreover, equality can be limited for reasons of the general interest if there is a rational link between the limitation and the object of the law.

An important decision of the Constitutional Council of May 1991¹⁷ reaffirms that there is one, indivisible French people without distinction of origin, race or religion. Reinforcing the long-standing refusal to recognize national minorities, the Council decided that the legislature could not identify the Corsican people as a part of the French nation, because this would admit a distinction necessarily based upon ethnic origin.

In another recent decision, the Constitutional Council judged that fundamental constitutional rights and liberties are recognized for all who reside on the territory of the Republic.¹⁸ This decision, for the first time, announced the principle of equality of rights for foreigners and affirmed that discrimination based on nationality is unconstitutional. Based on the Declaration of 1789 and the Preamble of the Constitution of 1946, it concluded that the Constitutional principle of equality is based on human rights and not on the rights of citizens. Linked to this, while the Constitution, article 3, reserves the expression of national sovereignty to the French people, who exercise it through election of representatives and referenda, the Constitutional Council has rendered two decisions that raise the possibility of recognizing the right of aliens to vote in local elections as well as for members of the European Parliament. The Council in effect decided that not every election implicates national sovereignty; the latter concerns only institutions of the Republic that are recognized by the Nation as expressing its will. The question posed by the decision is what rights, if any, remain limited to citizens only. This remains for further decision by the Council, but a wide application of the decision can already be seen, tending towards a general recognition of the rights of aliens.¹⁹ However, the Council's decision of 22 January 1990 accepted the possibility for the legislature to make certain rules applicable only to foreigners, such as those concerning entry and residence.

In Germany the Federal Constitutional Court has held that Article 3(1) ("All persons shall be equal before the law") prohibits arbitrary discrimination against aliens. Based on this, a regulation making it impossible for aliens to receive their old age pensions when living outside Germany was held to be unconstitutional because German pensioners would receive their pensions wherever they lived. However, the Federal Constitutional Court also decided that according to the German Basic Law only German citizens have the right to vote and to stand for elections for the Federal Parliament as well as for state parliaments.

In *The Netherlands*, most of the human rights in the Constitution are not absolute, and limitations on their exercise are possible by law except for article 1. Courts address issues concerning conflicting rights by balancing the principle of equal treatment and non-discrimination with the right of individuals and private institutions to live according to their own beliefs and ideals.

Under case law, it has been established that both direct or indirect discrimination constitutes discrimination as defined in the Netherlands' Constitution. Direct discrimination arises where a forbidden ground is used to apply differential treatment. Indirect discrimination occurs where criteria other than the forbidden ground is used to apply differential treatment and the use of this other criterion leads to the same result. Distinction in private life does not fall within this definition of discrimination, justified by the government on the basis that its unlimited

¹⁷ C.C. 91.290 D.C., 9 May 1991, J.O., 14 May 1991, p.1 6350.

¹⁸ Constitutional Court, Decision of 22 January 1990, C.C. 89.269 D.C., 22 January 1990. R.p.)

¹⁹ See the decision of 23 July 1991 (C.C. 91.293 D.C., 23 July 1991, J.O., 25 July 1991, p. 9854)(Refusal to recognize a Constitutional limitation in favor of citizens in the exercise of certain public functions).

interference into the private lives of individuals could conflict with the individuals' right to privacy.

Belgian case law indicates that the Constitutional norms on equality and non-discrimination do not exclude all differences of treatment. Such distinctions are legal if they have an objective and reasonable purpose in light of the aim and impact of the law. The principle of equality is violated when it is shown that there is not reasonable relation of proportionality between the means employed and the end pursued.²⁰

In *Greece*, there are cases involving the definition of "known religion" under the Constitutional protection of religious liberty as well as cases enforcing the Constitutional ban on proselytizing. On the first issue, the Courts have held that Jehovah's Witnesses form a recognized religion, but that the Krishna Consciousness Movement is not accepted. The ban on proselytizing is enforced through the oldest provisions of the Greek penal code, sections 1363/1938 and 1672/1939. Arrests were made of 1919 Jehovah's Witnesses between 1983 and 1990. A decision of the European Commission on Human Rights found the Conviction of a Jehovah's Witness for proselytizing to be in violation of article 9 of the Convention. Another major dispute has involved the conflict between Constitutional protection of equality and Greek legislation governing foreign workers in the merchant marine fleet. According to law 1376/1983, the salaries of foreign workers on ships of over 3000 tons are fixed by agreement between Greek and foreign labor unions. The salaries of the foreign workers cannot be below the sum they would earn in their own fleet, but can be below those earned by the Greek sailors doing the same work. A case brought by Sri Lankan workers invoked article 22 of the Constitution, to challenge the inequality of salaries. The Court of Appeals of Pireaus found that the provision of the Constitution protected all workers found on the Greek territory, without distinction as to sex, nationality, race or language, religious or political beliefs, and thus invalidated the bilateral agreements. It held that the Sri Lankan sailors were entitled to the difference in salaries. The judgment was appealed to the Court of Cassation, 754/89, which held that normally there could be no difference in the treatment of workers doing equal work. However, if the discrimination was imposed for reasons of social or general public interest, it could be permissible. In this case, the tribunal considered that the law, which was entitled "measures necessary in light of the maritime crisis" satisfied the test of general public interest due to intense international competition and the need to protect the national economy.

²⁰ CA. no. 21/89 of 13 July 1989; CA no. 223/89 of 13 October 1989, CA no. 1/90 of 11 January 1990; Cass., 17 November 1988, Bull., p. 288; Cons. d'Etat, Soc. Gen. de Banque no. 32769 of 20 June 1989.

V. International Legal Norms Applicable in EC Member States to Combat Racism, Racial Discrimination and Xenophobia

Summary: International human rights instruments generally prohibit racism and racial discrimination; indeed, systematic racial discrimination is often listed as a gross violation of human rights. The same cannot be said for xenophobia and resulting discrimination; xenophobia itself is rarely mentioned in international instruments and distinctions made between citizens and aliens within a state are sometimes expressly permitted. Basic protection for refugees are contained in the 1951 Geneva Convention on the Status of Refugees. EC member states have widely ratified or acceded to global and regional human rights treaties. Of the seven treaties most applicable to this study²¹, three have been ratified by all member states; two by all but one country; and two lack three member states as parties. *Ireland* has ratified the fewest treaties, followed by *Greece*.²² In most countries, individuals may invoke international human rights norms before domestic courts.

Very few decisions are reported in international jurisprudence concerning racial discrimination and none concerning xenophobia, although there are numerous cases where aliens have contested their expulsion from a country. It is not clear whether there are few complaints being filed, or whether procedural hurdles are preventing decisions on the merits.

The status of customary international law on racism, racial discrimination and xenophobia is less clear. While customary law generally forms part of the domestic law of EC member states, its use by courts varies considerably.

A. Treaty Provisions Concerning Racism, Racial Discrimination and Xenophobia

Among basic human rights treaties, the International Covenant on Economic, Social and Cultural Rights, adopted by the United Nations General Assembly on 16 December 1966, provides, in Article 2, paragraph 2, that the States parties

"undertake to guarantee that the rights enunciated in the present Covenant will be exercised without discrimination of any kind as to race, color, sex, language, religion, political or other opinion, national or social origin, property, birth or other status."

Every EC Member State is party to this treaty.

The International Covenant on Civil and Political Rights, adopted the same day as the above Covenant, similarly provides, in Article 2, paragraph 1, that each State party undertakes

²¹ The seven treaties are: the International Covenant on Economic, Social, and Cultural Rights; the International Covenant on Civil and Political Rights; the United Nations Convention on the Elimination of All Forms of Racial Discrimination; the UNESCO Convention on Discrimination in Education; the ILO Convention Discrimination (Employment and Occupation); the European Convention on Human Rights; and the 1951 Geneva Convention on the Status of Refugees.

²² Ireland is not a party to the Racial Convention, the UNESCO Education Convention, or the ILO Discrimination Convention. Greece has not ratified the Civil and Political Covenant or the UNESCO Education Convention. Belgium is also not a party to the latter treaty, while Spain and the United Kingdom have not ratified the ILO Discrimination Convention.

"to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, color, sex, language, religion, political, or other opinion, national or social origin, property, birth or other status.

Paragraph 3 of the same article provides that each State Party shall ensure that any person whose rights or freedoms are violated shall have an effective remedy, even against persons acting in an official capacity, and that the remedy shall include recourse to a competent judicial, administrative, legislative or other competent authority, as well as enforcement of any remedy granted.

Adopting a pluralistic approach, Article 27 of the Covenant provides that in those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practice their own religion, or to use their own language. This provision may pose problems for those states which have an assimilationist or individualist approach to issues of racial and ethnic minorities. All EC Member States, with the exception of *Greece*, have ratified or acceded to this agreement; however *France* filed a reservation to article 27 in light of its policy of not recognizing minority groups.

In addition to the reservation just cited, *Belgium and France* have filed reservations to Covenant article 20(2), that calls for prohibiting by law advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence. The Covenant contains provisions requiring a balancing of rights. Article 29(2) provides for the right to freedom of expression, including freedom to seek, receive and impart information and ideas of all kinds regardless of frontiers, either orally, in writing or in print, art or any other media. However, paragraph 3 recognizes certain restrictions on this right as provided by law and as necessary. Article 20 goes further in prohibiting any advocacy of nation, racial or religious hatred constituting incitement.

Article 10 of the European Convention limits the right to receive and impart information by even more stringent restrictions, permitting such "formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security; territorial integrity and public safety, for the prevention of disorder or crime, for the protection of health or morals, or the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary. Article 17 precludes reliance on Convention rights for justification of any activity "aimed at the destruction of any of the rights and freedoms set forth therein." Thus, it is evident that commitment to international law norms guaranteeing freedom of expression does not entail permitting the use of that freedom for racist or xenophobic ends.

The reservation filed by EC Member States limits the application of this article to the extent compatible with article 16 of the European Convention on Human Rights. *Luxembourg* filed a similar reservation to require that article 20 be implemented consistent with the rights to freedom of thought, religion, opinion, assembly and association contained both in the Universal Declaration of Human Rights and in the Covenant. *Denmark* made a reservation indicating that it would not prohibit war-propaganda, but did not reserve on prohibition of racist speech.

The Optional Protocol to the Civil and Political Covenant provides for the competence of the United Nations Human Rights Committee to receive individual complaints regarding human rights violations committed by a State Party, thus providing the possibility of an international recourse for victims. Eight EC Member States

(Denmark, France, Ireland, Italy, Luxembourg, The Netherlands, Portugal and Spain), having ratified the Optional Protocol.

The most extensive international obligations for states to combat racism and racial discrimination are contained in the United Nations Convention on the Elimination of all Forms of Racial Discrimination, adopted and opened for signature and ratification on December 21, 1965. Among EC Member States, only *Ireland* is not a party to the Racial Convention. *Denmark, France, Italy and The Netherlands* additionally have recognized the competence of the Committee on Racial Discrimination (CERD) under article 14 of the Racial Convention to receive communications from individuals within their jurisdiction claiming to be victims of a violation of the Convention by the State party concerned. *Belgium* has announced its intention to file the requisite declaration.

Parts I and II of the Convention contain the substantive provisions and measures of implementation. After defining racial discrimination in article I, the States parties in article II condemn undertake to eliminate racial discrimination. In particular they agree

- (a) "to engage in no act or practice of racial discrimination against persons, groups of persons or institutions and to ensure that all public authorities and public institutions, national and local, shall act in conformity with this obligation";
- (b) "not to sponsor, defend or support racial discrimination by any persons or organizations";
- (c) to "take effective measures to review governmental, national and local policies, and to amend, rescind or nullify any laws and regulations which have the effect of creating or perpetuating racial discrimination wherever it exists";
- (d) to "prohibit and bring to an end, by all appropriate means, including legislation as required by circumstances, racial discrimination by any persons, group or organization";
- (e) "to encourage, where appropriate, integrationist multiracial organizations and movements and other means of eliminating barriers between races, and to discourage anything which tends to strengthen racial division".

Paragraph 2 of the same article requires states to take special, affirmative measures when necessary to guarantee equal enjoyment of human rights. The specific rights referred to are enumerated in article 5. Article 6 further establishes a right to an effective remedy, including just and adequate reparation for any damage suffered as a result of racial discrimination. Pursuant to article 7, States parties are undertake to take positive measures to combat prejudices which lead to racial discrimination and to promoting racial harmony.

The most controversial provision of the Racial Convention is article 4, which provides that States Parties

"condemn all propaganda and all organizations which are based on ideas or theories of superiority of one race or group of persons of one color or ethnic origin, or which attempt to justify or promote racial hatred and discrimination in any form, and undertake to adopt immediate and positive measures designed to eradicate all incitement to, or acts of, such discrimination..."

Among other things, they are required to "declare an offence punishable by law all dissemination of ideas based on racial superiority or hatred, incitement to racial discrimination, as well as all acts of violence or incitement to such acts against any

race or group of persons of another color or ethnic origin and also the provision of any assistance to racist activities, including the financing thereof;" to "declare illegal and prohibit organizations, and also organized and all other propaganda activities, which promote and incite racial discrimination", and to "recognize participation in such organization or activities as an offence punishable by law"; and, finally, not to "permit public authorities or public institutions, national or local, to promote or incite racial discrimination." *Belgium, France, and the United Kingdom* have all reserved to the article to ensure its compatibility with free speech guarantees. In addition, *Spain* has reserved to article 22 by which it limits the jurisdiction of the International Court of Justice.²³

A final provision worth noting is article 1, paragraph 2 according to which the Racial Convention does not apply to any distinctions, exclusions, restrictions or preferences made by a State party between citizens and non-citizens. Thus, discrimination against foreigners, *per se*, is outside the scope of the treaty; it would be necessary to prove an unlawful racial motivation to bring an act against aliens within its terms. Among regional agreements, article 14 of the European Convention on Human Rights, to which all EC Member States are party, requires states parties to secure the rights and freedoms guaranteed by the Convention without any discrimination on the basis of race to everyone within the jurisdiction of the state. Article 13 requires that everyone whose rights and freedoms under the Convention are violated have an effective remedy before a national authority, whether or not the violation was committed by a public official. Among the guarantees related to remedies and due process, everyone accused of a criminal offense is entitled to the free assistance of an interpreter if he cannot understand or speak the language used in court (article 6). Notably, the European Commission on Human Rights, in the *East African Asians* case,²⁴ has stated that, as a parallel to article 14, a discriminatory treatment based on racial motives can constitute a degrading treatment in the sense of article 3 of the Convention.

The European Convention additionally affords certain protection to aliens in regard to expulsions. Apart from the Convention provisions prohibiting inhuman or degrading treatment (article 3) and guaranteeing the right to respect for private and family life (article 8), in connection with the right to an effective remedy before a national authority (article 13), specific protection for foreigners is contained in article 4 of the Fourth Protocol (collective expulsion of aliens is prohibited) and in Protocol No. 7. The latter, ratified by fewer than half the EC Member States (*Denmark, France, Greece, Italy, and Luxembourg*), provides certain due process guarantees in regard to the expulsion of aliens lawfully resident within the territory of the state in question. These include a requirement that a decision be reached in accordance with law. The alien must be allowed to submit reasons against expulsion, have the case reviewed, and be represented before the deciding authority. For reasons of national security or interests of public order all but the last stated right may be overridden by the state. For states not party to Protocol 7, the European Commission of Human Rights has held in case 7729/76 that a decision to deport a person does "not involve a determination of his civil rights and obligations or of any criminal charge against him" within the meaning of Article 6 of the Convention.²⁵ Thus, the due process guarantees of that article are unavailable.

In addition to the European Convention, four states (*France, The Netherlands, Portugal and Spain*) have ratified the Council of Europe Convention concerning the legal status of migrant workers.

²³ Spain filed the same reservation to article 9 of the Genocide Convention.

²⁴ Dec. Comm. 10/10/1970, app. 4403/70, Yearbook 13, p. 929.

²⁵ Decision of 17 December 1976, Decisions and Reports (DR), Vol. 7, p. 176. See also Application No. 7902/77, decision of 18 May 1977, DR, Vol. 9, p. 225; Application No. 8244/78, decision of 2 May 1979, DR, Vol. 17, p. 157; Application No. 9285/81, decision of 6 July 1982, paragraph 4, DR, Vol. 29, p. 211.

However, no EC member states have acceded so far to the International Convention on the Protection of Migrant Workers. Indeed, the *German* government has indicated that it will not sign the Convention.

All states, except *Ireland, Spain and the United Kingdom*, have ratified the International Labor Discrimination (Employment and Occupation) Convention, adopted 25 June 1958. Going beyond a prohibition of discrimination, each State party to the Convention agrees to declare and pursue a national policy designed to promote equality of opportunity and treatment, in order to eliminate any discrimination. Specific obligations include enacting necessary legislation and promoting educational programs; repealing discriminatory legislation and administrative practices inconsistent with a policy of equality; and ensure non-discriminatory public employment and training programs.

The UNESCO Convention on Discrimination in Education, adopted 14 December 1960, is applicable to all EC Member States except *Belgium, Greece and Ireland*. It defines discrimination in terms similar to those found in the Racial and ILO Conventions. However, it explicitly permits the establishment of separate educational systems or institutions for religious or linguistic reasons. In article 3, states parties undertake to repeal statutory provisions and administrative practices and instructions that involve discrimination in education; and to ensure equality in the admission of students to schools, scholarships, etc. No assistance may be granted by the public authorities to educational institutions that restrict or prefer students solely on the basis they belong to a particular group. Significantly, article 3, para.(e) mandates that "states parties give foreign nationals resident within their territory the same access to education as that given to their own nationals." Apart from these measures, article 4 calls for national policies that will promote equality of opportunity and treatment in education.

Certain additional obligations have been undertaken by individual states. *Greece* is a party to the 1923 Treaty of Lausanne on the Muslim minority in Greece. The first paragraph of article 2 of the 1923 Convention of Lausanne concerns the exchange of Greek and Turkish populations and refers particularly to the Muslim inhabitants of western Thrace. According to article 38(1), the government is obligated to provide for the minority "a complete and absolute protection of their life and their liberty, without distinction as to birth, nationality, language, race or religion." Article 39(2) and 40(1) guarantee equality before the law and the enjoyment of the same protection and rights as all other Greek nationals.

Portugal makes explicit reference to the Universal Declaration of Human Rights in article 16, para. 2 of the Constitution, demanding that all constitutional and legislative rules relative to human rights be interpreted and applied in conformity with it.

Recently, *Germany* has ratified the German-Polish Convention on Good Neighbourliness and Friendly Relations. This treaty gives the German minority in Poland and the Polish minority in Germany the right to receive financial support for cultural purposes and grants them the right to use their language in schools and "where it is possible and necessary" in court and in their contact with public authorities.

B. Jurisprudence of International Human Rights Organs

There is little jurisprudence of international human rights organs applying the treaty protections discussed above. Before the U.N. Committee on the Elimination of All Forms of Racial Discrimination, one case has been brought against an EC Member States. The *Yilmaz-Dogan* case, brought against *The Netherlands*, resulted in a finding by CERD that the applicant had been denied wrongfully her right to work.

The Government agreed to provide compensation *ex gratia* with respect to her period of unemployment.

Until 1988, 4,915 individual complaints were brought against Germany before the European Commission on Human Rights. Sixteen of these complaints were heard before the European Court of Human Rights. There were findings of violations in seven of the cases, but none concerned racism or racial discrimination under article 14.

Several efforts have been made to bring applications against *France* with regard to Breton language rights. The Human Rights Committee in each case has rejected the application in light of the "unequivocal" reservation made by France to article 27. There have been no decisions of the European Court of Human Rights against France in regard to Convention article 14. While the Commission's jurisprudence is somewhat less accessible, there have been 1074 cases registered against France since it accepted the right of individual petition relatively recently. Thirty-three of these cases have been declared admissible; apparently none of them concern allegations of racial discrimination.

There have been 218 individual complaints brought against Denmark before the European Commission and Court of Human Rights between 1956 to 1990. Of these 10 cases before the Commission and 7 cases before the Court were considered on the merits. None of the cases concerned article 14 discrimination on the basis of race and only a few concerned religion. However, several cases have been brought on the basis of the Penal Code. A pending case before the European Commission concerns a Danish Television journalist whose fine for aiding and abetting racial statements in an interview was upheld by the Supreme Court of Denmark. The Government has been asked to submit a statement on the case.

Between 1985 and 1990, the European Commission opened provisional files on over 200 cases involving Greece and formally registered 65 cases. Six of these were declared admissible, of which two were resolved between the government and the parties. Among the remaining cases, the Commission unanimously condemned Greece for violation of religious liberty due to the arrest of a Jehovah's Witness for proselytizing.

C. Applicability and Enforcement of International Norms in National Law

Among the EC member states in general, ratified treaties have a status equal, and in some cases (e.g. *Luxembourg*) superior, to the national constitution, thus ranking above legislation and other legal measures. In several cases (e.g. the *United Kingdom and Ireland*) a treaty must be enacted as legislation before it has internal effect. In other states (e.g. *Germany and Italy*), treaties are transformed into national law through domestic legislation, but only self-executing provisions of a treaty transformed into national law may be given direct effect and directly invoked before the courts. In the majority of EC member states, individuals may directly invoke international human rights norms in an appropriate case.

In *France*, the administrative codes recognizes that pre-existing legislation must be set aside in favor of a subsequent treaty that is incompatible with it (see e.g. the decision of the Conseil d'Etat of 7 July 1978 in *Croissant*). The Conseil d'Etat considers, however, that it does not have jurisdiction to set aside legislation that is subsequent to a treaty (see, e.g. the decision of 11 March 1968 in *Syndicat general des fabricants de semoule de France*). In all cases the courts give precedence to treaties over a government decision of any kind.

In *Luxembourg*, not only are treaties of superior legal value, international texts may be invoked by individuals either directly in order to secure a right guaranteed by a

convention or on an exceptional basis in order to prevent infringement of their rights. The provisions of the conventions are valid both before the judicial courts and before the administrative courts.

In *Portugal*, article 8 of the Constitution of the Portuguese Republic of 1976 provides that the rules deriving from ratified treaties take effect internally upon official publication, provided the treaty is in force internationally. The internal force and relation of the treaty to the Constitution and legislation is not stated. However, norms of international law may be subject to individual action to invoke their protection and courts may directly apply treaty provisions.

In *Spain*, international treaties to which it is a party immediately form part of the internal legal order upon publication in the Official Bulletin and are interpreted by the courts. Under article 96.1 of the Constitution, derogation from, and modification or suspension of, provisions are only possible in accordance with general norms of international law. It also allows Judges to examine the validity of national legislation vis-a-vis an international treaty, because treaties prevail over all previous or subsequent internal legislation of less than constitution status, giving treaties a quasi-constitutional status. Nothing prohibits an individual, or an organization from applying conventional or customary law in a case concerning discrimination, racism or xenophobia. Both treaties and rules of customary international law may be invoked by individuals for direct application to their benefit. Dispositions of the European Convention of Human Rights are frequently used by Spanish courts and invoked on numerous occasions as a direct source. The Constitutional Court also expressly uses the jurisprudence of the European Court of Human Rights. However, while the constitutional system permits application of international instruments ratified by Spain, the number of cases where the Courts have invoked these treaties is extremely rare. Article 10.2 of the Constitution requires the Constitutional Court to interpret constitutional provisions concerning fundamental rights and liberties in conformity with the Universal Declaration of Human Rights and international human rights treaties ratified by Spain.

Treaties in *Italy* are normally incorporated into domestic law through implementing legislation which mandates their binding nature within the state. Once incorporated, they can be derogated from by ordinary legislation, if they were adopted by ordinary legislation, but in practice this is not done. Treaties are subject to judicial review by the Constitutional Court. In addition, international human rights norms that have been incorporated into Italian law may be invoked in domestic court proceedings. Despite this fact, there are an extremely limited number of court decisions applying international norms on racism or discrimination.

According to its Constitution, international agreements do not have direct binding effect in *Ireland*, but require enabling legislation to have effect. The Courts see the role of the legislature as supreme in making laws and will not accord to international legislation any supremacy over domestic law. Generally accepted principles of international law merely guide relations with other states, and confer no rights on individuals. Thus, it appears difficult, if not impossible for an individual to successfully invoke international human rights norms in judicial proceedings when they conflict with domestic law. There have been no instances where international norms concerning discrimination, racism or xenophobia have been applied by Irish courts.

According to article 93 of the Constitution of *The Netherlands*, treaty provisions and decisions of international organizations which directly bind private and legal persons have binding force in domestic law and are directly enforceable. Incorporation into domestic law is not required in this case. Self-executing international rules prevail over conflicting national laws, the self-executing nature of which is decided by a national court. Upon ratification of CERD, statutory provisions proscribing discrimination were added to the Criminal Code and the Labor Law section of the

next amended Civil Code will incorporate obligations under the European Convention on the Legal Status of Migrant Workers. The Courts, authorities, and individuals can all make a direct appeal to self-executing international provisions. Article 26 of the Civil and Political Rights Covenant and article 14 of the European Convention are recognized as self-executing by Dutch courts, but the various provisions of CERD addressed to the state and the Economic and Social Rights Covenant are not considered self-executing. Also, the National Bureau against Racial Discrimination and the International Commission of Jurists (Netherlands) comments on the reports of the Dutch government to CERD as part of their work.

In *Belgium*, in order for the provisions of an international treaty to be incorporated in internal law, the treaty must be approved by the legislative chambers, in accordance with article 68 of the Constitution, ratified by the Crown as a branch of the Executive and brought to the attention of the citizens by its publication. The International Covenant on Civil and Political Rights has been incorporated into domestic law. Since the 1971 "le Ski" case involving S.A. Fromagerie Franco-Suisse, jurisprudence has upheld the primacy of international treaty law over internal law. In general, ratified treaty provisions can be given direct effect if (1) they are clear and juridically complete, (2) impose on the State an obligation to abstain or an obligation to act in a specific manner, and (3) are susceptible of being invoked as a right by individual persons without need for any additional internal legislation for the purpose of implementation.

In contrast, in the *United Kingdom* it is generally the case that individuals can invoke international treaties as an aid in deciding an unsettled point of domestic law, although they cannot claim treaty rights not afforded by domestic law. Customary international law is a part of domestic law although its exact status is unclear.

Denmark adheres to a dualist approach concerning the domestic effect of international agreements. Treaties may be accepted or ratified by the government, and then made part of domestic law through a special legislative act by the parliament. According to the terms of the legislative act, existing standards may be revised to conform to international standards; legislative amendments may be enacted or the entire international treaty may be adopted into domestic law verbatim. The Danish Parliament decided to incorporate the European Convention on Human Rights directly into domestic Danish law as of July 1, 1992. This will ensure that the Convention can be invoked before Danish courts, enhancing three Supreme Court decisions in 1989 that held Danish courts and other authorities are under an obligation to base their interpretations to the widest extent possible upon the Convention.

In *Greece*, international law is of constitutional status. An individual may invoke ratified conventions and customary international law, both of which form an integral part of domestic Greek law that may be directly applied by the courts.

In *Germany*, ratified treaties must be transformed into national law. Neither the Racial Convention nor the Economic, Social and Cultural Rights Covenant may be invoked as the basis for an individual's case. It has not been judicially decided whether an individual may bring a claim based upon the International Covenant on Civil and Political Rights. Thus far, only the European Convention on Human Rights has been incorporated into national law and can be invoked by an individual in Germany.

D. Norms of Customary International Law

The status of customary law is generally less clear than that of treaty law and there is a divergence of opinion on whether norms prohibiting racism, discrimination or xenophobia have become part of customary international law. In most states, customary international law forms part of domestic law.

In France, there are no cases on point, but French international law doctrine tends to reject the inclusion. In contrast, the *Greek* member of the U.N. Committee on the Elimination of Racial Discrimination has asserted that principles of equality and non-discrimination are not only generally accepted in international law, but that they form a principle *jus cogens*.

As mentioned earlier, *Ireland's* Constitution includes a provision stating that generally recognized principles of international law are accepted as its rule of conduct in its relations with other states, though these principles apparently do not apply to dealings with individuals within Ireland. However, in *Greece*, generally acknowledged rules of international law form part of domestic Greek law and take precedence over any contrary provision of the law. Similarly, the *German* Constitution provides that the general rules of customary international law are part of German law, according to article 25 of the Constitution. They are superior to state laws, and rights and duties can immediately be derived from them by the people living in the territory.

Spain has no constitutional or legal rules regarding the force of customary international rules in internal law; however, it has been the practice of the courts to apply such rules directly, without requiring any act of acceptance or transformation. The *Portuguese* Constitution article 8(1) provides that the rules and principles of general or ordinary international law shall form an integral part of Portuguese law.

Norms of customary international law are automatically incorporated into *Italian* law through article 10 of the Constitution, and they are not subject to derogation by ordinary legislation due to the nature of their object. In practice they are most often used to interpret existing norms of Italian law. Customary international law has constitutional status and pre-existing customary international law always prevails over contrary legislation. For subsequent development of customary law it may prevail when it is a question of "special" law but not in cases where it violates the values and principles of fundamental constitutional norms.

According to the traditional formula, "international law is part of the law of the land," customary international law is automatically incorporated into *Belgian* law, without any required formalities.²⁶ It must be noted, however, that the Cour de Cassation can apply only written Belgian law and thus customary international law can not be invoked to provide a remedy where legislation is contrary to it. In principle, the same dualist procedure required for giving domestic effect to ratified treaties applies to customary international law, although such positive measures are seldom called for.

In *Denmark*, customary international law is an integral part of laws and provisions administered by Danish authorities, according to the report of a Committee of Experts.

²⁶ Judgment of the Cour de Cassation of 25 January 1906 concerning the succession of S.M. Marie-Henriette, Queen of Belgium.

VI. Legislative and Regulatory Provisions

Summary: In addition to Constitutional provisions, every EC Member State has adopted legislative measures against racism and discrimination; some have recently strengthened their laws on these subjects. There are no legal instruments on xenophobia per se, although a substantial number of measures guarantee certain equal rights for aliens. A few states have not enacted comprehensive anti-discrimination legislation because they find that they have no national problem of racial discrimination or xenophobia.²⁷ Others legislate only regarding expressions of racial hatred or incitement to discrimination, relying on constitutional declarations of equality to protect individuals against actual discrimination.

Laws against racism and discrimination generally prohibit or declare wrongful all or some of three different categories of acts;

--discriminatory behavior through acts or omissions of state agents acting in the scope of their duties;

--discrimination committed by private individuals or institutions in different sectors: housing, employment, education and training furnishing of goods and services.

--words, acts, publications, audiovisual material, and organizations inciting hatred, violence or racial discrimination;

In all cases, the obligations of the United Nations Racial Convention have had a significant impact on Member State legislation.

In general, EC Member State legislation envisages criminal penalties as well as private causes of action against the perpetrator, whether a state agent or a private person or institution. In civil law countries, the establishment of punishable offenses can be particularly important as the basis of any judicial, administrative and/or other form of procedure available to victims of racial discrimination. The exception is *Germany*, where private remedies are rare. In the *United Kingdom*, on the other hand, the use of common law tort remedies or statutory rights of action is generally considered to have advantages over criminal sanctions.

In nearly all states, the absence of jurisprudence limits assessment of the effectiveness of existing measures. There are conflicting views as to why there are so few cases. It is variously claimed that (1) existing laws are effective; (2) strong penalties are counterproductive leading to few prosecutions and convictions; (3) procedural barriers and lack of support from police and prosecution hamper enforcement and preclude victims from obtaining remedies. Each may be true for one or more states or, for some, all the reasons may have a basis in reality.

A. General Laws

Among EC Member States, four countries (*Belgium, France, The Netherlands and the United Kingdom*) have enacted comprehensive codes against racism and racial discrimination. These establish the most extensive measures of legal protection in the field, however they are often only used incidentally as an instrument against racial discrimination. Other countries have attacked the problem in piecemeal fashion, with legislative measures scattered in various laws concerning the different fields in which racism or discrimination may be practiced. Such laws vary considerably in their coverage and strength.

²⁷ The United Nations Committee on the Elimination of Racial Discrimination has reaffirmed that the States parties to the Convention--all EC states except Ireland--have a precise obligation to enact legislation against racial discrimination in accordance with the Convention. The absence of such legislation could result in a violation of article 2.

The *United Kingdom* has the oldest and most extensive legislation on racial discrimination. Its first Race Relations Act was adopted in 1965, prior to ratification of the UN Racial Convention. The current Race Relations Act dates from 1976. UK legislation recognizes three kinds of discrimination; direct (affording less favorable treatment; segregation); indirect (applying a requirement or condition that has a disproportionate effect), and victimization of a person. Some other practices outside these categories also are included. The Race Relations Act 1976 does not apply to Northern Ireland, due to the territory's special status within the United Kingdom. In 1973 the Northern Ireland Constitution Act was passed. It enshrines the prohibition on discrimination on grounds of religious belief or political opinion. The prohibition applies to the acts of the executive as well as the Northern Ireland Parliament, whose functions are presently exercised by the Secretary of State for Northern Ireland. In addition, the Fair Employment (Northern Ireland) Act 1989 provides for a stricter regime in respect to employment discrimination than the Race Relations Act 1976.

Since 1972, *France* has had anti-racist legislation that forbids discrimination in housing, employment, and the furnishing of goods and services. It also prohibits racist defamation and insults as well as incitement to racial hatred. It creates a new infraction of revisionism and denial that genocide was committed during the Second World War. A law of 6 January 1978 also protects individuals against the creation of computer files containing identification of race; political, philosophical, or religious opinions; or the adherence to labor unions. At present in France, a major issue concerns the rights of aliens to vote in political elections. Already, foreigners can vote in elections in business enterprises and administrative councils of social security funds; they can participate in the election of municipal councilors (*conseillers prud'hommes*), but cannot themselves be elected. Foreign teachers appointed to French educational institutions can vote and be elected to the administrative council of their establishment. Foreign students and their parents also have participatory rights in the institutions with which they are linked.

Belgium has a single legislative act on racism and discrimination, dating from 30 July 1981. It is a criminal law, based on the Convention on the Elimination of Racial Discrimination, and it prohibits incitement to discrimination in regard to a person or a group (art. 1); the refusal to furnish goods or services in a place open to the public (art. 2); belonging to a group or an association which practices discrimination (art. 3); the arbitrary refusal of an agent or public officer to the exercise of a right or liberty pertaining to an individual (art. 4). The law does not contain provisions concerning equal opportunity for all irrespective of race. A recent legislative proposal, if adopted, will enlarge the scope of application of the law to cover housing and work.

The other EC Member States all have statutes concerning some aspects of discrimination and racism. *Italy* provides an example; it has several legislative or regulatory provisions based on the principle of non-discrimination contained in legislation concerned with employment, housing, health, and treatment of detainees. Law 654/1975, implementing the Convention on the Elimination of Racial Discrimination, criminalizes certain racist conduct. *Ireland* also is typical of countries without a comprehensive code. It has several laws applicable to the subject including the prohibition on Incitement to Hatred Act of 1989, implementing the International Covenant on Civil and Political Rights. This law is the main protection for minorities. There are four additional Statutes in Ireland having application in the area of non-discrimination: The Unfair Dismissals Act 1977 prohibits dismissals on the basis of race, color, religion or political beliefs; The 1988 Data Protection Act requires any organization which holds information on the racial background of individuals to register with the Data Commissioner; The 1988 Housing Act does not bar discrimination in housing, it merely recognises that

travellers have special needs and empowers local authorities to build halting sites to facilitate those needs. It has not been judicially determined whether this provision merely enables, or mandates authorities to provide such sites. The Hotel Proprietors Act of 1963 imposes a duty to receive all guests except upon reasonable grounds. Denmark takes another approach. Equality and non-discrimination on grounds of race and ethnic or national origin is not guaranteed in general in legislation; however, the general principle of equality exists as a rule of law. It guarantees a fair trial and legal decisions based on law made the Parliament. In addition to the kinds of specific laws referred to above, anti-discrimination provisions have been included in *German* regulations for public officials, personnel and high schools.

B. Criminal Laws

Virtually all countries have enacted criminal sanctions against some forms of racism, racial discrimination or xenophobia in addition to having general criminal laws against violence and property damage. The latter usually do not take the motivation of the perpetrator into account, although in some cases proof of a racist motivation may enhance the offense or the penalty, as is the case in Portugal.²⁸ The fact that most laws on assault, for example, do not consider racist motivation makes it difficult in many cases to obtain information to accurately gauge the numbers of racist attacks. *France* has extensive penal sanctions, including the infraction of "revisionism". In *Greece*, Penal law 927/1979 aims to repress acts or activities involving racial discrimination. It was supplemented by article 24 of law 1419/1984. According to this legislation, the following acts are punishable by imprisonment and fine:

- publicly to incite or provoke discrimination, hate or violence in regard to individuals or groups solely because of their race, ethnicity or religion;
- organize or participate in organizations aimed at deliberate propaganda or activities tending toward racial discrimination;
- publicly to express offensive ideas in regard to individuals or groups because of their race, ethnicity or religion;
- to refuse goods or services to someone on the sole ground of their race or ethnicity or to impose conditions for the same motivation. There are no judgments applying this law at present.

Luxembourg's criminal law is based on an act executing the UN Convention on Racial Discrimination. The law, dated 9 August 1980, added new articles 454 and 455 to the Penal Code. According to these articles, any person refusing a service or a good or who by words or writings incites hate or violence in respect of a person or a group of persons because of race, color, descent or ethnic or national origin commits an offense.

As previously noted, *Belgium* adopted a law 30 July 1981 criminalizing certain acts or incitement to acts inspired by racism or xenophobia. Article 1(3) of the Belgian law also sanctions anyone who publicly announces an intention to practice racial discrimination. The infractions must be committed either in a meeting or public place; or in the presence of several individuals, in a private place, but one open to a certain number of persons; anywhere in the presence of the offended person and before witnesses; or by a writing that is attached, distributed, sold, offered for sale, or exposed to public view; or, finally, written and addressed or communicated to several persons. The intention or motivation must be manifest, making proof difficult in many cases. In addition, specific provisions of the Penal Code make it a punishable offense for any state official to, on account of race, color, or national or ethnic origin of a person or group to refuse the exercise of a right or liberty.

²⁸ Under Portuguese law, the offense of murder is aggravated if it is racially motivated.

In *Spain*, while there are no general legislative provisions concerning racism or non-discrimination besides those already codified in the Spanish Constitution, which are deemed sufficient, Spanish law prohibits discrimination. Article 173 of the Penal Code allows victims to obtain compensation for material and moral damage suffered as a result of the offense.

Criminal sanctions relevant to racial discrimination are imposed by two different statutes in *Italy*: Law 645/1952, which implements the XIIth transitional provision of the Constitution forbidding the reorganization of the fascist party, and Law 654/1973 implementing the International Convention on the Elimination of all Forms of Racial Discrimination after its ratification and providing sanctions for conduct that violates Convention article 4. A further important measure in Italy, not reported in other countries, is Law 943/1986, which imposes a criminal sanction on anyone who, in order to favor the exploitation of migrant workers, employs them illegally or acts as a intermediary in clandestine movement of alien workers.

The Netherlands' Criminal Code has seven anti-discrimination provisions and sanctions for public infractions including intentional insults, either oral, written or by images, incitement to xenophobia, and discrimination on grounds of race as well as publication of, and dissemination of these insults (communications) other than at one's request or for objective publication. It is also an offence to support or participate in any way in activities which discriminate against people on racial grounds or to discriminate in the exercise of a profession of trade or public service.

The Penal Code of Denmark No. 266 B was amended by Law no. 288 in 1971 and again in 1987 to meet its obligation under the Convention on the Elimination of Racial Discrimination. It states, "Any person who, publicly or with the intention of wider dissemination, makes a statement or imparts other information by which a group of people are threatened, insulted or degraded on account of their race, color, national or ethnic origin, religion or sexual orientation, shall be liable to a fine or a simple detention or to imprisonment for any term not exceeding two years." The Racial Discrimination Act prohibits any person in non-profit or commercial activities from discriminating on the basis of race; the Register Acts prohibits registration of information on the account of a person's race or religious conviction.

In the *United Kingdom*, race relations legislation has involved the civil law rather than the criminal law. In preferring civil rather than criminal enforcement, it was believed that criminal proceedings would be less likely to be brought, since the higher standard of proof would often be impossible to satisfy. In addition, criminal proceedings would be aimed at the punishment of the wrongdoer and not at the provision of a remedy of the victim of discrimination. Nonetheless, in Northern Ireland, Public Order (N.I.) Order 1987 creates a series of offenses concerning the dissemination or propagation of fear or hatred. The provisions consider religious and racial hatred together, lending support to the view that, in Northern Ireland, discrimination ostensibly based in religion is in fact linked to or grounded in ethnic differences. The law is discussed in further detail below.

In *Germany*, section 130 of the Penal Code makes it an offence to attack the human dignity of others in a manner which is liable to disturb the public peace by inciting hatred against certain parts of the population, urging violent acts against such groups or insulting, maliciously ridiculing or defaming such groups. Section 131 provides that it is an offence to disseminate, publicly exhibit, post, demonstrate or otherwise make accessible, to manufacture, procure, supply, store, offer, advertise, import or export literature, sound or picture recordings, illustrations or representations that incite racial hatred. Further in Germany, homicide (the intentional killing of a human being) motivated by racial hatred may lead to a conviction of murder which carries a life sentence upon conviction. However, courts are arguably reluctant to find a homicide motivated by racial hatred due to its life

sentence, as opposed to manslaughter, which carries a minimum sentence of five years.

C. Measures Concerning Specific Discriminatory Conduct

Most of the sectors of conduct or activity discussed here are regulated not only by specific statutes in various countries, but are contained in the general codes of the *United Kingdom, Belgium and France* or discrimination is prohibited by general rules of equality and non-discrimination (*Spain, Portugal*).

1. Housing

About one-half the EC countries either have or are considering specific legislation concerning discrimination in publicly owned and/or private housing. In the latter situation, there often are exceptions for individuals renting rooms in their own homes in order to taken into account respect for privacy and family life. The result is considerable conflict among laws.

In *Italy*, explicit provisions exist against discrimination in housing. Article 1, Law 943/1986, recognizes for all regularly resident alien workers the same rights in the field of housing as are recognized for Italian citizens. However, although discrimination in housing is prohibited, landlords have discretion to determine the criteria of fitness to rent.

Denmark has few specific measures concerning incitement or discrimination in housing at the local governmental level; however it has a general policy of burden sharing among the municipalities to avoid high concentrations of minorities. In private homes, the decision to rent out rooms or flats is made exclusively by the owner. No measures are taken to prevent discrimination in this area. If the character of renting out such rooms changes into a more commercial nature, a private person is not allowed to discriminate according to the Racial Discrimination Act. However, measures could be taken under the Penal Code section 266B in case of an unlawful statement made to a journalist, or if the owner of a private collection has a public showing in his or her home.

Section 20 of the *United Kingdom* Race Relations Act applies to many activities in the provision of lodgings, covering hotels, boarding houses, real estate agents, accommodation bureaux and municipal housing departments. There are exceptions for privately arranged house sales, small dwellings, and for letting shared accommodation. The Act also does not apply to cases where a person takes someone into his home, and treats them as if they were a member of his family (e.g. foster parents), or takes in persons requiring special care and attention. Similar provisions exist in *Ireland*.

In *France*, discrimination in housing is prohibited pursuant to articles 416, para. 1 and 2 and 187-1 of the Penal Code. These provisions prohibit discrimination in the offering of any good or services, including housing. Thus, any refusal to sell or rent lodging, or conditional sale or rental, based on race, ethnicity, nationality, religion, constitutes illegal discrimination. As with many other areas of law on this subject, the problem is one of proof; a racist motivation must be shown by the applicant in order for there to be an offense. Very rarely will such a motive be explicitly stated. Several cases have been lost by plaintiffs due to evidentiary problems.

In *Belgium* there is a proposed law to extend non-discrimination rules to the housing field. At present, discrimination in this field is not prohibited by law. Moreover, article 18bis of the Code regarding aliens provides that the King, on proposal of the Minister of Justice, can prohibit all foreigners other than those coming from EC

countries, the right to stay or establish themselves in certain cities, if it is deemed that the proportion of foreigners in these places harms the public interest. The law does not apply to those already living in the area. It is reported to be increasingly difficult to open centers to house refugees and those demanding asylum, due to budgetary constraints and lack of political will. Many centers are overflowing. A similar, but illegal, quota system practiced by a municipality in *Denmark* was struck down by its courts.

2. Employment

Work, like education, forms one of the principle means of integration and improvement of the situation of minorities, including aliens. It is thus in the field of employment that most special legislation regarding non-discrimination can be found. *Belgium* and *Denmark* stand out for their lack of measures in this field, and *Greece* constitutes a special case in that its legislation often permits or requires discrimination.

Spain's Workers' Statute is typical. It protects against discrimination in hiring and in the workplace. Law 604/1966 prohibits dismissal from private employment by reason of religious or political opinions or participation in trade unions. Law 300/1970 guarantees the right to freedom of expression inside work premises, and nullifies any agreement with discriminatory purposes. Law 108/1990 prevents dismissal based on discriminatory grounds; Law 158/1981 incorporated into domestic law International Labor Organization Convention 143 of 1975. Much of Spanish legislation concerns the rights of alien workers. The right to work is not guaranteed to foreigners in Spain; any offer is subject to there being no competing Spaniards. Law 943/1986 recognizes the equality of rights and treatment in the field of employment to all regularly resident aliens; and Law 39/1990 grants all regularly resident aliens the right to exercise commercial activities independently of the principle of reciprocity.

Luxembourg relies on a mixture of private law and public law instruments. The large majority of immigrants, mostly Portuguese (44,934), is almost exclusively employed in the country as construction workers or as assistants in service industries. In these sectors, the personnel are generally protected by the provisions of a collective bargaining agreement. The agreements are negotiated by the unions and establish general obligations. Moreover, even if the company does not fall under the obligations of a collective employment agreement, Luxembourgish labor legislation applies in regard to minimum salaries as well as all social advantages available to nationals. Aliens as well as nationals have the same possibilities to defend themselves before courts in case their rights are violated, the protection of individuals and their property being guaranteed to all residents by the Constitution. In sum, the laws governing collective bargaining agreements (12.6.65) and work contracts (24.5.89) are fully applicable to foreign workers, without distinction as to origin, including stateless and refugee individuals.

In *The Netherlands*, discrimination on the basis of race has been found to constitute a wrongful act, under article 162(2) of the Civil Code, in a number of summary proceedings concerning discrimination in the refusal of access to dance clubs and bars for alien and migrant customers. In 1987 the Minister of Social Affairs and Employment instructed the directors of the District employment offices not to support employers' discriminatory recruitment requirements. Furthermore, a Code of Conduct was drawn up for temporary employment agencies in respect of discriminatory practices. It allows for complaints to be adjudicated by the complaints board of the Confederation of Employment Agencies for Temporary Work. In practice, however, it has been shown that though most agencies are

aware of the Code, 90 percent of them given in to the discriminatory requirements of employers.

In *Belgium* existing law does not specifically address this question. Similarly, the Racial Discrimination Act of *Denmark* does not contain specific provisions protecting against discrimination in hiring or dismissing employees. In the latter situation, however, general labor laws prohibit unfair dismissal, including for reasons of racial discrimination.

The Unfair Dismissals Act 1977 in *Ireland* makes it unlawful to dismiss an employee on account of race, color or religious beliefs. An employee who has been so dismissed can take a claim to the Employment Appeals Tribunal, a quasi-judicial body run under the auspices of the Department of Labor if they have been in the same employment for one year or more.

Provisions in Part II of the Race Relations Act in the *United Kingdom* render it unlawful for a person to discriminate against another on racial grounds in respect of arrangements for determining who shall be offered employment, the terms of an offer, or refusal or deliberate omission to offer employment. It is also unlawful to discriminate against an employee in respect of terms of employment, access to opportunities for promotion, transfer or training, or any other benefits, facilities or services, and as to dismissal or any other detriment. Contract workers are covered by section 7. There is a limited exception recognized in permissible application of the concept of "genuine occupational qualification."

In *France*, employment discrimination is illegal, but there have been few prosecutions and even fewer convictions. As is often the case, the problem is one of proof. The victim may be unsure of the motivation for dismissal or discipline, or may be unable to pursue an action due to the cost or time involved in seeking a remedy. In regard to the latter, a 1989 report made by the Consultative Commission on Human Rights, noted the lack of associations to combat racism in employment.

In *Germany*, specific anti-discrimination provisions have been included in regulations concerning civil servants, and employees of public institutions, private companies and schools. Civil servants have to be appointed without consideration of the applicant's race (section 7 Beamtenrechtsrahmengesetz). Public authorities and the representatives of employees of public institutions and civil servants are under an obligation to make sure that everyone is treated equally and that there is no discrimination on the basis of race.

3. Education

As the majority of EC Member States are parties to the UNESCO Convention on Discrimination in Education, its provisions are applicable to them. In addition, a few states have enacted their own legislative measures, or have included education among the prohibited areas of discrimination in their general anti-discrimination legislation (e.g. the *United Kingdom*, *France*). Many of the provisions concerning education are concerned with foreigners. *Italy* is typical of the latter. The Ministry of Education, in Circular 207 of 16 July 1986, stated that "all those who reside on Italian territory have full right of access to every type and level of Italian school, even if they are not citizens; any hostility or hesitation in their regard constitutes a manifest violation of the constitutional and civil principles of the Italian State." The Circular envisages specific measures for the education of gypsy and nomadic students. In *Germany*, section 2 Hochschulrahmengesetz, requires universities to take the special needs of foreign students into consideration.

A recurring educational problem is linguistic differences. In this regard, there is wide divergence in the laws and practices. In *Italy*, all programs of the compulsory schools affirm the right to linguistic protection for those who have a different

linguistic origin. Certain regions in Italy enjoy the right to bilingual education in schools of all types and levels. Other minorities have cultural and language courses taught on the initiative of associations and bodies.

Like Italy, *Spanish* Organic Law 8/85 grants the right to education to foreigners resident in Spain in article 1.3 on the same terms as to citizens. Article 9 of Organic Law 7/85 regulating the rights and freedoms of foreigners in Spain also recognizes that foreigners legally found within the territory of Spain have the right to an education and the freedom of instruction, as well as the right to found and direct teaching institutions.

Some *Danish* municipalities have specific measures to disperse enrollment of foreign students on a voluntary basis to avoid high concentrations. A recent case, however, upheld denial of a transfer to a school with a high concentration on the basis of the Act of Public Schools, article 2 of the Optional Protocol and article 14 of the European Convention and article 26 of the Covenant on Civil and Political Rights. In the context of this case, the Ministry of Justice emphasized that Danish international obligations were not isolated, because it is in the interests of both Danish and foreign children to get a proper education, only possible if there is no high concentration of foreign speaking pupils. Act no. 355, 4/6-1986 concerning education of adult immigrants obliges local authorities to carry out the educational program with local education organizations or language schools of the Danish Refugee Council.

Education is specifically covered in sections 17 to 19 of the *United Kingdom's* Race Relations Act, and also mentioned in section 20. Section 17 makes it unlawful for bodies in charge of educational establishments to discriminate with regard to opportunity for and terms of admission, to treatment, and to exclusion or other detriment. This includes both public and private schools, universities and colleges. Foreign language schools, private tutorial colleges, driving schools and piano teachers would be covered by section 20.

In *France*, more than one million foreign students exist. Although discrimination in education is illegal, there are cases where the mayors of various towns and cities have refused to enroll alien or minority students. The courts have condemned these refusals and ordered the children admitted. In March 1992, the Paris Court of Appeals confirmed both the right to education in nursery schools and two convictions of the Mayor of one town for having refused registration in the local nursery schools to children of foreign origin in 1988 and 1989. Eight Deputy Mayors were charged in February 1992 with racial discrimination for voting to suspend the supply of equipment of kindergartens that continued to accept immigrant children. In another case, the authority of the prefect was substituted for that of the mayor in order to achieve the admission. In this field, there are numerous associations assisting victims.

In *Ireland*, the State Training Authority has a policy of not allocating places in their training courses to non-EC nationals unless there is an excess of available places, which very rarely happens. The only exception to the application of this policy is the admittance of non-EC nationals holding Irish work permits into the courses.

Greece has special laws and administrative acts based upon the Treaty of Lausanne. These laws grant the Muslim minority the right to create and operate their own schools. Approximately 234 schools and two colleges have been created in Western Thrace; in these schools education in the Turkish language is obligatory and creates problems for the Pomak Muslims whose language is disappearing. The creation of public minority schools with teaching in Greek and Pomak is considered as a necessary future measure to avoid the "turkification" of the Pomak minority. There also exist provisions on the establishment of schools for foreigners.

4. Liberty of Religion

Grounds of religious discrimination under certain circumstances can fall within legislation concerning racism, racial discrimination and xenophobia. This is particularly true when the distinction appears to be discrimination against Jews or other minority religious groups who also share a racial or ethnic identity. Anti-semitism, although not expressly written in the redrafted Constitution of *Denmark* was one of its primary concerns, discrimination on the basis of which is considered to be racism. Anti-semitism is not a term of art in the law of any *United Kingdom* jurisdiction.

Because the definitions and scope of laws on racial discrimination are not always clear, some countries also have enacted laws guaranteeing non-discrimination in matters of religion and have specific protections for religious liberty. For example, in addition to article 14 of the *Spanish* Constitution, articles 16.1 (freedom of thought), 16.2 (no one can be compelled to reveal their religion) 16.3 (prohibition of an official state religion) and 27.3 (parents' right of religious and moral training of their children). In *Denmark*, a new Marriage Act opened the possibility for authorizing ministers of non-recognized communities to perform marriages with civil validity. This authority is granted on an ad hoc basis. The *British* Race Relations Act does not provide for religion explicitly, but religious bodies in some capacities (for example, as employers) would be covered by the law.

5. Commercial Activities, including provision of goods and services and access to facilities

Greek Act No. 927/1979 is typical of the many national measures applicable to this sphere of activity. It makes it a criminal offense for anyone who, in his professional capacity as a provider of goods or services, withholds such goods or services from any person solely on account of that person's racial or national origin or makes the provision of such goods or services contingent upon some condition relating to that person's racial or national origin. However, in a related matter, *Greek law* requires that non-profit associations involving foreigners have an equal number of foreigners and Greeks on their Boards of Directors (art. 107, Introductory Act to the Civil Code). The Athens Court of First Instance upheld this requirement when it was challenged for conformity with the European Convention on Human Rights and the Treaty Establishing the European Community.

Section 3.03.1 of the Hotel Proprietors Act 1963 in *Ireland* requires the provision of accommodation, food or drink to any person requesting them except on reasonable grounds. At the time of enactment, the then Minister of Justice commented that it was absolutely clear that no court would consider color to be a reasonable ground. *Belgium* also has a law on this subject, subject to the condition that the place is one "open to the public."

Section 20 of the *United Kingdom* Race Relations Act is applicable to this sphere. It has wide scope, applying to providers of goods, facilities and services. This section inexhaustively lists the scope of its application, but draws a line at particular forms of activity, sufficiently private or domestic, that fall outside the scope of the provision. Section 20 also applies to banking and finance, as provisions of services to the public. Additionally, the Consumer Credit Act 1974 provides in section 25 that in determining whether an applicant for credit or consumer hire business is a "fit person", account must be taken of evidence that he has practiced discrimination on grounds of sex, color, race, or ethnic or national origin in a business capacity.

The Racial Discrimination Act in *Denmark* prohibits a person from refusing to serve someone on the same conditions as other on account of race.

Negotiations between the Financiers Association and *The Netherlands* National Bureau against Racial Discrimination led financial institutions to tighten their Code of Conduct in order to prevent discrimination in granting consumer credit. Under Article 29 of the Consumer Credits Act 1992, reasons for the refusal of credit have to be given in writing if the applicant so desires. The intention behind this provision is to prevent such decision being made on the basis of racial discrimination.

6. Participation in elections and government at all levels

In general, provisions regarding equality and non-discrimination protect all citizens in this regard. Some national laws extend certain political rights to aliens as well. This is a subject of much current attention. *Spanish law 7/85*, article 5.1 states that foreigners shall not have the right to active or passive political participation. The same article, however, indicates that the possibility exists for foreign residents to run for office in municipal elections if such right is guaranteed on a reciprocal basis in the candidate's country of origin. Similar measures exist in *Italy, The Netherlands, and France*. In *Ireland*, voting in general and presidential elections is limited to Irish nationals resident in Ireland, except for nationals of *Great Britain*, resident in Ireland, who have the right to vote in general, but not presidential elections. Foreign nationals can obtain the right to vote in local elections.

The electoral law of the *United Kingdom* does not distinguish as between color, race or ethnic origin, but nationality is a relevant condition of entitlement to vote.

7. Health

In several countries there exist specific guarantees of equal access to medical care, many of which are directed towards guaranteeing access for foreigners. Organic Law 5/84 regulating the right to asylum in *Spain* extends social and economic benefits to refugees and their families. The right to health in *Italy* is recognized by article 32 of the Constitution as a fundamental right of every individual, and has been implemented by Law 833/1978 which instituted the national health service. A Code of Practice for medical doctors, approved in 1989 expressly forbids any discriminatory treatment on grounds of race, religion, or nationality.

According to the Act regulating the public health system, anyone who is domiciled in *Denmark* has the right of medical treatment. Foreigners entering Denmark assume this right after six weeks of legal residence and refugees attain this right immediately upon recognition. Swiss, Nordic and European Community nationals also attain this right immediately upon entry. Asylum seekers have no right to receive medical treatment apart from first aid before they are recognized as refugees.

In the *United Kingdom*, there are no specific provisions regarding medical or health services in the Race Relations Act 1976, but section 20 would apply to actions in this sphere. By legislation, the National Health Service provision is generally available only to those who are "ordinarily resident", except when EC law applies or reciprocal agreements are in force.

In *Belgium*, pressure from the Community recently produced a new law (20 July 1991) that abolished a condition of 5 years uninterrupted residence before an individual could obtain subsistence aide. Now, refugees are entitled to such assistance from the date their refugee status is obtained.

8. Administration of Justice

Constitutional measures generally apply to this field, but there are some supplementary legislative acts. For example, in *Portugal*, laws provide for equal access to justice, specifically mentioning certain groups of aliens (those legally resident for more than one year). In *Italy*, article 24 of the Constitution guarantees equality in the administration of justice. In addition, Italian Law 354/1975 prohibits discrimination in the administration of justice in prisons, as the right to seek judicial protection is a fundamental right of every person. It also states that detainees have to be treated impartially, without any discrimination on grounds of race, nationality, socio-economic status, political opinions or religious beliefs. Regulation 431/1976 requires that linguistic and cultural differences need to be considered when dealing with alien detainees.

The Criminal Code of *The Netherlands* also applies to this subject. The law makes it a felony for public officials to discriminate in the fulfillment of their official duties.

In contrast, *United Kingdom* law makes no explicit provision for equality in the administration of justice. However under section 20 of the Race Relations Act, concerning provision of goods, facilities or services to the public, a duty not to discriminate can be inferred, and the application of the provision to central government activities and officials is confirmed by section 75, though the *Amin* decision, discussed below, makes doubtful its application to police, probation or prison officers. Also it is clear that those who exercise judicial functions in the *United Kingdom* are immune from all civil liability for actions done or words used in their judicial capacity. Section 20 would apply to legal professionals who offer their services to the public, and provisions in the Courts and Legal Services Act 1990 have brought advocates' services within the law.

9. Marriage and family, including adoption

Most of the regulation of this subject falls within the general Constitutional provisions on equality in the exercise of civil rights and there are few legislative measures. However, there are some specific laws, particularly in regard to personal status. The issue can be particularly delicate where the cultural norms and traditions of a particular group clash with values of the majority of society, particularly in regard to the rights of women and children. The *Spanish* Civil Code declares that foreigners enjoy the same civil rights as Spaniards except as provided in special laws and treaties. The nationality of the individual determines the applicable civil law in matters of civil status and capacity, family rights and obligations, and rights of succession in case of death. Adoption laws of the husband's nationality govern in cases of a married couple's conflicting nationalities. An adoptee under the age of eighteen receives Spanish nationality if either adopter is a Spanish national.

In *Luxembourg*, foreign spouses of nationals may opt for Luxembourg nationality through a simplified procedure under more liberal conditions than naturalization. The purpose of the Act is to promote the integration of aliens. No mention of race or origin is included in *Denmark's* Marriage Act, however, the Aliens Act grants the right to everybody domiciled in Denmark the right to reunification with one's spouse, without regard to race or origin. It is specifically provided in section 23 of the Race Relations Act in the *United Kingdom* that section 20 concerning provision to the public or a section thereof does not apply to "anything done by a person as a participant in arrangements in... his home..." Therefore, actions and decisions by

private persons concerning adoptions and fostering of children are put clearly outside the scope of the Act.

VII. Indirect or Institutional Racism

It is generally acknowledged that laws and practices not intended to discriminate can nonetheless have a discriminatory impact, weighing disproportionately on racial or ethnic minorities. For example, legislation that requires all children born within a country be given a name from an approved list--often based in the religion or history of the country--has the aim of preventing parents from creating hardships for their children by given them absurd or ridiculous names. However, by limiting the list as indicated, those belonging to minority groups can find themselves unable to give their children traditional or family names.

Similarly, a major problem faced by minorities in *Portugal* and *Spain* is said to be the facially-neutral application of complex legal procedures necessary to obtain proper authorizations for work, residence and schooling. In *Denmark*, this type of situation is sometimes referred to as "little institutional racism", that is, a logic or attitude permitting application or adoption of neutral-appearing legislation that in fact has a discriminatory impact. Perhaps most revealing, a 1983 inventory of 1300 different national laws and regulations in *The Netherlands* determined that 80 percent of them had a disparate impact on ethnic minorities. Approximately 100 of them have been or will eventually be amended. The rest are considered as not discriminatory or justifiably discriminatory by the government.

There are two types of legal measures adopted to combat such institutional or indirect racism. One, contained in the Race Relations Act of the *United Kingdom*, includes indirect discrimination (applying a requirement of condition that has a disproportionate effect) within coverage of the Act and thus prohibits it. In addition, the Commission for Racial Equality has specific duties imposed by section 43 of the Race Relations Act to monitor the Act to ensure its proper functions; it also attempts to monitor proposed legislation to bring matters to the attention of the government.

In contrast, *The Netherlands*, as noted above, has undertaken a review of their legislation in an attempt to identify those laws that impact disproportionately on minorities and to amend or repeal them.

VIII. The Scope of Application of Legal Measures

Summary: There are clear divergences of policy in regard to the applicable scope of legal measures to combat racism, racial discrimination and xenophobia. Three issues in particular divide national policy: (1) the extent to which state agents should be liable or, conversely, what immunities should be granted and for what conduct; nearly all states provide that the government and/or government agents will be liable for discriminatory acts in violation of an individual's rights, but most provide exceptions and immunities for some types of officials; (2) the extent to which anti-racism and anti-discrimination laws insert themselves into private or non-commercial conduct; and (3) the extent to which the same laws limit speech and information in order to combat the dissemination of ideas based on racial superiority or racial hatred. There is no clear consensus on these issues and consequently, legal measures vary considerably.

A. Duties of Public Officials and Constitutional or Legislative Immunities

All states impose some specific duties on public officials to ensure equality or at least to not discriminate in respect of rights and liberties. *Belgium, France, Denmark and the Netherlands* have specific provisions making discrimination by a state official a punishable offense. In *Belgium and France*, violations include refusal to allocate unemployment benefits, refusal to celebrate a civil marriage, refusal to inscribe a foreign student in school, etc. According to subparagraph three of the Belgian statute, the accused can be exonerated if the action is based upon superior orders and these orders are not "manifestly illegal." In such a situation the superiors are responsible. In *France*, the criminal code also extends liability to any person vested with public authority or any citizen holding public office who, through action or failure to act, impedes the exercise of any economic activity by any natural or legal person on grounds of race, ethnic origin or religion. Those who violate the act also may be held civilly liable.

In *Denmark*, too, public officials can be held criminally or civilly liable for acts violating laws on racial discrimination. Victims can file administrative or criminal complaints or bring civil actions for damages. The Racial Discrimination Act, The Administration Act and the Public Register Act include a number of non-discrimination provisions concerning public officials generally, and supplement public transportation and communication employees' obligations to serve all customers on an equal footing.

Public servants in *The Netherlands* are under an obligation to refrain from discriminatory behavior under the non-discrimination and equal treatment provision of the Constitution as well as article 429quater of article 137g in the Criminal Code. The latter provides that discriminatory behavior of government officials towards any citizen in the exercise of public service or of one's official duties is a felony. A bill supplementing the Criminal Code adds a specific and increased penalty for civil servants who are guilty of discrimination while on duty. Discriminatory acts by the administration also can be examined in administrative or judicial proceedings in light of the established general principle of proper administration, which includes the principle of equal treatment.

Portugal has several laws on this subject. Officials may be held liable in civil or criminal law for depriving an individual of rights guaranteed to him or her, but special rules apply to political officials such as the President, the members of government, deputies, etc., for acts committed in the exercise of their political functions. Decree Law 119/83 of 25 February, regulating institutions responsible for social security, health, education and housing, prohibits any discrimination on racial grounds. Another bill stipulates that every citizen shall be entitled to access to employment in the police forces without distinction on the grounds of, *inter alia* race or country of origin, and under conditions of equality and liberty. In addition, Decree Law 442/91 of 15 November, provides in article 5 that in its relations with individuals, the public administration must obey the principle of equality and cannot privilege, benefit, disfavor, deprive of a right or impose a duty on anyone by reason of *inter alia* race, language, or country of origin.

In *Spain*, public officials have the obligation to remove the barriers to, and promote conditions which enable real and effective freedom and equality for individuals and for the groups to which they belong. Other laws are more general. In *Greece*, for example, the obligations of the United Nations' Convention on the Elimination of Racial Discrimination are directly applicable by and binding on authorities, including law enforcement officials.

In most cases, local administration also has its own anti-discrimination policy, often based on the protection of public order. Such policies have been used to prevent meetings and gatherings of racist or discriminatory groups. In addition, sometimes a local administration can or is obliged to act against discrimination, and may refuse or withdraw a license or subsidy, such as in the case of the Horeca Wet Catering Act.

In the *United Kingdom*, public officials are under duties similar to private individuals not to discriminate, even in the absence of particular provisions. For example, there is no specific provision concerning prison officers, but they are covered by section 20 and 21 of the Race Relations Act concerning provision of facilities to the public and managers' treatment of occupiers of premises. Some public sector employment training bodies are explicitly named, as are local education authorities and certain responsible bodies in the public education sector who are given the "general duty to secure that facilities for education are provided without racial discrimination." Some bodies with housing responsibilities were also extended Section 71 duties to eliminate unlawful racial discrimination. Section 75 subjects the central government to race relations legislation. On the other hand, in *Amin*, a case of an Asian woman and *United Kingdom* citizen who was refused a special entry voucher for admission into the *United Kingdom* because she was not a head of household, the House of Lords held that the expression, "provision...of goods, facilities, or services" in the Race Relations Act was not apt to include an immigration official's control function. Two later cases distinguishing *Amin* held that the Inland Revenue's dealing with taxpayers, and the allocation of work in prisons were within the meaning of section 20.

In addition to some uncertainty about the applicability of laws to all government agencies and agents, various traditional immunities from liability still exist in many countries. In the *United Kingdom*, the Queen as a person enjoys absolute civil and criminal immunity for all her actions. Superior judges also have absolute civil and criminal immunity for anything they do on the bench, including racist remarks or acts. Generally, other public servants are not immune from civil actions. The Crown and local governments are in principle covered by the 1976 Race Relations Act. However, the Crown benefits from certain privileges.

In *Belgium* parliamentarians benefit from total immunity for all their expressions and votes, according to article 44 of the Constitution. In addition, there is a temporary and limited immunity for certain acts they commit during their terms of office. The latter does not prevent civil actions against members of Parliament for discrimination

in matters not touching their expressions of opinion or votes, but the Constitution provides that the Assembly must decide whether to waive parliamentary immunity. The immunity forms part of the public order and cannot be waived by the member; however, it is not absolute. Recently two parliamentarians were implicated in the publication of a racist electoral pamphlet. The Movement against Racism, Antisemitism and Xenophobia (M.R.A.X.) brought a complaint and an inquiry was opened. However, the affair was judged as involving press liberties and was transferred to the Court of Assize, where procedures are more difficult.

There are no special legislative measures governing the actions of public officials in *Ireland*. However, they must act in accordance with the Constitutional guarantee of fair procedures when making administrative decisions. They are subject to constitutional equality as citizens. However, recordings of the courts and the houses of the Oireachtas are immune from the provisions of the Prohibition on Incitement Act.

B. Application of Legal Measures to Private Non-Commercial Activities

A split is evident in the views of EC Member States in regard to application of laws on equality and non-discrimination to areas of private, i.e., non-state, activities. In some cases, only the state is prohibited from discriminating. In other states, some private conduct is regulated as well, particularly if it is commercial. Where non-state conduct is regulated, the balance between associational rights, guaranteeing individuals the freedom to form groups and organizations, and the prohibition of racist and discriminatory activities has created particular difficulties.

Among those who resolve the balance in favor of privacy, the *Belgian* law on discrimination is specifically limited to discrimination committed by any person furnishing or offering to furnish a good or a service in a public place (emphasis added). Thus, most private discrimination is excluded. Similarly, in *Ireland*, it would seem that in situations where a constitutional right is not being infringed, it is lawful to discriminate in private relations. In the *United Kingdom*, concerning the provision of goods, facilities and services, the Race Relations Act does not apply to clubs or associations with fewer than 25 members, if they are not worker or employer organizations and if they do not provide for the public or a section of the public. Employment in a "private household" falls outside the Act as well, apart from cases of victimization. Charitable organizations may not confer benefits upon persons of a particular color, but discrimination on the other racial grounds are not unlawful. Volunteers who provide their services without any form of contract are not generally protected by the Act, although a discriminatory advertisement for volunteers would be included.

Also among the group limiting application of anti-discrimination laws to the public sphere is the Criminal Code of *The Netherlands*. The policy is justified as restricting unlimited governmental interference in the private lives of individuals, based on the constitutional right to privacy. The Dutch government limits application to the public sphere on the basis of the strict language of Article 1 of the Racial Convention.

In contrast, in *Italy*, in general, it is not permitted for anyone, person or organization to discriminate on the basis of race, ethnicity, or national origin. Similarly, in *Portugal*, the constitutional provisions against discrimination apply to all private relations as well as to government actions toward individuals. Any discriminatory act in private relations causing economic or social harm can result in an action by the victim for equal treatment or for damages for the harm suffered.

Taking an intermediary position, the *Danish* Constitution ensures that people can form any kind of private club, according to its own rules of membership, without any

preliminary interference from public authorities. However, if membership or admission is open to new members, it is unlawful according to the Racial Discrimination Act to refuse admission or membership on the basis of race or origin. Specific kinds of private institutions or organizations may be covered by laws prohibiting discrimination: political parties (*Italy, United Kingdom*); trade unions (*Denmark, United Kingdom*); private schools (*Italy, United Kingdom*). In *Denmark*, membership in political parties depends on internal rules and is not governed by law. Italian Law 645/1952, prohibiting the reorganization of the fascist party, imposes heavy sanctions on anyone who promotes, organizes, or directs an association, movement or groups which "pursues antidemocratic aims (...) celebrating, threatening or using violence (...), advocating the suppression of constitutional freedoms or denigrating democracy (...) or making racist propaganda (...)" The sanctions are doubled if the association is armed or if it makes use of violence. Even if in general private action is not covered by anti-discrimination laws, the majority of states prohibit the formation or membership in organizations that incite racial hatred. In 1989, *Ireland* adopted the Prohibition on Incitement to Hatred Act which covers organizations and publications which incite racial hatred. *Italy, Luxembourg, France, Germany, and Belgium* have similar laws. Belgium punishes any person who is part of, or lends aid to, a group or an association which in a manifest and repeated fashion practices racial discrimination or segregation. Note that the individual need not himself or herself have committed an act of discrimination. In *Greece*, punishment is provided for any person who forms or participates in organizations whose purpose is to organize propaganda or activities of any nature that give rise to racial discrimination. Any organization that conceals its racist nature could be subject to article 105 of the Civil Code; it provides that a Court may order the dissolution of any association that " has a purpose different from the one specified in its statutes" or if "the purpose and operation of the association have become unlawful, immoral or contrary to public order." Also in *Portugal*, the criminal code provides penalties for the propagation of ideas inciting racial discrimination and for encouragement of racist activities through the promotion of those ideas by participation in organizations that uphold them or through support, financial or otherwise, for fascist activities (art. 189). Criminal legislation also provides penalties for the formation of groups, organizations or associations engaging in activity whose object is the commission of a crime (art. 287 and 288). Section 78.2 of the *Danish Constitution* limits the freedom of organizations practicing violence, or seeking to attain their objects by violence, or instigation to violence or by similar punishable influence, on dissidents, and can petition to have them dissolved by Court decision. No case concerning dissolution of associations have been brought to the Court.

C. Incitement to Racial Hatred and Issues of Free Speech

The scope of laws on racism, discrimination and xenophobia raise issues in many countries of their compatibility and balance with freedom of expression and freedom of information and the press. Some laws distinguish between commercial and non-commercial speech, others between journalistic and non-journalistic dissemination, and a few between broadcast and print media. As discussed below, a case concerning the proper balance between concerns for speech and the elimination of racism and racial discrimination is currently pending before the European Commission on Human Rights.

1. Expression and non-press publications or organizations

Provisions on incitement and other manifestations of racism exist in most states, although there are exceptions. Some of the existing laws on this subject are long-standing. For example, in *Italy* two laws regulate or prohibit publications that may promote, incite, promulgate or organize discrimination. The laws deal specifically with fascist materials; advocating the creation of a fascist or racist association, movement or group, or openly praising fascism or racist ideas or methods is criminally sanctioned, and the penalties are higher if it is done through the media.

Ireland's Prohibition on Incitement to Hatred Act makes it a criminal offence to publish or distribute written materials which are threatening, abusive or insulting and are intended to or, having regard to all the circumstances, are likely to stir up hatred. Prior to passing the law, it had come to the attention of the police that Ireland had become a base for printing racist literature due to the lack of prohibitions.

The Criminal Code of *The Netherlands* in articles 137(c),(d), and (e) prohibits publicizing or disseminating expressions with the purpose of discriminating on racial grounds or with the intent to incite hatred or discrimination and violence on racial grounds, other than for objective publication or with the consent of the party receiving such expressions. Article 137(f) prohibits the participation or support of activities which will result in racial discrimination. Any organization pursuing such objectives may be dissolved under the provisions of the Civil Code. It is sufficient to prove that an accused knowingly accepted the risk that an expression is offensive to a group or people on grounds of their race and or religion. It is the nature of the expression and not the intentions of the one who publicized the expression that governs.

The Penal Code in *Denmark* provides that "Any person who, publicly or with the intention of wider dissemination, makes a statement or imparts other information by which a group of people are threatened, insulted or degraded on account of their race, color, national or ethnic origin or religion shall be liable to a fine or imprisonment for any term not exceeding two years."

In the *United Kingdom*, there is no specific provision concerning publications in the anti-discrimination laws. However, there may be criminal liability in connection with publications which are liable to stir up racial hatred, under the Public Order Act 1986 and (for Northern Ireland) the Public Order (Northern Ireland) Order 1987. The law extends to broadcasting and visual recordings as well as to the print media and oral communications.

Greece has adopted Act No. 927/1979, that criminalizes expressions of racial hatred. Article 1 provides that anyone who publicly, whether orally or in the press, by written or illustrated texts or by any other means, intentionally incites discrimination, hatred or violence against persons or groups of persons solely on account of their racial or national origin is punishable by no more than two-years' imprisonment or a fine or both. Article 2 of the same act concerns group defamation and provides for a penalty of up to one year's imprisonment or a fine or both for anyone who publicly, whether orally or in the press, expresses ideas which are offensive to other persons or groups of persons because of their racial or national origin.

Special mention must be made of penal laws, many enacted or strengthened relatively recently, that criminalize dissemination or propagation of claims that no genocide was committed against the Jews during World War II. The 1990 *French* law against revisionism was mentioned previously. To this may be added the *German* 21st Criminal Law Amendment, dated 13 June 1985 (Federal Law Gazette I, p. 965). Prior criminal law regarded denials of the Holocaust as incitement to racial discrimination, punishable by up to five years imprisonment, and a defamation of or insult to, every Jew living in Germany. However, prior to 1985, an insult was only

subject to prosecution if the insulted person submitted a demand for prosecution. In this situation, a person seeking to prosecute had to personally submit a demand as part of which he or she had to prove themselves to be of Jewish origin to show the right of application. In light of history this century, the latter requirement proved to be a significant deterrent to prosecution. The 1985 amendment removes the requirement of a complaint and permits *ex officio* prosecution of any denial of the Holocaust. The same act makes the importation, production or storage of the symbols of Neo-Nazi organizations punishable, also clearly stipulating that publications with a punishable content can be confiscated even after expiry of the time limit on criminal prosecution.²⁹

2. Advertising.

Portuguese Decree Law 303/83 of 28 June, provides that advertising must not encourage discrimination on the grounds of race (article 5). It is also forbidden to engage in any advertising which is based on fear or may encourage or incite violence or unlawful or criminal activities.

In *Denmark*, advertising which is not a violation of the Penal Sanction Code but is nonetheless inconsistent with the principles of decent marketing practice is examined by the Consumers' Ombudsman, established by the Marketing Act.

The Netherlands Advertisements Code has provisions which might be significant in discrimination cases. Each advertisement is required to be in conformity with the law, the truth and the requirement of good judgment and decency. A breach of the criminal discrimination prohibition always leads to a contravention of the Advertisement Code. The broadcasting of advertisements in *Italy* which might generate intolerance is expressly forbidden by Law 223/1990, which dictates a new discipline for the radio and television system.

3. Press laws and codes of conduct

As with other aspects of speech and information, there is a divergence of laws and policies regarding the extent to which freedom of the press may permit the dissemination of racist information or propaganda. Some states give wide latitude to the press and rely upon professional codes of conduct, but the majority strictly prohibit any expression of racist speech, including incitement to racial hatred or racist insults.

The journalists code of ethics of *Portugal* provides that journalists must observe the fundamental principles of human rights and refrain from encouraging racial hatred. The Press Council in July 1988 issued a recommendation in connection with a series of newspaper articles that were deemed to contain disparaging statements based on race, color, or ethnic origin, thus inciting to racial hatred. The Council alerted public opinion and requested the Office of the Prosecutor General to carry out an investigation of those acts, which were punishable under the Criminal Code. The request was granted.

Greece also relies on codes of journalistic ethics for print and broadcast media journalists. These include prohibitions on racist speech or derogatory portrayals. Violation of the code can result in disciplinary proceedings and sanctions.

France amended its press law after ratification of the UN Racial Convention to punish incitement to discrimination, hatred or violence against a person or group of persons

²⁹ See also, Germany Penal Code section 130, discussed *supra* p. 44.

because of their origin, ethnic group, nation, race or religion. The same law prohibits defamation and racial insults.

Newspapers in the *United Kingdom* are regulated by the Press Complaints Commission which issues guidance and receives and adjudicates complaints. Its predecessor received 142 complaints in 1990. Recent government statements have emphasized the threat of legislation in this regard.

Laws applicable to the print media are generally applied to broadcast media as well, but in some cases there is special legislation. The *Portuguese Broadcasting Act* provides in article 5 that among the functions of a public broadcasting system are encouraging pluralism and better mutual acquaintance between Portuguese nationals and aliens. Article 8 prohibits the transmission of programs or messages inciting to violence.

In *The Netherlands*, political parties taking part in national elections have a right to broadcast on the radio and television prior to elections. A 1989 case was brought against the Center Democrats for using racist and xenophobic language in its campaigns, upon which the Court did not impose a general prohibition. A Media Act is under consideration at present to address this type of problem, since political parties are subsidized, even those with racist ideas.

The *United Kingdom* has two statutory bodies to give guidance on standards and to adjudicate on complaints of unjust or unfair treatment in programs, the Broadcasting Complaints Commission and the Broadcasting Standards Council. Codes and guidelines have been formulated with clauses regarding the treatment of race, in particular the Broadcasting Standards Council's Code of Practice which instructs that "apart from strict legal requirements within the country, sensitive treatment of the differences which exist between races and nations is called for" and that "there are times when racial or national stereotypes, whether physical or behavioral, may be used without offence in programs, but their use should always be carefully considered in advance."

In *Luxembourg*, a law of 27.7.1991 on electronic media stipulates in article 6 that the content of Luxembourg radio programs, among others, may not include any incitation of hate based on race, sex, opinion, religion or nationality. And article 28 of the same law states that television publicity should not undermine respect for human dignity, or contain any discrimination by reason of race, sex or nationality, and should not attack religious or political opinions.

The difficult issues raised in this field are best exemplified by a case from *Denmark*. In July 1985, Danish National Television broadcast an interview with members of a group of youths, called the Green Jackets. In the broadcast, members of the group expressed extreme racist views, including support for the practice of eugenics. The interviewer and editor intended the broadcast, in the public interest, to inform the public about the existence of racism and its dangers in Denmark.

No indication of support was indicated for the group or its views. Three members of the group, as well as the editor and interviewer, were subsequently prosecuted under Penal Code section 266B, quoted above. All were convicted, the interviewer and editor of complicity in making the statements public. Both were fined. The convictions were upheld on appeal. The Supreme Court, by majority decision, held that freedom of expression did not outweigh the legitimate interest in protecting members of minority groups against racist propaganda. It found that the two journalists had assisted in disseminating the racially discriminatory remarks. The case has been submitted to and is now pending before the European Commission of Human Rights. In the meantime, the Danish Parliament amended the law concerning media liability, effective January 1, 1992, to exclude liability for journalists unless, by publishing racist ideas, they intend to "threaten, insult, or degrade" people. Offensive remarks made by named persons on a TV broadcast will now be the sole responsibility of those who expressed them.

4. Mailing or posting

The post is subject to regulation in many countries to prevent or punish the mailing of racist materials. In *Denmark*, the Penal Code includes a prohibition of written or other non-oral statements, like pictures, being sent through the mail. In 1991 a person sent a "collection of poems" to a number of private persons, in particular some Jewish persons, which included highly offensive anti-Semitic statements and the person, previously convicted, was sentenced to 20 days of simple detention. In another case, involving a chain letter which encouraged those receiving it to pursue practical jokes at the expense of foreigners owning food stores by ordering large quantities under false names. In the *United Kingdom*, there is no system for controlling, in advance, what may be sent by mail. However, in addition to racial hatred offenses, the Post Office Act 1953 makes it an offence to send any indecent or obscene article or communication by post, which could apply to racially offensive material since such communications have been held not to be limited to sexually explicit materials.

IX. Penalties and Remedies

A. Criminal Sanctions

Summary: Criminal sanctions for illegal acts of discrimination, racism or xenophobia include fines, prison sentence, public retractions in the case of defamatory publications, dissolution of racist organizations, and deprivation of civil liberties. There is wide variety in the amounts of fines and length of sentence. While the range of penalties is indicated--from a minimum of 8 days imprisonment in *Belgium and Luxembourg* for incitement or belonging to a racially discriminatory organization to two years for the same offense in *Greece* and up to five years in *Germany*--such cross-country comparisons have limited utility because the general views on brevity or length of appropriate penalties must be taken into consideration. More important is the weight of sanctions for racism and racial discrimination in comparison to other offenses within the same country, how often cases are brought, and with what results. In general, reports indicate that few cases are brought, and penalties imposed are generally light although the severity is increasing as judges take cases more seriously and legislatures increase the applicable sanctions. Imprisonment is almost never imposed unless it is a case of violent attack against the victim. In such cases, prosecution is normally pursuant to laws on assault, homicide, arson, etc. and not according to laws on racial discrimination. Fines vary enormously in the amounts imposed. More creative penalties have been enacted recently in some countries. In France it is foreseen that those condemned can be required to do community service; journals may be ordered to publish retractions or replies from associations concerned with racism.

A significant number of countries report no cases of criminal prosecution for racist offenses. The reasons for this are unclear and are variously attributed to the effectiveness of the laws (*United Kingdom*), a deterrent effect resulting from the difficulty of proving racist motivation (*France*), lack of police and prosecutorial assistance (*Belgium, The Netherlands, Italy*), the counterproductiveness of high-profile criminal cases (creating a martyr-like sympathy for the perpetrators, *France, Germany*) and the availability and preference for other remedies (*Denmark, United Kingdom*). In some countries, all the reasons have been found significant. A further problem with reporting is that prosecutions for assault, homicide, and other criminal offenses are not normally listed as racist offenses, even when the motivation is known. This could result in a large under-reporting of racial attacks.

1. The Range of Penalties

As noted, the *Greek* statute on incitement to racial hatred or discrimination and on racial defamation provides for penalties of two years and/or a fine in the first case of intentional incitement to acts that may engender discrimination, hatred or violence against persons or groups of persons solely on account of their racial or national origin if the acts occurred publicly, and one year and/or a fine in the second. Racially-motivated refusal to provide goods or services also is subject to up to one year imprisonment and/or fine. In *Belgium*, incitement or belonging to a racially discriminatory association

is punished by 8 days to 6 months in prison and/or a fine of 2,800 to 40,000BF.³⁰ The penalty in Luxembourg is virtually identical. The sanctions are considerably lighter than those imposed in *France* for the same offense. Moreover, unlike the French law, Belgium does not provide for the dissolution of racist associations nor for civil disabilities imposed on those convicted. A 1990 French law reinforces the powers of courts in cases alleging racism and anti-semitism. The law provides for the suspension of the civil rights of persons found guilty of violating laws against racism and discrimination.

In *Portugal*, genocide-like activities are punishable by imprisonment for 10 to 25 years, while racial libel or defamation and acts of incitement to racial violence is punishable by imprisonment for one to five years. Founding or participating in a racist organization is punishable by imprisonment for two to eight years. In *Italy*, the law against genocide specifies a penalty of 10 - 18 years imprisonment.

Ireland's Prohibition on Incitement to Racial Hatred Act 1989, sections 2, 3 and 4, makes it an offence to publish or distribute written material outside (or heard or seen outside) a private residence, or to distribute, show or play a recording of visual images or sounds if "the written material, words, behavior, visual images or sounds, as the case may be, are threatening, abusive or insulting and are intended or, having regard to all the circumstances, are likely to stir up hatred." The maximum penalty on indictment for these offenses is a fine of IR 1,000 pounds and two years imprisonment. On summary conviction the maximum is a fine of IR 10,000 pounds and six months imprisonment.

Penal sanctions in *The Netherlands* for insults or incitement are maximum one year in prison or a maximum fine of 10.000 guilders, and for publication or dissemination up to 6 months and a maximum fine of 10.000 guilders unless the offence has been committed in the practice of one's profession, and the editor or distributor has twice been convicted within the last 5 years, in which case deprivation from practicing their profession may result.

Participation or support either financially or materially in any way with the purpose to discriminate on racial grounds may result in a fine 5.000 guilders. Discrimination on grounds of race in the exercise of public service, or one's profession or trade may result in imprisonment up to six months or a maximum fine of 10.000 guilders. Discrimination against citizens in the exercise of one's official duties is now a felony, punishable up to a month in prison or a fine of 10.000 guilders.

The Penal Code of *Germany* includes section 130, incitement to xenophobia, which carries a penalty ranging from 3 months to 5 years, and including the possibility for monetary compensation. Sections 131, deals with incitement to racial hatred and sections 185-189 concerning xenophobia, carry penalties for insults ranging up to one year or monetary compensation.

Denmark's Penal Sanction Code provides for fines, simple detention, or imprisonment for any term not exceeding two years, except where there is a simultaneous violation of other penal provisions.

The use of penal laws in connection with racial discrimination was rejected in the *United Kingdom*. Legislation making the expression of racist sentiment a criminal offence was first introduced in Great Britain in 1965 in section 6 of the Race Relations Act. The 1976 Act replaced section 6 with its own Section 70, a new offence for stirring up racial hatred, which was inserted into the Public Order Act 1936. The requirement of proof of intent was replaced with a lower standard of proof. The change facilitated

³⁰ Interestingly, actual discrimination is punished less severely. For example, discrimination in providing a good or service is punished by a maximum of 3 months imprisonment and 200 francs fine. The most severely punished offense is official discrimination; state authorities can be sentenced to imprisonment for between 15 days and a year; i.e. double the penalty for incitement.

enforcement, but the number of prosecutions remained fairly low. A new Public Order Act was adopted in 1986, replacing the existing law on incitement to racial hatred with a code of offenses, five of which differ principally by reference to the medium of communication.

2. Application of criminal penalties

Several countries have no statistical entries for racist and xenophobia attacks. *Italy*, for example, has virtually no cases reported. Those states which do have data, show rising levels of violence and discrimination, while the number of prosecutions and convictions remains extremely low. In *Germany*, September 1991 brought an unprecedented level of attacks in on immigrants and refugees by skinheads and other citizens. The attacks lasted for days and resulted in deaths, injuries and the evacuation of asylum seekers from their residences which were burned down. In October, the police registered almost 1,000 criminal acts hostile to aliens. Statistical recording of racist incidents has been inconsistent, ranging from more conservative police estimates to those from the constitutional defense board. In 1989, figures differed between 269 and 516. The Federal Criminal Office figures for 1991 were 2074 hostile criminal acts, of which 325 were fire attacks and 188 were attacks against individuals. This is contrasted with documented attacks of between 200 and 269 between 1987 and 1990.

The number of prosecutions for violations of section 130 of the German Penal Code, incitement to xenophobia, are not recent figures but since 1977 have increased from 11 to 28 in 1978, to 40 in 1979, 54 in 1981 and 70 in 1986. Prosecutions for incitement to racial hatred under section 131 rose from 4 in 1982 to 31 in 1986. In 1982 and 1983, the Federal Minister of the Interior banned and dissolved racist organizations for disrespect for human dignity. Among German prosecutions are the 1985 murder of a Turkish national by skinheads, but the racist motives were not proven; the 1989 killing of Ufuk Sahin after his assailants directed racial slurs at him which the Court decided was not motivated by racist or xenophobic motives; and the 1987 murder of an Iranian refugee after a petty theft incident by an employee, also resulting in the Courts dismissal of racist motives.

In May 1992, in one reported prosecution for an arson attack, three skinheads were convicted. Although the prosecutor had requested 4 to 9 year prison terms, two received suspended sentences and one received three and one-half years imprisonment. The judge accepted drunkenness as a mitigating factor.

During the period 1985 - 1988, *The Netherlands* initiated between 27 (1987) and 61 (1986) prosecution for racial offenses. Fifty-three cases remained pending, while nearly as many complaints were not prosecuted as were pursued.

The ratio of prosecutions to complaints indicates the extreme difficulties faced by victims in obtaining a remedy, often due to problems of proof and sometimes to lack of understanding of procedures. In 1990, the *Belgian* Minister of Justice announced that 1266 complaints were registered between 1981 and 1989 based on the 1981 legislation. Of these 987 were not pursued. Only 43 decisions were rendered resulting in 14 convictions. In *France*, accessing data banks through the words "discrimination" and "racism" produced 248 decisions from all French tribunals. This represents a very small part of the racist incidents reported in France.

In *Denmark*, there has been a declining number of complaints under the Penal Code from a high of 29 in 1988 to 7 in 1991. However, racial discrimination offenses are only noted in reference to racist statements, not ordinary crimes with a racist motivation.

One incident involving the broadcast of discriminatory messages brought five different complaints for the single case. In 1990 a decision to change the statistics and merge the decisions and charges categories. Reports from 1985 through 1989 indicate there were single prosecutions according to the Racial Discrimination Act except in 1986 and 1987 when there were two prosecutions. There were a total of 13 convictions based on the Penal Code in Denmark during the period of 1985 to 1991. In two of the cases recorded, five persons who undoubtedly violated the provision were convicted. In two incidents where defendants set fires with molotov cocktails in a club of immigrant workers and also to a refugee residence, the charges were registered as arson. Other incidents were considered acts of violence, not of racial discrimination.

Also in *Denmark*, two politicians were convicted in 1980 of violations of the Penal Code. In response to their participation in a debate concerning allocations of foreigners in the municipality, they published a letter in the newspaper referring to guest workers as taking advantage of the social system and ruining the lives of young people by selling them drugs for personal gain. This was held to be a punishable insult and the author was fined DKK 2000. Another case concerned a member of a right-wing party who was asked by the editor of a newspaper to comment on the foreign workers in connection with the on-going European Communities election campaign. He stated that the guest workers scattered in large settlements do little or no work at all and that they only benefit from the Danes, and that they multiply like rats. In another interview, he stated that many arrive illegally bringing hashish, narcotics and prostitution. Because the statements were made in a debate as part of an election campaign, the politician was only sentenced to a fine of DKK 4000. The editor of the first newspaper was sentenced as well since he initiated and determined the subject of the article. The second newspaper was not sanctioned since it was the first article which instigated the second one. A year later, the politician sent a manuscript of the speech for which he was fined and he was sentenced to two weeks detention for his defiance. Finally, there is the "Green Jackets" case, discussed earlier.

Looking at the case law, many *Belgian* cases have concerned defamatory statements. For example, a 1983 decision convicted a city council member under the 1981 law for having stated to an opponent during a public meeting, "dirty Jew, go back to Israel." Other cases have similarly focused on the question of derogatory or defamatory terms used in reference to racial or ethnic minorities, or foreigners. In regard to actual discrimination, a significant case in Liege indicates some of the difficulties of proof. In a successful action, the plaintiff alleged that he was publicly denied purchase of a drink because of his race. He was unable to exactly state the words used by the server. However, the Court of Appeal found that the server could not justify the refusal to serve on the basis of any objective criterion (dress, behavior, drunkenness) and therefore the accusation was found meritorious. At the trial court, the judge had ruled that there were doubts that must be resolved in favor of the accused.

In *Great Britain*, between 1979 and 1986, 59 people were prosecuted for the offence of stirring up racial hatred, with none of the 22 cases forwarded by the Commission in 1979 to the Attorney-General authorized for prosecution, prompting the Public Order Act 1986. There are no reliable statistics for total numbers of complaints that a criminal offence has been committed, because complaints may be made to individual police forces or to a variety of other official bodies. The Commission for Racial Equality publishes figures in its Annual Reports, citing 62 complaints in 1988, 115 in 1989 and 55 in 1990, of which it referred 16, 4 and 18 to the prosecution authorities. The most prominent trial in the United Kingdom occurred in 1991, when the Dowager Lady Birdwood (aged 78) was convicted after she was found to have distributed and

possessed anti-semitic leaflets. She was given a conditional discharge, and ordered to pay 500 pounds towards prosecution costs. One month later, approval was given for another prosecution after a Conservative party supporter allegedly described the black person chosen as the local parliamentary election candidate as "a bloody nigger." No decision was rendered since the accused died prior to his trial. Two other prosecutions in 1991 in England and in Wales both resulted in convictions and sentences of two months' imprisonment together with six months imprisonment suspended, and the other being bound over. Penalties for the six offenses under the 1986 Act are maximum 2 years imprisonment and/or a fine with the offence is tried on indictment, and 6 months imprisonment when there is a summary trial.

B. Civil Remedies

Summary: In many states, civil remedies are preferred to criminal proceedings, and viewed as more effective. Penal convictions require a higher level of proof than civil actions and thus are more difficult for the victim to win. Also, criminal sanctions do not repair the damage to the victim.

There are common judicial, administrative and other recourse procedures in the EC states, but also much variety. Available remedies for reparation of acts of racial discrimination include civil and administrative remedies, and the existence of ombudsmen or Human Rights Commissions. In comparing the procedures, there are clear differences in regard to elements which impact upon the effectiveness of the remedies: accessibility to courts and agencies by those individuals or groups likely to be victims of racial discrimination; ability to detect subtle forms of discrimination; flexible evidentiary criteria and standards of proof; speed of action and other procedural aspects; and the involvement of non-governmental organizations concerned with discrimination and xenophobia. In general, victims face problems of proof, as well as other problems common to all those seeking to use often overburden legal systems. It must be added that in some countries, the fear of reprisals is cited as a significant disincentive to litigation.

While in some countries protection against discrimination is provided through the penal codes and procedures, in nearly all offenses against personal rights can be remedied or compensated, in procedures before civil courts. *Germany* is the noteworthy exception; civil remedies are rare. In many cases the civil remedies are not specific to racial or ethnic discrimination, but are an application of a general provision that anyone who causes another damage is liable for reparations. However, there remain in certain situations distinctions in law between citizens and non-citizens, resulting in further discrimination.

An important role is played in many civil law countries by the Public Prosecutor who may, in specific instances, act on his or her own initiative against discrimination. Thus, even if no complaint is lodged by a victim of racial discrimination, the Prosecutor may make an investigation *ex officio* if there are reasonable grounds for believing that a wrongful act has been committed.³¹ In at least one case, legislation provides that not only the victim and the Public Prosecutor, but any regularly constituted association intended by its statutes to combat racism, may exercise the rights recognized to a plaintiff in any case of a racist offense relating to the press or any offense involving racial discrimination.

1. Civil actions

In *Germany*, reparation and indemnification for damages suffered through an act of racial discrimination may be claimed under section 823(1) and (2) Civil code. The courts will interpret racial discrimination as a violation of the "general right to personality" (section 823(1)); victims of unlawful acts, for example, offenses under sections 130 and

³¹ The Public Prosecutor is also, as a rule, under an obligation to institute criminal proceedings if an offence has been committed.

131 of the Penal Code, may claim compensation under section 823(2). Although the constitutional fundamental rights are not directly binding on the private sphere they may have a certain impact on the interpretation of the civil law. For example, according to German law, private contracts that are immoral are invalid. Thus a contract that discriminates on the basis of race or nationality may be held to be invalid.

Under section 75 of the Betriebsverfassungsgesetz, employers and workers' committees are under obligation to ensure that there is no discrimination against an employee on the basis of race or nationality. This provision leads to the direct applicability in the employment context of the rights laid down in article 3 of the Basic Law. Violations of section 75 may lead to a claim for compensation under section 823(2).

In Germany, civil remedies are rarely used. The primary reasons for this are the burden of proof, lack of information and financial risk. In cases where the victim cannot establish that he or she was the victim of a criminal offense it is very difficult if not impossible to prove that a certain act was based on racial or xenophobic motives. As convictions of racism carry particular stigma, judges are reluctant to hold that a plaintiff was subject to racial discrimination. Furthermore, victims of racism or xenophobia are in no way encouraged to bring a claim before the court. The lack of high profile cases has led to the perception that a civil action is unlikely to be successful. The third reason for the reluctance to bring a civil action is the fact that if the victim loses the case he or she will not only have to pay their own costs, but will also have to cover the costs of the defendant. If the victim is a foreigner, the defendant may even demand that the victim deposits a certain amount of money before the case is heard.

In *Spain*, foreigners enjoy the same administrative and judicial recourse as nationals to defend fundamental rights and public liberties, both as plaintiff and co-party. In addition, the right to effective assistance of counsel is recognized and guaranteed to foreigners, as well as use of procedural, administrative and judicial options in the defense of any violation of their rights, even reaching the actions of administrative authorities. Spanish administrative law specifically foresees reparations for damage stemming from a violation of the principle of non-discrimination. Civil liability also can be based on the Workers' Statute and the Penal Code (for discrimination that violates penal laws).

France has several civil remedies. In addition to claims for assault and defamation, the possibility exists for an action based on insult. The anti-racist law of 1972 provides that an action may be brought against anyone who utters a racist insult. The provision has been used successfully in several high profile cases. In addition, a worker claiming discrimination has the possibility to invoke discrimination before a civil tribunal (le tribunal de prud'hommes). There are certain advantages, including the possibility of the employer having to rehire a wrongfully dismissed worker as a remedy for discrimination, or having to pay damages. On the other hand, the jurisprudence indicates that courts are willing to accept rather easily the justifications given by employers for their acts.

In the *United Kingdom*, the 1976 Race Relations Act permits civil actions at the instance of a victim of discrimination. For cases of employment discrimination, an administrative arbitral body first attempts a settlement and, if unsuccessful, proceeds to a hearing. In other domains where discrimination is prohibited, actions are commenced directly before a civil court, unless the complainant is serving in the armed forces and the complaint concerns those forces. In the latter case, proceedings are taken according to legislation governing the military. Civil actions generally are in the form of a tort for breach of a statutory duty.

In *Luxembourg*, any victim of a discriminatory act may personally institute legal proceedings to obtain satisfaction or compensation for moral or material injury. Criminal

proceedings may be instituted either by the public prosecutor, or by the victim. If such proceedings are instituted, the criminal court also rules on the question of compensation. Similar to United Kingdom cases of employment discrimination, any application for nullification of an administrative act or decision must be presented by the victim to an administrative court. If the court rules in his favor, the victim also may apply to a civil court for damages.

In *Italy*, any person within the jurisdiction may bring a civil action to safeguard their fundamental rights but there is no general civil action possible against racism or xenophobia per se. Where discrimination has occurred, a judgment may declare this fact.

In *Denmark* anyone can apply for compensation if another person has caused financial or other damage. Most civil actions involving racial discrimination are linked to violation of penal code provisions, although not all criminal actions result in civil claims. In cases of criminal prosecution, the question of compensation for the victim can be made an integral part of the trial or a separate civil action can be brought. Where a crime of group defamation or incitement to racial hatred is committed, it is deemed that no individual may seek compensation. However, where incitement or defamation is directed at an individual or specific individuals, it is not prosecuted under the group defamation act and the injured party or parties may bring actions for compensation.

In *The Netherlands*, article 162, book 6 provides that anyone who has committed a wrongful act may be obliged to remedy the resulting damage. Wrongful act, or tort, includes an infringement of law or an act or omission contrary to a statutory obligation or that which according to unwritten law is proper in society. Case law establishes that this includes an act contrary to a treaty as well as a statute. It is not necessary to prove a violation of the Criminal Code to plead a tort. In *The Netherlands*, tort actions based on the Civil Code have proved to be effective in obtaining remedies in some discrimination cases. Breaches of due care required in society, falling short of the anti-discrimination provisions in the criminal code, may be the basis of a cause of action for discrimination. Many victims in this country prefer combatting discrimination through civil suits because they are not dependent upon the police and or the Public Prosecutions Department in their investigation and prosecution.

In *Greece* the victim has a right of compensation if the law is violated by a public official acting in the exercise of his authority. In addition, the act can be annulled by an action for abuse of discretion before the Council of State.

In *Portugal* victims of discrimination who bring an action against either government officials or private individuals whose acts cause them injury, may obtain a remedy in conformity with articles 483ff of the Civil Code. All contracts or other private legal acts that violate the principle of non-discrimination are considered null and without effect if that solution best protects the victim. Otherwise, non-discriminatory provisions may be added to the contract. When a crime has been committed the victims may ask compensation for damages suffered either during the criminal process, or after in a separate civil action.

A victim of racial discrimination or hatred in *Ireland* cannot bring a civil action under The Prohibition of Incitement Act, which only allows for criminal sanctions, but under the Unfair Dismissals Act 1977 a case may be brought before the Employment Appeals Tribunal, both criminal and civil actions are possible in the District Court under the Hótel Proprietors Act 1963, and tort remedies exist for defamation, intimidation or conspiracy.

2. Procedural and Substantive Requirements

In most countries, there are relatively short time periods during which a civil action for damages may be brought. In the *United Kingdom*, complaints against acts of discrimination in employment must be brought before industrial tribunals within three months of the alleged discrimination or five months if the assistance of the Commission for Racial Equality is sought. For reasons of equity, the tribunals may extend the time limits. In *Greece*, an action to annul an illegal administrative action must be brought within two months after publication or communication of the act. In *France*, an infraction of a racist nature must be complained of within three months; on the other hand, rarely is a decision rendered before one year after the facts, by which time the origin of the complaint may have been forgotten, at least by the public influenced by the original racist event.

In virtually all cases it is necessary to prove the existence of a wrongful act, resulting harm, and a link of causality between them. In practice, the law has moved in a more protective direction. However, one of the major difficulties with racial discrimination is that often it is difficult to prove. It is rare that a negative decision is explicitly stated to have been taken due to race or ethnic origin. Most discriminatory acts are without their motivation being clearly announced or a non-racial motivation is expressed. In some cases, the actors do not even consciously realize that their prejudices have led them to commit discriminatory acts. Because of problems of proof, a Council of Europe study on Intercommunity and Interethnic Relations in Europe found that in certain countries, civil actions against discrimination were more effective than penal sanctions and have advantages in the lower level of proof generally required.³² In *France* current law no longer requires that an offense of incitement to racial hatred or discrimination be based upon a showing of deliberate intent to arouse hatred for a group. It is enough that objective incitement is shown and that the victim was defamed or insulted.

Linked to the level of proof is the issue of who has the burden of proof and what evidence may be utilized. Not every state permits the use of statistical data or investigations into patterns or situations that appear to indicate the existence of discrimination. Inference of discrimination from repeated refusal to hire minority applicants remains a technique of limited application.

Judicial proceedings in the *United Kingdom* have utilized statistical data in drawing adverse inferences from a history of failures by black candidates to be appointed to posts. Statistics will often be necessary to prove disparate impact in cases indirect discrimination. Jurisprudence also allows its use in cases of direct discrimination, although one Employment Appeals Tribunal took objection to the means used to obtain it. The Commission Code of Practice recommends that employers keep statistics and monitor the composition of its workforce, a policy which would greatly facilitate procedures for requiring the disclosure of documents for litigation. In contrast to the practice in the UK, in *Denmark* statistics may be used to prove a general situation but not as evidence in a concrete case.

In *The Netherlands, France and Belgium*, proof of racial discrimination can be acquired through a "test method", not only for civil, but for criminal actions. This permits members of a racial or ethnic group to present themselves at an establishment. If they are consistently refused entry while whites are accepted, the burden shifts to the proprietor to justify the conduct. In addition, a 1982 decision of the Supreme Court of

³² Council of Europe, Les relations intercommunautaires et interethniques in Europe, Rapport final. MG-CR (91) final p.35.

the Netherlands opened the door to shifting the burden of proof by use of statistical data. The plaintiff in the case demonstrated that a housing corporation had allocated only one of 543 houses to minority applicants, while they represented 10.2 percent of those applying for housing. The court accepted that such evidence could shift the burden of proof to the defendant to provide legally acceptable reasons for the disparity in treatment. Italy goes further. According to article 2697 of the Civil Code a victim of discrimination may introduce statistical data to prove that because of the absence or presence of certain empirical data a situation of discrimination exists.

Proof of discrimination is a serious problem pointed out by nearly all rapporteurs. In *Portugal*, in addition to the general problems of proving discriminatory intent or racial motivation, there is a general problem in the administration of justice. Hearings are not recorded or registered and there is no exact record of proof that can be reviewed by an appeals court. Statistics cannot be used in Portugal. For example, one of the largest private Portuguese Banks, Banco Comercial Portuguese, had only 25 women among 3500 employees. The 25 who work are married to directors or other highly placed Bank employees. Nonetheless, no discrimination was found.

In *Ireland*, it is not clear how a court would view statistical data as evidence of discrimination since statistics were not used in the only two cases that have been brought before the Employment Appeals Tribunal on the issue of racial discrimination.

Finally, in many countries, including *The Netherlands, Germany, and the United Kingdom*, a major disadvantage and deterrent to a victim who pursues a civil cause of action is liability for the procedural costs in the event the suit is unsuccessful. Partly because of this, class actions suits are a growing topic of discussion in The Netherlands, leading to the acceptance of interest groups as parties to legal actions by the judiciary as well as the introduction of a Bill providing for class actions.

3. Potential remedies

Remedies vary with the type of discrimination alleged. In cases of housing discrimination, plaintiffs may be awarded a house or apartment. In other cases, successful plaintiffs have been awarded monetary compensation for both material and moral damage. In the *United Kingdom*, the basic principle is *restitutio in integrum*, but damages can be awarded for injury to feelings. The courts have said that awards "should not be minimal, because this would tend to trivialise or diminish respect for the public policy to which the law gives effect." Injury to feelings must be taken seriously English law permits aggravated or exemplary or punitive damages intended to punish the defendant in cases of particularly malicious, insulting or oppressive behavior. Punitive damages generally are not widely known outside England and are not available in Scotland.

In *Belgium*, those who succeed in a civil action may obtain reparations in kind or damages and interest. When the victim has suffered moral injury, compensation is possible. The possibility does exist in some cases for an award of punitive damages where actual damages are insufficient to condemn the act performed. Other reparations may include publication of the decision condemning the defendant. In *Denmark*, victims of violence can obtain compensation from the state by means of a Compensation Board, if the violator is not apprehended. Remedies of execution and injunctions are also possible.

In *Portugal*, both material and moral damages may be recovered while in *Spain*, a person who by act or omission causes moral or material harm to another has the responsibility

for restoring a victim to the status quo ante according to article 1902 of the Civil Code, in addition to a monetary fine which a court has the discretion to award. Natural and legal persons have the right to rectification, according to Organic Law 26/III/84, which in the case of publications provides for the elimination of the source of any harm and which foresaw the possibility of a special and expedient procedure for receiving satisfaction.

There is no specific civil remedy in *Italy* in favor of victims of discrimination, racism or xenophobia. However, according to general principles of civil liability, an action for damages can certainly be brought against an offender. An employee who succeeds in proving their dismissal was unlawfully based on grounds of race or religion could be reinstated. There is no limit to the amount of damages which may be claimed. However, moral damages may only be obtained if the civil wrong constitutes at the same time a criminal offence.

In *Ireland*, under the Unfair Dismissals Act 1977 an employee is entitled to one of three remedies: reinstatement to the position held at the time of the dismissal; re-engagement either in the position held or in a different position which would reasonably be suitable; or compensation, which is limited to actual financial loss including lost income, plus any prospective loss which may have resulted from the dismissal. An employee is defined as one who has already entered into or works under a contract with an employer, thus limiting standing under this law and restricting claims from one who is denied employment. Reimbursement for lost income resulting from an unfair dismissal must be offset by any income or money received while unemployed. Compensation is limited to a maximum of 104 weeks gross pay. A court decision established the principle that damages can be awarded for the breach of a constitutional right even where no common law right of action exists. Any award of damages granted in such an action will be nominal except where the plaintiff has suffered actual loss.³³

In *The Netherlands* Civil Code, anyone who has committed wrongful acts may be obliged to remedy the resulting damage. Injunctions and restraining orders, in addition to monetary compensation, are possible civil remedies for discrimination.

In *Belgium, Italy and Denmark* there are no limits on the damages that may be sought, but in Denmark judicial practices has established the level of compensation. In contrast, in *Great Britain*, in cases of discriminatory dismissal from employment, the amount of damages is limited to 10,000 pounds. Other types of discrimination awards are not limited, but guidelines are set by the superior courts which can and do increase or decrease the level of damages awarded by lower courts or tribunals.

C. Administrative Agencies and Ombudsmen

Several states have enacted special procedures for implementation by the administrative authorities, in order to ensure equal treatment and equal access to public places and services. In some cases administrative action can be initiated *ex officio*, which may be more effective than if an individual has to take the initiative; as noted, individuals often face impediments or hesitate before filing complaints.

In addition to properly called administrative remedies, other authorities may play an important role, such as national assemblies, councils of state, political parties, trade unions, and national or local human rights commissions. The latter may bring about rapid action, particularly in urgent cases, such as those pertaining to housing, employment and similar situations. Most such commissions aim at settlement and

³³ *Meskeil v. CIE*, *supra*.

conciliation, but may in some cases initiate proceedings before courts or industrial tribunals. *Italy*, in contrast, reports no agencies or authority specifically designated to combat racism and discrimination.

In some countries trade unions play a useful role in initiating action to curtail discriminatory action, such as discriminatory contracts or conditions of work. Union management grievance procedures also sometimes deal with complaints of discrimination. In addition, the promulgation of professional codes of conduct establishing industry standards have played an important role in discouraging or combatting racism and discrimination in *the Netherlands*.

In *Portugal*, the *Provedor de Justice* (ombudsman) may receive petitions, claims and complaints concerning acts or omissions on the part of the authorities. The Provedor may then make recommendations to the competent bodies with a view to preventing or redressing injustice. In addition, the government established on December 10, 1988 a Commission for the Promotion of Human Rights and the Elimination of Equality in Education, with the express mandate of studying the multidisciplinary aspect of the subject and proposing measures to further its study and increase awareness of it among students and teachers.

The *Defensor de Puebla* in *Spain* is designated by Parliament as the High Commissioner for the defense of fundamental constitutional rights. According to article 9, they can undertake any investigation on behalf of a party or on their own initiative in order to explain the actions or decisions of the Public Administration and its agents, in relation to citizens, in light of article 103.1 of the Constitution and in respect of fundamental constitutional guarantees. The Defensor's authority extends to the activities of Ministers, as well as administrative authorities, functionaries or any other person acting in the service of the Public Authority, all civil authorities, and local officials. No written complaint is required for the Defensor to act. A government Commission was created in 1979 to study the problems of gypsies, the Congress of Deputies approved an administrative oversight body in 1985, and since 1989, an Office has existed under the direction of the State Office for Social Action of the Ministry of Social Affairs. Local communities have undertaken similar actions in this regard. While no administrative agency concerned with discrimination or racism exists in *Ireland*, the government has appointed an Ombudsman. The Ombudsman has the responsibility to investigate complaints from members of the public against state and semi-state bodies, though he has not yet had any cases dealing with racial discrimination. His findings are not binding, but since he is a government official his decisions do carry weight.

The Netherlands also has an Ombudsman, a general institution with powers embracing civil servants and the state administration including the Ministers of State, Ministerial administration, and state and local police, but not activities of local authorities. The Ombudsman has been vested with wide statutory powers to investigate on its own initiative or upon the complaint of a citizen or resident. It may make a ruling of guilt and in its judgment, if necessary, recommendations.

A Bill on Equal Treatment was submitted to the Dutch Parliament in 1991. It includes provisions for the creation of a committee on equal opportunities. This committee will have the power to investigate complaints and mediate between the parties. If the committee considers a discrimination to be unlawful it may also initiate legal proceedings.

Forty Anti-Discrimination Bureaus in *The Netherlands* based on private initiatives or set up by local municipal bureaucracies specialize in taking cases of discrimination reported to them by victims and intermediaries, in giving information how to prevent racial discrimination, and in local research. They also started test cases of discriminatory

admission policies of discotheques. The groups are coordinated by the National Bureau against Racial Discrimination. The National Bureau was founded in 1985 as an independent organization funded by the Ministry of Justice to do research, issue codes of conduct, advise the government on anti-discrimination legislation, train and advise lawyers and workers of local anti-discrimination bureaus and lawsuits, giving aid to plaintiffs. Other organizations involved in the fight against racial discrimination are the Anne Frank Stichting, the Anti-Racism Information Center in Rotterdam and the national Anti-Discrimination Conference.

In the *United Kingdom*, the 1976 Race Relations Act set up the Commission for Racial Equality, consisting of a Chairman and between 7 and 14 other persons appointed by the Home Secretary. The Commission for Racial Equality has broad jurisdiction ranging from research and community relations work to investigatory and advisory roles. It may give financial or other assistance to any organization, with the consent of the Secretary of State if coming from public funds, undertake educational activities, or issue codes of practice or guidance. It has an important role in enforcing the Act, sections 29-31 in particular, conducting formal investigations, issuing non-discriminatory notices, and requesting the issuance of restraining or other court orders in cases of persistent discrimination. It may act in some cases as "prosecutor" and in some as Investigator or the source of sanctions. The administrative enforcement of the Act by the Commission runs in tandem with the individual's direct right of access to a court or tribunal, except in the case of enforcement of section 28 through 31, which only the Commission has standing to enforce.

France created a secretary of state for immigrants in 1974. Later, the problems of immigration were divided among various ministries and, finally, in 1990, a secretariat charged with integration was established. The High Council of Integration is composed of nine members named for three year terms. Its functions are to examine the conditions of integration of resident aliens in France and to respond to any relevant question submitted by the Prime Minister; develop the politics toward integration; and gather information and statistics on immigration and integration. During 1991 two groups divided the work of the Council. One concerned legal and cultural issues, the other economic and social issues, including employment. A statistical working group obtains information on the situation within the country. Also in France, in 1990 the Prime Minister announced a national plan to combat racism. Educational institutions are a primary focus of the plan. In addition, several preventive programs have been organized by the police.

Among agencies that play a positive role in combatting discrimination, the role of the *Belgian* Commissioner General for Refugees should be cited. According to the provisions of article 57/28 of the refugee law of 14 July 1987, the Commissioner must submit to the Minister of Justice an annual report concerning his mission. The report is then transmitted to the legislature. In each report, problems of discrimination and xenophobia are pointed out for action. For example, the most recent report notes numerous difficulties faced by lawfully resident aliens in regard to obtaining "l'act d'etat civil" after they obtain refugee status. In addition, there are abuses cited in regard to local taxes imposed by city officials for the delivery of documents, correction of spelling errors in registration, prolonging residency documents (cartes de sejour), etc. In one case, the administrator reports that a Brussels city administration imposed a tax of 1000 francs per person per month on a family of six for "administrative costs" in regard to the monthly prolongation of a "titre de sejour." Other cases are noted where judicial decisions canceled exorbitant taxes imposed by local communities.³⁴

³⁴ M. Bossuyt, Fourth Annual Report of the Commissioner for Refugees and Stateless Persons, 1992, p. 31.

In *Germany* consulting services for migrant workers and their families have been established as well as language courses and special vocational training courses. In addition there are three different types of consulting bodies. In some cities like Frankfurt and Nuremberg they are elected by the migrant workers themselves; others, like those in Berlin, are solely made up of appointed officials. The third category of consulting bodies is made up of appointed officials as well as elected members (for example, in Stuttgart and Erlangen). The only function of these bodies, however, is to act as consulting agencies for the migrant workers.

There are several administrative agencies in *Luxembourg* that aid foreigners. The Ministry of the Family and Solidarity has instituted an immigration service to assure the protection, assistance and material well-being of foreign workers and their families. Among other things, the service assists with problems of housing. In addition, a National Immigration Council and Communal Consultative Commissions, the latter created by Grand-Ducal regulation of August 5, 1989, assist with immigrant problems and have foreign members sitting on them.

D. Assistance to Victims to Bring Claims

1. Financial assistance through legal aid

Legal aid is available for indigent victims of racism in either criminal or civil matters in all EC Member States, although it is severely limited in *Germany*, *Ireland* and *Italy*. In *Germany*, the Law on Victim's Compensation provides that a foreign victim has no right to public help or special financial compensation in cases where Germans do not have such a right in the victim's country of origin. This led to a situation where many victims of racial or xenophobic attacks in 1991 had not right to public help or compensation.

In some cases, there are restrictions on the tribunals for which the aid may be used. For example, *British* legal aid is available to indigent victims for advise and representation before courts, though not before international tribunals. The Commission for Racial Equality has power to assist actual and prospective litigants who apply for assistance either because the case raises a question of principle or because it is unreasonable to expect the applicant to deal with the case unaided given its complexity or for other reasons. In *Ireland*, although legal aid and advice to those unable to afford a private solicitor is provided for, representation at tribunals is specifically excluded, which effectively restricts representation in employment cases unless an appeal reaches the Circuit Court. Class actions are also expressly excluded from the legal aid scheme. Where assistance is possible, long delays even up to 20 months and sparsely located centers make actions impracticable. Legal aid is not available in constitutional claims. In *Luxembourg*, legal assistance is free and accorded to each citizen as well as foreign residents in cases where their total revenues fall under the guaranteed minimum level

The procedural rights of aliens involved in criminal proceedings in *Italy*, either as victims or the accused, are seriously hampered by the lack of adequate guarantees concerning legal aid, interpretation or translation of documents. Legal aid is in theory also available to aliens, but the effectiveness of the right is almost totally frustrated by the requirement of a residence certificate, which is often difficult to obtain. Interpretation in the course of public hearings is provided, but is not available to detainees during meetings with their legal counsel.

2. Assistance and representation by non-governmental associations and organizations combatting racism

Nearly all countries have recently seen the formation of groups or associations intended to combat racism or xenophobia. They often play a crucial role in assisting victims of racism, discrimination and xenophobia.

In *Denmark*, there are a number of private institutions that advise individuals on whether to see a lawyer and pursue an action; the assistance of these associations is not limited to cases of racism or xenophobia. The more than 90 such organizations do not themselves represent plaintiffs. However, as discussed further below, an ad-hoc organization, the Ishoj committee against xenophobia filed, conducted, and successfully argued a case for which the municipality was obliged to pay the costs.

Similarly, a rather large number of associations exist in *France*, including the Movement against Racism and for Friendship among Peoples (MRAP), the League for Human Rights, SOS-Racism, etc. Many of these associations publicize problems of racism and xenophobia, and bring actions for victims of discrimination. An amendment to the French Code of Penal Procedure, adopted by Act NO. 85-10 of 3 January 1985, allows associations combatting racism to institute civil actions in cases involving racist offenses (incitement to racial hatred, racial insults and defamation, and refusal of services), as well as bodily assault, murder and arson, when "committed against a person because of his national origin or because, actually or supposedly, he belongs or does not belong to a particular ethnic group, race or religion." *Belgian* and *Dutch* law permits civil actions to be brought by non-governmental associations against those who attack the aims which they pursue, provided that the group has been in existence more than five years and that human rights or combatting racism figure in the statute of the organization. After the judiciary allowed organizations to be party to a legal action in respect of racial discrimination the government introduced a bill which will guarantee the right of individual victims of discrimination and of organizations defending the right of these individuals to institute civil actions; the bill was introduced in 1991 and has been submitted to the Council of State. It is planned that the law will enter into force of 1 January 1994.

In *Greece*, even groups lacking legal recognition may bring actions, but this is not the normal practice. In contrast, in *Spain* it normally the case that actions are brought by organizations on behalf of victims.

In *Portugal*, a small organization, SOS Racismo, has begun working, but under the law no organization can bring a complaint. In *Italy* there are numerous organizations. However, they do not provide legal assistance nor file claims although Italian NGOs have limited power of intervention in civil proceedings in conformity with rules established by the Code of Civil Procedure. In *Luxembourg* different organizations and associations are concerned with foreign workers and help them if they become victims of discrimination or racism. The most well known and the most active is l'ASTI, the Association de Soutien aux Travailleurs Immigres.

Class actions of similarly situated victims generally are not inscribed in law or procedure, although it has been proposed in *The Netherlands*. However, in *Belgium* there is a proposal to authorize worker groups, labor unions and independent worker organizations to bring actions in cases where there are refusals to hire or terminations based on racist motives.

The approach to associational representation differs considerably among countries.

With the agreement of a victim of racial discrimination, an association may pursue a claim on the victim's behalf in *Belgium, Denmark, and in France*. In *Luxembourg*, associations may bring actions only if they themselves have suffered damages. They do not have standing to bring public interest actions on behalf of victims. There are no legal provisions for interest group actions under *Netherlands* law; an association may bring an action only if members of the association have been victims of discrimination. In 1991, the government introduced a bill meant to guarantee the right of individual victims of discrimination and organizations defending the right of these individuals to institute civil actions; the bill has been submitted to the Council of State and it is planned that the law will enter into force on 1 January 1994. In *Portugal*, there is no standing for associations, while in *Ireland*, organizations can help potential plaintiffs, but it is not possible for them to take independent action in filing suits without locus standi. Ireland has few NGOs working in the area of anti-discrimination. They offer advice services to victims of racism but due to a lack of resources are not usually in the position to represent clients taking actions. In the employment field in the *United Kingdom*, trade unions may assist members. However, they may not act independently on behalf of disadvantaged groups, since in such circumstances the organizations lack title and interest to sue in Scotland or locus standi in England.

There is only one significant case reported. In *Denmark*, the mayor of Ishoj recommended that local housing associations restrict the allocation of flats to immigrants in order to prevent xenophobic attitudes from increasing. In 1980 the municipality agreed that no immigrants should be allowed to rent flats if their percentage in each building exceeded 10 percent. Most of the immigrants were from Turkey. The Ishoj Committee against Xenophobia, at the request of two individuals who had been denied housing due to the quota system, filed suit for violation of the Racial Discrimination Act. The case was initiated and conducted by the organization, who selected its plaintiffs from among the many victims. The court decided in favor of the plaintiffs and ordered the municipality to pay the 50,000 DKR costs incurred by the organization in conducting the lawsuit.

Currently, nineteen different welfare organizations are serviced by the *Netherlands* Center for Aliens and the National Cooperative Organization for Foreign Workers (LSOBA), an umbrella organization for a large number of local and national organizations of foreign workers from the Mediterranean countries and a Working Group of approximately 500 lawyers to provide professional legal aid in aliens cases have also been established. There has been a tendency for LSOBA to broaden its scope of action from its initial concern with social welfare issues and housing, education and legal status of migrant groups. It has occasionally taken up cases of allegations of racial discrimination with increasing success due to its professional standards and due to having larger financial resources than local action groups.

In 1979, a Directorate for the coordination of minority affairs was established in *The Netherlands* as a division of the Ministry of Home Affairs in order to bring about more effective coordination among the various policies and programs on ethnic minorities. The Memorandum on Minorities 1983 created the possibility for ethnic minority groups to have a voice in minor policies of the government on a local and national level. On a national level, they would provide advice at the request of the Minister of Home Affairs or on their initiative. Since 1985, target minorities in *The Netherlands* have participated in Landelijk Advies en Overlegstructuur, the National Advisory Committee for Minorities.

X. Affirmative Measures and Programs to Combat and Prevent Discrimination, Racism or Xenophobia

Summary: As noted earlier, there are fewer positive or affirmative actions taken by EC member states than there are prohibitions and regulations.

In *Portugal*, there is virtually no positive action foreseen, while in *Italy*, there are numerous programs, including training for all public officials and public servants on the function of public administration and the problems raised by immigration. Law enforcement, education and social service personnel are given further training against discrimination. However, in the field of education, with a few exceptions, no training courses have been instituted to help teachers or officials deal with the problems posed by immigration; no provisions exist dealing with new problems posed by intercultural education in primary schools; instruction in the language of origin is not available to alien children, except to Tunisian children who attend classes in Sicily taught by Tunisian teachers according to Tunisian schooling programs.

In *Denmark*, the subjects of discrimination, racism and xenophobia are introduced in lessons on international human rights at the Police College. Special courses in how to deal with foreigners were introduced in 1989, as a result of the increase in refugees, and their increasing contact with police. All newly appointed prison officers are also given training in international human rights standards. All employees including officials attend in-service courses about immigrants in Denmark as part of a program of continuing education to ensure public service is performed in accordance with domestic and international rules.

In the *United Kingdom*, section 45 of the Race Relations Act empowers the Commission to "undertake to assist (financially or otherwise) the undertaking by other persons of...educational activities." This has included collaboration in formulating strategies, employee teaching programs, and training of officials from central government and other institutions. The exact number of training courses, if any, which have been organized in *Ireland* for public servants to deal with the problems posed by immigration or minorities is not known.

In contrast, in *Luxembourg*, the government policy is directed towards combatting racism and xenophobia through integration of foreigners in society through education of their children. Maximum efforts are made to ensure equality of educational opportunity and full integration, including preschool programs with linguistic training necessary to follow the normal school program. Additional detailed measures are established for primary and secondary education, as well as a program of Adult Education including literacy training.

In *The Netherlands*, the Supreme Court in 1984 decided that article 6 of the Constitution permits an employee who gives sufficient and timely notice to have a free day to enjoy an important non-christian holiday, except where their absence would cause serious damage. Similarly, in the *United Kingdom*, positive discrimination would count as unlawful discrimination under section 1 of the Race Relations Act, however, under section 35, it is not unlawful to afford "persons of a particular racial group access to facilities or services to meet the special needs of persons of that group in regard to their education, training or welfare, or any ancillary benefits." Sections 37 and 38 permit special training schemes to boost the number of minority group members in an

occupation where they are disproportionately represented and to encourage applications from underrepresented minority groups.

In a separate measure, the *United Kingdom*, since 1969, has a standard clause inserted in all government contracts requiring contractors to conform to the employment provisions of the Race Relations Act, although there is no governmental attempt to monitor compliance. The government is not, however, required to take into account racial, ethnic or alien status in awarding benefits or contracts.

According to *Danish* law, everyone is equal under the law, which includes the awarding of governmental benefits and contracts. The Danish authorities have been very cautious about exercising positive discrimination favoring minorities or aliens in general. The government is not in a position to award benefits or contracts on the basis of positive discrimination, except where legislation passed by Parliament allow such action, which has not yet occurred.

Several countries have established particular programs to inform potential victims of their legal rights. In *Portugal*, a protocol between the Ministry of Justice and the Bar Association in November 1986 established a Legal Information Office in several cities. The Office provides free legal guidance and advice to all those who do not have sufficient economic resources to engage a lawyer.

Law 943/1986 and Law 39/1990 in *Italy* concerning the legalization of aliens expressly provides for measures intended to facilitate circulation of relevant information. Regional and administrative regulations have shown awareness of the need to create centers to disseminate necessary assistance and information, but funding has mainly been used to address the housing problem. Special offices have been created within the local branches of the Ministry of Employment to deal with the problems of non-EEC workers and to facilitate implementation of the legal provisions concerning the employment rights of aliens.

In *Denmark*, under the Aliens Act section 48, public authorities are obliged to inform the applicants of asylum about their right to contact the Danish Refugee Council, who is entitled to provide the person concerned with legal advice concerning the asylum procedures. If refugee status is granted, introduction to Danish society is provided in an 18 month program carried out by the Refugee Council, including guidance about the legal system and their rights. The *United Kingdom* issues periodic governmental announcements and advertisements regarding rights and responsibilities under race laws. Public education is considered to be one of the more important functions of the Commission on Racial Equality.

Within educational institutions, *Italy* has regulations to combat stereotypes in public schools, specifically in textbooks. In the field of anti-racism in *The Netherlands*, several activities have taken place or are taking place in secondary education, including research on racism in school books through an evaluation of geography and history books in secondary education, following a similar study in 1987 on social studies books; screening of books on racism; and activities within the framework of knowledge on the second world war, which bears down on anti-racism. In contrast, in *Denmark*, with the exception of the Penal Code, no specific provisions combat stereotypes, racism or xenophobia in public textbooks. While such provisions are non-existent, geography books which to some extent used stereotyping of citizens of other nations have been replaced. There is no state monitoring of schoolbooks in the *United Kingdom*, and discretion over their selection and recommendations is widely diffused. The Commission For Racial Equality has issued codes of practice to guide schools.

Other government sponsored campaigns include publishing popular literature about national and international efforts to combat racial discrimination and for the realization of

human rights; dissemination of information about the offices of ombudsmen and human rights commissions; giving publicity to the operation of recourse procedures available; and dissemination of information for victims or potential victims of racial discrimination, such as migrant workers and minorities. In *Luxembourg*, since 1988, campaigns against xenophobia and racism have been undertaken by labor unions and the press, supported by the government. Moreover, in response to the formation of extremist movements, the four large political parties of the country agreed in 1988 on a common platform in regard to foreigners, reaffirming their commitment to human rights and mutual respect for foreigners in a multicultural society, and stating their conviction that the presence of foreigners contributes economically, socially, and culturally to the country. The platform explicitly rejects xenophobia and any attempt at exclusion and commits the parties to renounce all appeals to racist propaganda or emotions.

In *The Netherlands* there have been several national campaigns on radio, television and other media with the aim of combatting discrimination and prejudice. Denmark has initiated a dialogue between immigrant organizations and a Council of representatives was established. It received governmental subsidies of 1.7 million DKK. It advises the government in matters of immigrant policy, and initiates different activities such as conferences on relevant themes and subjects. The Ministry of Internal Affairs initiated a public campaign in 1990-1991 by sponsoring 10 million DKK to promote understanding, tolerance and openness towards foreigners. 147 meetings and cultural arrangements with Danes and foreigners have been subsidized within the past two years. A conference on racism and xenophobia was organized in December 1991, one day before a parliamentary debate on this subject, the result of which was a mandate for the government to produce a proposal for general legislation to combat discrimination in the fields of housing, education and employment before April 1992.

In *Germany*, combatting and preventing discrimination, racism and xenophobia is mostly directed to integrating aliens into society. Therefore, many programs to educate aliens have been established. There are courses specific to language or jobs. Most of these courses have a certain national group as its target. Most of the courses are offered at the municipal level. Another means of integrating aliens is through the representative bodies of alien groups. Efforts may be divided into three major categories: cooperation between representatives of the officials and the aliens for information exchange, information services for the community with members from official instances and alien representatives, and interest groups chosen by their members. Finally, there is an official designated for alien questions. They mainly have administrative functions, and they exist on the federal level as well as in some federal states. In addition, in Frankfurt an Maim, a Ombudsman-type official exists.

In the *United Kingdom*, the government does seek to provide information about and to promote the aims of race relations legislation through advertisements and other means, but it is the Commission for Racial Equality that is more involved in public campaigns, programs and conferences aimed at eliminating racism and discrimination.

Conclusions

The recurring problem of racism, discrimination and xenophobia has reached serious levels in EC Member States. In response, Constitutional and legislative measures to sanction violations and provide remedies are being reviewed and strengthened. In common to all states with written constitutions are constitutional statements of equality,

in most cases supplemented by specific prohibitions against racial discrimination.³⁵ In addition, global and regional human rights instruments that prohibit racism and racial discrimination are very widely ratified, providing a general framework of legal measures to protect potential victims. Indeed, the United Nations Convention on the Elimination of All Forms of Racial Discrimination has had a strong influence on legislation and even constitutional provisions in various states.

There is a fundamental divergence in legal measures between those states that approach the problem of combatting racism and racial discrimination through classic guarantees of individual liberties and rights, and those that recognize, enact and implement minority rights for ethnic, linguistic, or other groups. The choice of approach seems dictated more by historical and philosophical reasons than by a sense that one or the other is more effective in combatting racism and discrimination and no conclusion can be drawn from the existing reports.

Another evident difference in the legal measures taken by EC Members is between states that have adopted comprehensive anti-discrimination laws and those that have enacted disparate, sectoral legislation. In this case, it seems clear that the former approach avoids the gaps that exist in countries that have adopted only piecemeal legislation and offers an integrated and more coherent approach to combatting racism, discrimination and xenophobia. In particular, comprehensive legislation appears to permit, if not encourage, consideration of difficult issues of balancing rights of association, expression, press, and privacy, with concern for combatting racism, racial discrimination and xenophobia. It is recommended that each state review existing legislation for gaps in coverage and consider the adoption of comprehensive anti-racism and anti-discrimination legislation.

The dearth of jurisprudence is a matter for some concern. In the face of evidence of rising racist attacks in most states, it is surprising to find so few reports of prosecutions, convictions, or civil remedies. In some countries, it was stated that no cases could be found of application of existing legal measures. As discussed in the report, various explanations are given for this, only one of which is positive (the laws are working well). More frequently, general problems of overburdened legal systems, high costs, inability to meet the burden and standard of proof in regard to a racial motivation for acts complained of--particularly in criminal cases--, lack of support from police and prosecutors, and general unfamiliarity of victims with legal remedies available to them, were cited as reasons for the lack of application of existing laws. It could be useful if procedures were reviewed, including the training and professional requirements of police and prosecutors.

The role of associations appears to be crucial in many states in overcoming or mitigating some of the problems just mentioned. In particular, the ability of such associations to represent victims or to bring claims directly appears to strengthen awareness and enforcement of anti-discrimination laws. Opening procedures to them could be a positive measure in many states.

Finally, there remain cases of statutory discrimination, both on the face of certain laws, and more frequently, in their disproportionate impact on minorities. A review of legislation, such as has been undertaken in several countries, can assist in eliminating such discrimination.

³⁵ The United Kingdom principle of the rule of law, which has been identified as underlying constitutional practices includes a requirement that persons should be treated equally.

Tables

International Conventions

For more details on the reservations and declarations made in respect of the different conventions please see the following pages.

	B	DK	F	D	GR	IRL	I	L	NL	P	E	UK
CADE		r1	r	r			r	r	r	r	r	r1
CERD	r	r	r	r	r	s	r	r	r	r	r	r
CIEC N°4			r	r			r	r	r	r	r	r
CSR51	r	r	r	r	r	r	r	r	r	r	r	r
D(E&O) C	r	r	r	r	r		r	r	r	r	r	
EARMP	r3		r3	r3	r3		r3	r3	r3	r3	r3	
ECHR	r	r	r2	r2	r	r2	r	r	r	r2	r2 r3	r
Protocols N° 1	r	r	r	r3	r2	r3	r	r2	r3	r	r2	r2
N° 2	r	r	r	r	r3	r	r	r	r	r	r	r
N° 3	r	r	r	r	r3	r	r	r	r	r	r	r
N° 4	r	r	r	r		r3	r3	r	r3	r	s	s
N° 5	r	r	r	r	r3	r	r	r	r	r	r	r
N° 6	s	r	r	r3	s		r	r	r3	r	r	
N° 7		r2	r2 r3	s3	r	s	r3	r2	s3	s	s	
N° 8	r	r	r	r	r	r3	r	r	r	r	r	r3
ECLSMW	s		r2 r3	s3	s		s	s	r2 r3	r	r	
ESC	r3	r3	r3	r3	r3	r3	r3	r3	r3	r2 r3	r3	r3
ESC (Add. Protocol)			s2	s	s		s	s	s3		s	
ECSS	r3	r3	r3	r3	r3	r3	r3	r3	r3	r2 r3	r3	r3
ESC (Supp Agreemnt)	r		s		s	s	r	r	r	r	r	
ET(SS)C		r	r	r		r	r					
ICCPR	r	r	r	r		r	r	r	r	r	r	r
ICCPR (OP)		r	r			r	r	r	r	r	r	
ILO N° 118		r	r	r		r	r		r			
MW (SP) C							r				r	

R Ratified.

S Signed.

1 Denotes the acceptance by the Member State with respect to other state parties assuming the same obligation to refer any dispute arising under the Protocol to this Convention to the ICJ for settlement (Article 25 of the Protocol).

2 Denotes that these States have signed or ratified the Convention or Protocol subject to certain reservations.

3 Denotes that these States have signed or ratified the Convention or Protocol subject to certain declarations.

CADE	UNESCO Convention against Discrimination in Education
CERD	Convention on the Elimination of all forms of Racial Discrimination
CIEC	International Convention on Civil Status
CSR51	Convention relating to the Status of Refugees of 1951
D(E&O)C	ILO Convention (No 111) concerning Discrimination in respect of Employment and Occupation
EARMP	European Agreement on Regulations Governing the Movement of Persons between Member States of the Council of Europe
ECHR	European Convention for the Protection of Human Rights and Fundamental Freedoms
ECLSMW	European Convention on the Legal Status of Migrant Workers
ESC	European Social Charter
ECSS	European Convention on Social Security
ICCPR	International Covenant for Civil and Political Rights
ICCPR OPT. PROT.	Optional Protocol to the International Covenant on Civil and Political Rights
ILO	International Labour Organization

Reservations and declarations made

1) International Convention on the Elimination of all Forms of Racial Discrimination (CERD)

	DATE (ratific.)	RESERVATIONS (Article)	DECLARATIONS (Articles)
B	7/8/75	-	4
DK*	9/12/71	-	-
F*	28/7/71	-	4,6,15
D	16/5/69	-	-
GR	18/6/70	-	-
IRL	-	-	-
I*	5/1/76	-	4, 6
L	1/5/78	-	-
NL*	10/12/71	-	-
P	24/8/82	-	-
E	13/9/68	-	-
UK	7/3/69	-	4, 6, 15, 20

- * Denotes the acceptance by that Member State of the competence of the Committee on the Racial Discrimination to receive and consider communications from individuals who claim to be victims of a violation of any of the rights set out in the Convention (Article 14 (1)).

2) International Covenant for Civil and Political Rights (ICCPR)

	DATE	RESERVATIONS (Article)	DECLARATIONS (Articles)
B*	21/4/83	2, 3, 10(2) (a), 10(3), 14(1), 14(5), 19, 21, 22, 25	18, 19, 20(1), 21, 22, 23(2)
DK*	6/1/72	10(3), 14(1), 14(5), 14(7), 20(1)	
F*	4/11/80	4(1), 9, 14, 19, 27	13, 14(5), 20(1), 21, 22
D	17/12/73	14(3) (d), 14(5), 15(1), 19, 21, 22	
IRL	8/12/89	14, 14(6), 19(2), 20(1)	6(5), 10(2), 23(4)
I*	15/9/78	12(4), 14(5)	9(5), 14(3) (d) 15(1), 19(3)
L*	18/8/83	14(5), 19(2), 20(1)	10(3), 14(5)
NL*	11/12/78	10(2), 10(3), 12(2) 12(4), 14(3) (d) 14(5), 14(7), 19(2), 20(1), 25(c)	
P	15/6/78	-	-
E*	27/4/77	-	-
UK	20/5/76	4, 9, 10(2) (a), 10(2) (b), 10(3), 11, 13, 14(3) (d), 23(4) 25(b), 25(c)	12(1), 4, 20, 23(3), 24(3)

* Denotes the acceptance of that Member State of the competence of the Human Rights Committee to receive and consider communications by other state parties in respect of alleged breaches of the obligations and rights contained in this Covenant (Article 41).

Annex I

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I

(Information)

EUROPEAN PARLIAMENT

COUNCIL

COMMISSION

DECLARATION AGAINST RACISM AND XENOPHOBIA

(86/C 158/01)

THE EUROPEAN PARLIAMENT, THE COUNCIL, THE REPRESENTATIVES OF THE MEMBER STATES, MEETING WITHIN THE COUNCIL, AND THE COMMISSION,

Recognizing the existence and growth of xenophobic attitudes, movements and acts of violence in the Community which are often directed against immigrants;

Whereas the Community institutions attach prime importance to respect for fundamental rights, as solemnly proclaimed in the Joint Declaration of 5 April 1977, and to the principle of freedom of movement as laid down in the Treaty of Rome;

Whereas respect for human dignity and the elimination of forms of racial discrimination are part of the common cultural and legal heritage of all the Member States;

Mindful of the positive contribution which workers who have their origins in other Member States or in third countries have made, and can continue to make, to the development of the Member State in which they legally reside and of the resulting benefits for the Community as a whole,

1. *vigorously condemn* all forms of intolerance, hostility and use of force against persons or groups of persons on the grounds of racial, religious, cultural, social or national differences;
2. *affirm their resolve* to protect the individuality and dignity of every member of society and to reject any form of segregation of foreigners;
3. *look upon it as indispensable* that all necessary steps be taken to guarantee that this joint resolve is carried through;
4. *are determined* to pursue the endeavours already made to protect the individuality and dignity of every member of society and to reject any form of segregation of foreigners;
5. *stress* the importance of adequate and objective information and of making all citizens aware of the dangers of racism and xenophobia, and the need to ensure that all acts or forms of discrimination are prevented or curbed.

I

(Information)

COUNCIL

RESOLUTION OF THE COUNCIL AND THE REPRESENTATIVES OF THE
GOVERNMENTS OF THE MEMBER STATES, MEETING WITHIN THE COUNCIL

of 29 May 1990

on the fight against racism and xenophobia

(90/C 157/01)

THE COUNCIL OF THE EUROPEAN COMMUNITIES AND
THE REPRESENTATIVES OF THE GOVERNMENTS OF THE
MEMBER STATES, MEETING WITHIN THE COUNCIL,

Having regard to the Treaties establishing the European
Communities,

Having regard to the opinion of the European
Parliament ⁽¹⁾,

Having regard to the opinion of the Economic and Social
Committee ⁽²⁾,

Whereas the fight against racism and xenophobia forms part
of the broader context of protecting fundamental rights;
whereas the joint declaration by the European Parliament,
the Council and the Commission on Fundamental Rights
of 5 April 1977 ⁽³⁾ bears witness to the prime importance
that the Community institutions attach to respect for
fundamental rights;

Whereas, in the Single European Act, the Member States
stressed the need to 'work together to promote democracy
on the basis of the fundamental rights recognized in the
constitutions and laws of the Member States, in the
Convention for the Protection of Human Rights and
Fundamental Freedoms and in the European Social Charter,
notably freedom, equality and social justice';

Whereas, in its resolution of 16 July 1985 concerning
guidelines for a Community policy on migration ⁽⁴⁾, the
Council stressed that 'with a view to the harmonious

coexistence of nationals of the Member States and migrant
workers and their families, initiatives should be developed at
Community, Member State and local level to inform and to
promote awareness';

Whereas, in its resolution of 16 January 1986 ⁽⁵⁾, the
European Parliament, noting the recommendations
contained in the Committee of Enquiry's report on the rise
of racism and fascism in Europe, called on 'the Commission,
the Council, the other Community institutions, the
parliamentary committees, the Bureau of the European
Parliament and the governments and parliaments of the
Member States to take the measures necessary to put them
into practice';

Whereas, on 11 June 1986, the European Parliament, the
Council, the Representatives of the Member States, meeting
within the Council, and the Commission, recognizing 'the
existence and growth of xenophobic attitudes, movements
and acts of violence in the Community which are often
directed against immigrants', adopted a declaration against
racism and xenophobia ⁽⁶⁾ 'vigorously condemning all forms
of intolerance, hostility and use of force against persons or
groups of persons on the grounds of racial, religious,
cultural, social or national differences; and looking upon it as
indispensable that all necessary steps be taken to guarantee
that their joint resolve to protect the individuality and dignity
of every member of society and to reject any form of
segregation of foreigners be carried through';

Whereas it behoves the institutions of the Communities and
the competent authorities of the Member States, each in
keeping with its powers, to take the necessary measures to
implement this resolution,

⁽¹⁾ OJ No C 69, 20. 3. 1989, p. 43.

⁽²⁾ OJ No C 23, 30. 1. 1989, p. 33.

⁽³⁾ OJ No C 103, 27. 4. 1977, p. 1.

⁽⁴⁾ OJ No C 186, 26. 7. 1985, p. 3.

⁽⁵⁾ OJ No C 36, 17. 7. 1986, p. 142.

⁽⁶⁾ OJ No C 158, 25. 6. 1986, p. 1.

1. TAKE NOTE of the Commission communication on the fight against racism and xenophobia concerning the implementation of the Interinstitutional Declaration of 11 June 1986 against racism and xenophobia aimed at protecting in that respect everyone within Community territory;

2. RECOGNIZE that acts inspired by racism and xenophobia may be countered by legislative or institutional measures such as the following:

- (a) ratification, by those Member States which have not yet done so, of international instruments contributing to the fight against all forms of racial discrimination;
- (b) recognition, by those Member States which have not yet done so, of the individual petitions referred to:
 - in Article 25 of the European Convention for the Protection of Human Rights and Fundamental Freedoms and
 - in Article 14 of the International Convention on the Elimination of All Forms of Racial Discrimination,
 ratification, if necessary, of the Optional Protocol to the International Covenant on Civil and Political Rights;
- (c) resolute application of laws aimed at preventing or curbing discrimination or xenophobic acts and the preparation of such laws by those Member States which have not yet done so;
- (d) efforts at national, regional and local level to integrate the different communities properly and, where appropriate, promotion of national mediation procedures;
- (e) the granting to the bodies concerned in the fight against racism and xenophobia of the right to institute or support legal proceedings, to the extent that this is compatible with the legal system in the Member State concerned;
- (f) the development of legal assistance, available in accordance with the rules of the legal system of the Member State concerned, to enable those concerned to defend their rights;
- (g) underlining the importance of substantial measures to counter the possible effects on children of discriminatory acts based on racism and xenophobia;

3. CALL UPON the Member States to adopt such measures as they consider appropriate, paying particular attention to those referred to in point 2;

4. CONSIDER that an effective preventive information and education policy is of considerable importance in the fight against racism and xenophobia, and, in this context:

(a) in the field of information:

- (i) note that the Commission, in compliance with Article 4 of the EEC Treaty:
 - will make a comparative assessment of the legal instruments implemented in the various Member States to combat all forms of discrimination, racism and xenophobia and incitement to hatred and racial violence,
 - will contribute to improved dissemination of information on these legal instruments,
 - will promote demoscopic studies on the perception of democratic values and on the state of relations between the various communities living in Europe;

(ii) invite the Member States to:

- draw attention to the role that the media can play in eliminating racial prejudice and promoting harmonious relations between the various communities living in Europe; encourage reflection on information when faced with instances of violence, particularly of a racial nature;

(b) in the field of education and young people:

(i) expect that the action taken to:

- promote a European dimension in education tailored to the specific situation of each Member State, such as will develop civic-mindedness and the values of pluralism and tolerance,
- promote exchange programmes for young people as a means of encouraging tolerance and understanding,
- develop and extend current community cooperation aimed at improving the education of migrant workers' children,

will make a significant contribution to, *inter alia*, reducing xenophobia and promoting and encouraging tolerance and mutual understanding;

(ii) recall the action already taken in this context, namely the:

- resolution of the Council and the Ministers of Education, meeting within the Council, of 24 May 1988 on the European dimension in education ⁽¹⁾,
- Council Decision 88/348/EEC of 16 June 1988 adopting an action programme for the promotion of youth exchanges in the Community — 'Youth for Europe' programme ⁽²⁾,

⁽¹⁾ OJ No C 177, 6. 7. 1988, p. 5.

⁽²⁾ OJ No L 158, 25. 6. 1988, p. 42.

- Council Directive 77/486/EEC of 25 July 1977 on the education of the children of migrant workers ⁽¹⁾,
- actions to promote modern language teaching, actions for the schooling of the children of migrant workers and Community measures for the benefit of their languages and cultures of origin;

(iii) invite the Member States to:

- encourage the civic and vocational training of teachers, particularly in areas with a large

immigrant population, in order to introduce them to the characteristics of the various origins and cultures of their pupils and students,

- encourage knowledge of the languages and cultures of origin;

5. STRESS the importance of all appropriate forms of cooperation between the Community and the Council of Europe;

6. RECOGNIZE the significance of the action, and the initiatives promoted, by the United Nations in the fight against racial discrimination.

⁽¹⁾ OJ No L 199, 6. 8. 1977, p. 32.

Annex IV

Conclusions of the Maastricht European Council (9 and 10 December 1991)

Declaration on racism and xenophobia

The European Council notes with concern that manifestations of racism and xenophobia are steadily growing in Europe, both in the member States of the Community and elsewhere.

The European Council stresses the undiminished validity of international obligations with regard to combating discrimination and racism to which the member States have committed themselves within the framework of the United Nations, the Council of Europe and the CSCE.

The European Council recalls the Declaration against racism and xenophobia issued by the European Parliament, Council and Commission on 11 June 1986 and, reaffirming its Declaration issued in Dublin on 26 June 1990, expresses its revulsion against racist sentiments and manifestations. These manifestations, including expressions of prejudice and violence against foreign immigrants and exploitation of them, are unacceptable.

The European Council expresses its conviction that respect for human dignity is essential to the Europe of the Community and that combating discrimination in all its forms is therefore vital to the European Community, as a community of States governed by the rule of law. The European Council therefore considers it necessary that the Governments and Parliaments of the member States should act clearly and unambiguously to counter the growth of sentiments and manifestations of racism and xenophobia.

The European Council asks Ministers and the Commission to increase their efforts to combat discrimination and xenophobia, and to strengthen the legal protection for third country nationals in the territories of the member States.

Lastly, the European Council notes that, in connection with the upheavals in Eastern Europe, similar sentiments of intolerance and xenophobia are manifesting themselves in extreme forms of nationalism and ethnocentrism. The policies of the Community and its member States towards the countries concerned will aim to discourage strongly such manifestations.

European Communities – Commission

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