Volume 3

2011 Expert workshop on the prohibition of incitement to national, racial or religious hatred

Annex
Case Law
Public Policies

Louis-Leon Christians
(with collaboration of Sophie Minette and Jancy Nounckele)
University of Louvain (Belgium)

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Georgia

Criminal Code 1999,

Articles 109, 117, 126 murder, damage to health, torture due to racial, religious, national or ethnic intolerance

Article 142. Violation of Equality of Humans

1. Violation of equality of humans due to their race, colour of skin, language, sex, religious belonging or profession, political or other opinion, national, ethnic, social, rank or public association belonging, origin, place of residence or material condition that has substantially prejudiced human rights, -
   shall be punishable by fine or by corrective labour for the term not exceeding one year or by imprisonment for up to two years in length.
2. The same action committed:
   a) by using one's official position;
   b) that has produced a grave consequences, -
   shall be punishable by fine or by corrective labour for up to one year in length, by deprivation of the right to occupy a position or pursue a particular activity for up to three years in length or without it.

Article 142-1 : New Article 142-1 was adopted on June 6, 2003 to the Criminal Code of Georgia. It criminalizes any act of racial discrimination committed with the intention of inciting national or racial hatred or conflict, humiliating national dignity, or directly or indirectly restricting human rights or granting advantages on the grounds of race, skin color, social status or national or ethnic affiliation. Deprivation of liberty for up to 3 years is determined as a sanction. The same act, committed with the use of violence that endangers life or health, or with the threat of such violence, or through abuse of one's official position, is punishable by deprivation of liberty for up to 5 years. Article 142-1has been drafted in a broad way and covers all manifestations of racial discrimination including dissemination of racist and xenophobic ideas and materials constituting incitement to discrimination, hatred, or violence and directed to any religion and its followers. This Article applies in all cases of dissemination of such ideas or materials, regardless the means employed for this purpose. Therefore, spreading discriminatory, racist and xenophobic ideas by means of print, audio-visual and electronic media, including Internet is equally prohibited and criminalized.

Article 156. Persecution

1. Persecution for speech, opinion, conscience, religious denomination, faith or creed or political, public, professional, religious or scientific pursuits, -
   shall be punishable by restriction of freedom for up to two years in length or by imprisonment similar in length.
2. The same action:
   a) under violence or threat of violence;
   b) by using one's official position;
   c) that has resulted in a substantial damage, -
   shall be punishable by fine or by restriction of freedom for up to three months in length or by jail sentence for up to four years in length or by imprisonment for up to three years in length, by deprivation of the right to occupy a position or pursue a particular activity for the term up to three years or without it.

Art. 407 genocide

Case Law

CONSEIL DE L'EUROPE

COUNCIL OF EUROPE

COUR EUROPÉENNE DES DROITS DE L'HOMME
EUROPEAN COURT OF HUMAN RIGHTS

ANCIENNE DEUXIÈME SECTION

AFFAIRE MEMBRES DE LA CONGRÉGATION DES TÉMOINS DE JÉHOVAH DE GLDANI ET AUTRES c. GÉORGIE

(Requête n° 71156/01)

ARRÊT

STRASBOURG

3 mai 2007

DÉFINITIF

03/08/2007

Cet arrêt deviendra définitif dans les conditions définies à l'article 44 § 2 de la Convention. Il peut subir des retouches de forme.

En l'affaire Membres de la Congrégation des témoins de Jéhovah de Gldani et autres c. Géorgie,

La Cour européenne des droits de l'homme (ancienne deuxième section), siégeant en une chambre composée de :

Jean-Paul Costa, *président,*
András Baka,
Loukis Loucaides,
Corneliu Bîrsan,
Karel Jungwiert,
Mindia Ugrekhelidze,
Antonella Mularoni, *juges,*
et de Sally Dollé, *greffière de section,*

Après en avoir délibéré en chambre du conseil le 6 juillet 2004 et le 3 avril 2007,

Rend l'arrêt que voici, adopté à cette dernière date :

PROCÉDURE

1. A l'origine de l'affaire se trouve une requête (n° 71156/01) dirigée contre la Géorgie et dont des ressortissants de cet Etat, 97 membres de la Congrégation des témoins de Jéhovah de Gldani[1] ainsi que M. V. Kokossadzé, Mme N. Lélachvili, M. A. Khitarichvili et Mme L. Djikourachvili (« les requérants »), ont saisi la Cour le 29 juin 2001 en vertu de l'article 34 de la Convention de sauvegarde des droits de l'homme et des libertés fondamentales (« la Convention »).

2. Les requérants ont été représentés devant la Cour par Me A. Carbonneau, membre du barreau de Québec, Canada, et du barreau arménien, et par Me M. Tchabachvili, membre du cabinet juridique « Légalité et Justice dans le Caucase ». Le gouvernement géorgien (« le Gouvernement ») a été successivement représenté par MM. K. Korkélia et L. Tchélidzé, Mmes T. Bourdjaliani et E. Gouréchidzé, représentants généraux du gouvernement géorgien auprès de la Cour, auxquels a succédé le 1er septembre 2005 Mme I. Bartaïa, agente du Gouvernement.

3. Les requérants alléguaient en particulier que, attaqués par un groupe de religieux orthodoxes extrémistes dirigés par M. Vassil Mkalavichvili, prêtre défroqué, ils avaient été roués de coups et, pour certains d'entre eux, blessés. Ils se plaignaient qu'aucune enquête effective n'eût été conduite et que les auteurs de cette attaque fussent restés impunis.

1. Cités dans l'annexe au présent document.

4. La requête a été attribuée à la deuxième section de la Cour (article 52 § 1 du règlement de la Cour). Au sein de celle-ci, la chambre chargée d'examiner l'affaire (article 27 § 1 de la Convention) a été constituée conformément à l'article 26 § 1 du règlement.

5. Par une décision du 6 juillet 2004, la chambre a déclaré la requête partiellement recevable.

6. Le 1er novembre 2004, la Cour a modifié la composition de ses sections (article 25 § 1 du règlement). La présente requête a été attribuée à la deuxième section ainsi remaniée (article 52 § 1).

7. Les requérants ainsi que le Gouvernement ont déposé des observations écrites complémentaires (article 59 § 1 du règlement).

8. Des négociations en vue d'un règlement amiable de l'affaire (articles 38 § 1 b) de la Convention et 62 du règlement) ont été menées du 20 juillet au 9 novembre 2005, mais elles n'ont pas abouti. En janvier 2007, le Gouvernement n'a pas donné suite à l'ultime tentative faite par les requérants pour régler l'affaire à l'amiable.

EN FAIT

I. LES CIRCONSTANCES DE L'ESPÈCE

9. Les requérants sont 97 membres de la Congrégation des témoins de Jéhovah de Gldani (« la Congrégation »)[1] ainsi que M. Vladimer Kokossadzé, Mme Nino Lélachvili, M. Alexi Khitarichvili et Mme Leïla Djikourachvili, également membres de ladite Congrégation et résidant à Tbilissi. Il apparaît que M. Vladimer Kokossadzé est par ailleurs le porte-parole de la Congrégation.

10. Les faits de la cause, tels qu'ils ont été exposés par les parties, peuvent se résumer comme suit.

11. Lors d'une réunion religieuse tenue le 17 octobre 1999, la Congrégation, composée de cent vingt personnes, fut attaquée par un groupe de religieux orthodoxes dirigés par M. Vassil Mkalavichvili (« le père Basile »). Celui-ci avait été prêtre de l'Eglise orthodoxe autocéphale de Géorgie avant d'être défroqué par elle le 31 juillet 1995 à la suite de son adhésion à la ligue des prêtres séparatistes de Grèce. Le Synode lui avait reproché également différents actes d'agression physique commis envers des membres de l'Eglise orthodoxe ainsi que des insultes proférées à l'égard du Catholicos Patriarche de toute la Géorgie.

1. Cités dans l'annexe au présent document.

12. Toujours le 17 octobre 1999, vers midi, l'un des requérants, M. Miriane Arabidzé, vit le groupe du père Basile, composé de plusieurs dizaines de personnes, atteindre l'entrée de service du théâtre où la Congrégation tenait sa réunion.

13. M^me^ Nounou Gviniachvili, requérante, fait état de la peur des membres de la Congrégation, qui avaient tous vu auparavant à la télévision des scènes d'agression de témoins de Jéhovah par le père Basile et ses partisans.

14. Les agresseurs, dont certains portaient des soutanes, hurlaient et avançaient en brandissant de grandes croix en fer et des bâtons. L'un d'eux (M^me^ Lia Akhalkatsi, selon les requérants) filmait cette avancée. Lorsque les agresseurs atteignirent la porte arrière de la salle de réunion, plusieurs témoins de Jéhovah, dont M. Miriane Arabidzé, essayèrent de maintenir la porte fermée jusqu'à ce que les autres participants quittent la salle par la porte d'entrée principale. Or, entre-temps, certains partisans du père Basile étaient également arrivés devant l'entrée principale du bâtiment, de sorte que les témoins de Jéhovah se retrouvèrent bloqués entre deux groupes d'agresseurs. Seuls certains d'entre eux purent se réfugier dans la cave et appeler la police de leurs téléphones portables.

15. Dans la salle, une soixantaine de témoins de Jéhovah furent frappés avec des croix, des bâtons et des ceintures.

16. M. Miriane Arabidzé fut également battu et, lorsqu'il tomba à terre, l'agresseur (M. Mikhéil Nikolozichvili, selon les requérants) lui dit qu'« [il allait] bien mourir pour Jéhovah ! ». Il ressort de l'enregistrement de l'attaque (paragraphe 35 ci-dessous) que plusieurs hommes, armés de bâtons, encerclèrent ce requérant qui se couvrit aussitôt la tête avec les mains, mais qui, sous les coups, tomba à terre. Il reçut alors des coups de pied à la tête et au dos.

17. M^me^ Roza Kinkladzé, requérante, fut frappée au visage, à la tête et au dos. M^me^ Nathéla Kobaïdzé, requérante, reçut un coup au visage et le sang coula de ses lèvres. Elle eut également une entorse au pouce. M^me^ Nino Djanachvili, requérante, fut frappée et poussée dans les escaliers. Tombée à terre, elle aperçut M^mes^ Nino Gnolidzé, Nino Lélachvili et Nora Lélachvili, requérantes, gisant à terre, évanouies. M^me^ Lia Bakhoutachvili, requérante, fut attaquée par trois femmes et par un jeune prêtre qui la rouèrent de coups de pied, déchirèrent ses vêtements et la traînèrent par les cheveux. Le même prêtre asséna des coups de croix et de bâton à M^me^ Nora Lélachvili, requérante, qui s'évanouit. La fille de celle-ci, Nino Lélachvili, requérante, fut traînée par terre, reçut des coups de pied au visage et fut flagellée à coups de ceinture jusqu'à ce qu'elle perdît connaissance. M. Merab Jijilachvili, requérant, se vit administrer des coups de bâtons et de poing. Tombé à terre, il fut roué de coups de pied et ses vêtements furent déchirés. M^me^ Ia Tchamaouri, requérante, reçut des coups de ceinture à la tête. M. Vladimer Kokossadzé, requérant, fut également battu sans merci par six

hommes. Néanmoins, il réussit à négocier avec le père Basile et le bras droit de celui-ci, M. P. Ivanidzé, l'autorisation de quitter le bâtiment pour trente femmes et enfants enfermés dans le bureau du directeur du théâtre. On les laissa sortir, mais ils furent suivis et agressés dans la rue.

18. M. Alexi Khitharichvili, requérant, fut battu et, après être tombé à terre, fut piétiné. Ses lunettes furent cassées. Il ressort de l'enregistrement de l'attaque (paragraphe 35 ci-dessous) que plusieurs hommes maintinrent ce requérant debout, lui rasèrent la tête en déclamant « au nom du Père et du Fils et du Saint-Esprit ! ». N'ayant pas réussi à le raser complètement, les agresseurs, vexés, continuèrent de l'insulter et de le frapper. Entendant au loin les cris de sa mère qui était attaquée par un groupe de femmes, il perdit conscience.

19. Les hommes, femmes et enfants ensanglantés quittèrent le bâtiment en courant. Seize victimes furent aussitôt hospitalisées.

20. M^me^ Patman Thabagari, requérante, eut la rétine d'un œil endommagée à vie en raison des coups de pied reçus à la tête. Elle fut hospitalisée du 17 au 21 octobre 1999. Lors de son hospitalisation, elle saignait de l'œil. Selon le rapport de l'expertise médicale réalisée du 29 octobre au 2 novembre 1999, elle souffrait d'un traumatisme crânien et présentait des hématomes et des blessures, et des contusions à l'œil droit.

21. Des extraits des carnets de santé de certains requérants, faisant état de l'examen médical subi lors de l'hospitalisation, ont été produits devant la Cour. Ils renferment les observations suivantes :

– M. Ilia Mantskava : douleurs au front et à l'œil gauche ;

– M. Vladimer Kokossadzé : blessure au crâne, hématomes au front et contusion à la poitrine ;

– M. Alexi Khitarichvili : hématomes au dos et à la poitrine ; saignements au dos lors de son hospitalisation ;

– M^me^ Nino Lélachvili : blessure au crâne, hématomes à la nuque, maux de tête et douleurs dans le dos ;

– M^me^ Ia Tchamaouri : blessure au crâne, côté gauche de la tête enflé, hématomes et maux de tête ;

– M. Miriane Arabidzé : blessure au crâne, contusion à la main droite, contusions à la lèvre supérieure, maux de tête et congestion au niveau des yeux ;

– M^me^ Zaïra Djikourachvili : blessure au crâne, hématomes et maux de tête ;

– M. Merab Jijilachvili : blessure à la tête au niveau du visage, yeux enflés et maux de tête ;

– M^me^ Nora Lélachvili : blessure au crâne, hématomes autour des yeux et congestion au niveau de l'oreille droite.

22. Quatorze des quinze requérants mentionnés aux paragraphes 16 à 18 et 20 et 21 ci-dessus (à l'exception de M^me^ Nino Gnolidzé) ainsi que quarante-quatre autres (paragraphes 23, 24, 26 et 27 ci-dessous) décrivent les circonstances de leur agression le 17 octobre 1999.

23. Il ressort de ces témoignages que MM. Nodar Kholod et Tenguiz Djikourachvili, ainsi que M^mes^ Béla Kakhichvili, Lia Mantskava, Khathouna Kerdzévadzé, Eléné Mamoukadzé, Nana Pilichvili, Makvala Mamoukadzé, Ether Tchrélachvili, Lamara Mtchédlichvili, Nana Kapanadzé, Pikria Tsariélachvili, Nani Kobaïdzé et Lili Kobéssova furent également battus.

24. Pour ce qui est des autres requérants, M^me^ Izolda Pourtséladzé fut traînée par les cheveux. M^me^ Ia Vardanichvili fut frappée au dos et, à l'instar de ses enfants, traînée par les cheveux. M. Djoumber Bgarachvili fut frappé à la tête et blessé au nez. M^me^ Leïla Mtchédlichvili reçut un coup de coude violent et trébucha dans les escaliers, elle fut aussi frappée à la tête. M^me^ Leïla Tsaritov fut traînée par les cheveux. M^me^ Raïssa Maïssouradzé fut elle aussi traînée par les cheveux et ses agresseurs la frappèrent après lui avoir tordu les bras derrière le dos ; son fils fut grièvement blessé et poussé dans les escaliers. M^me^ Kéthino Kiméridzé fut tirée par les cheveux et frappée. M^me^ Amalia Ardgomélachvili fut traînée par les cheveux et, après l'agression, elle s'évanouit. M^me^ Nathia Milachvili fut frappée et reçut des coups violents à la tête. M^me^ Iza Khitarichvili, encerclée par sept femmes, fut traînée par les cheveux et battue. M. Chotha Maïssouradzé fut battu par plusieurs hommes.

25. Il ressort de la grande majorité des témoignages que Kakha Kochadzé, fils de M^me^ Lia Bakhoutachvili (paragraphe 17 ci-dessus), a reçu des coups violents à la tête et au ventre et qu'il a perdu conscience. Les médecins de l'hôpital n^o^ 1 de Tbilissi constatèrent par la suite que l'intéressé avait une blessure au crâne et des côtes cassées.

26. M^mes^ Lamara Arsénichvili, Eléné Djodjoua, Kétévane Djanachvili, Thina Makharachvili, Dodo Kakhichvili, Lali Khitarichvili, Nounou Gviniachvili, Néli Guiorgadzé, Eka Kerdzévadzé, Darédjane Kotranova, Lia Sidamonidzé, Cécile Gagnidzé et Chakhina Charipov et MM. Romiko Zourabachvili, Amirane Arabidzé, Zakro Kotchichvili, Djamboul Arabidzé et Datho Gvaramia, requérants, déclarent avoir échappé à l'agression physique. Toutefois, les enfants de M^mes^ Lia Sidamonidzé et Cécile Gagnidzé furent également battus.

27. Sans affirmer avoir été elle-même physiquement agressée, M^me^ Leïla Djikourachvili allègue que sa fille de dix ans a été traînée par les cheveux, que son fils de onze ans a reçu une gifle et un coup de poing à la tête et que son fils handicapé de sept ans a été agressé.

28. M. Amirane Arabidzé indique que, dès le début de l'attaque, il a réussi à quitter le bâtiment pour se rendre à la police. M^me^ Eka Kerdzévadzé déclare qu'après avoir échappé à l'agression elle s'est rendue avec son mari à la police du sous-district III de Gldani où elle a informé les policiers que les

témoins de Jéhovah faisaient l'objet d'une attaque violente dans le bâtiment du théâtre. Les policiers se sont limités à enregistrer cette déclaration sans toutefois décider d'intervenir. M^me^ Lia Sidamonidzé affirme également s'être rendue au même commissariat de police avec plusieurs autres témoins de Jéhovah. Le chef du commissariat aurait répondu : « à la place des agresseurs, j'aurais fait pire avec les témoins de Jéhovah ! ». Alors qu'il fuyait le lieu de l'agression, M. Vladimer Kokossadzé a rencontré sur la route trois policiers qui, après avoir écouté sa demande d'intervention, ont répondu qu'ils « ne [se] mêl[eraient] pas de ce genre d'affaires ».

29. Toutefois, selon M^mes^ Leïla Mtchédlichvili, Dodo Kakhichvili, Makvala Mamoukadzé et Chakhina Charipov, ce n'est que lorsque la police est arrivée sur place que les témoins de Jéhovah, toujours bloqués dans le bâtiment du théâtre, ont pu s'en échapper. D'après M^me^ Chakhina Charipova, l'une des victimes est accourue vers un policier en lui montrant la main à laquelle le père Basile l'avait blessée d'un coup de croix et en lui disant : « Regardez ce que Basile vient de me faire ! ».

30. Tous les requérants déclarent que les victimes qui réussissaient à fuir le bâtiment en courant se trouvaient confrontées à un cordon de partisanes du père Basile devant la porte de sortie. Ces femmes étaient chargées de contenir les victimes et de les refouler vers l'intérieur, où les actes d'agression se poursuivaient. Par ailleurs, elles fouillaient les victimes au corps et retournaient leurs poches et sacs. Les bibles, ouvrages religieux et tracts étaient alors confisqués et jetés dans le feu brûlant à proximité. Les victimes étaient maintenues devant le feu et forcées à le regarder. Lors de la fouille, les sacs à main étaient déchirés et jetés par terre. M^me^ Makvala Mamoukadzé, requérante, s'est vu arracher son sac à main qui contenait de l'argent, les clés de son appartement, une bible et sa montre. Ces objets ne lui ont jamais été rendus. Les agresseurs auraient volé d'autres affaires personnelles des victimes, tels des bijoux et appareils photo.

31. Les cinquante-huit requérants (paragraphe 22 ci-dessus) sans exception se plaignent d'avoir été insultés, verbalement agressés et traités de tous les noms, dont « traîtres » et « vendeurs de la patrie pour un sac de riz ». La majorité des requérants affirment que les agresseurs sentaient l'alcool.

32. Les requérants mentionnés aux paragraphes 23, 24, 26 et 27 ci-dessus confirment les actes d'agression dont furent victimes leurs quinze compagnons cités aux paragraphes 16 à 18 et 20 et 21 ci-dessus, qui furent les plus violemment attaqués.

33. S'étant rendue sur les lieux, la police décida de conduire M. Miriane Arabidzé au commissariat où il fut insulté par des policiers. Le père Basile et son partisan Mikheil Nikolozichvili, également présents au commissariat, tentèrent d'agresser à nouveau la victime.

34. Un enregistrement de l'attaque du 17 octobre 1999 fut diffusé sur les chaînes nationales de télévision « Roustavi-2 » et « Kavkassia » les 17, 18

et 19 octobre 1999. Le père Basile et M. P. Ivanidzé, ainsi que d'autres membres de leur groupe, y étaient parfaitement identifiables. Leurs noms furent également donnés par les victimes aux autorités compétentes.

35. L'enregistrement du journal télévisé diffusé sur la chaîne « Roustavi-2 » le 18 octobre 1999, produit devant la Cour par les requérants, illustre l'attaque telle qu'exposée ci-dessus. Il n'en ressort pas que les requérants aient rétorqué aux actes d'agression physique dirigés contre eux. L'enregistrement montre des livres en train de brûler pendant que le père Basile et ses partisans prient et chantent. Il comporte également un extrait de l'interview avec le père Basile qui, se tenant devant ce feu, explique le bien-fondé de ses actes, dont il se dit satisfait.

36. Dans plusieurs entretiens ultérieurs, le père Basile affirma lui-même qu'avant de se rendre sur un site il prévenait la police et les services de sécurité de l'Etat pour que ceux-ci n'interviennent pas. Cette complicité est d'ailleurs relevée par des organisations non gouvernementales dans une déclaration conjointe du 13 mars 2001 (paragraphe 76 ci-dessous).

37. Interrogé après l'attaque des requérants, le Président géorgien déclara qu'il condamnait les pogroms de toute sorte et qu'une enquête devait être conduite pour que les auteurs des agressions soient poursuivis pénalement.

38. Entre le 17 et le 29 octobre 1999, quelque soixante-dix victimes de l'attaque du 17 octobre 1999, dont les cinquante-huit requérants cités aux paragraphes 16 à 18 (à l'exception de M^me^ Nino Gnolidzé) et 20, 21, 23, 24, 26 et 27 ci-dessus, portèrent plainte auprès du procureur de la ville de Tbilissi, décrivant en détail les actes de violence litigieux, et demandèrent que les auteurs fussent punis.

39. L'action publique fut mise en mouvement par l'organe d'enquête du ministère de l'Intérieur du district de Gldani, mais les poursuites furent suspendues d'abord le 13 septembre, puis le 3 décembre 2000, au motif que les auteurs de l'attaque n'avaient pas été identifiés. Lors de l'ultime reprise de la procédure en mars-avril 2001 (paragraphe 63 ci-dessous), l'enquêteur K. fit comprendre aux victimes qu'elles ne devaient pas s'attendre à un résultat durant l'année 2001. Malgré cinq rappels adressés au procureur général de Géorgie, dont le dernier en date du 8 mars 2001, aucune suite ne fut donnée à ces plaintes.

40. Devant la Cour, les requérants relatent cette procédure chronologiquement.

Par des ordonnances des 22, 25 et 27 octobre et 5 décembre 1999, seuls onze requérants furent reconnus parties civiles par l'organe d'enquête du ministère de l'Intérieur du district de Gldani (affaire pénale n^o^ 0999140) – M. Miriane Arabidzé et M^me^ Nora Lélachvili pour dommage physique et moral, M. Ilia Mantskava pour dommage physique et matériel, M^me^ Makvala Mamoukadzé pour dommage matériel, M^me^ Zaïra Djikourachvili pour dommage matériel et moral, M^mes^ Nathéla Kobaïdzé, Patman Thabagari, Nino Lélachvili et Ia Tchamaouri et M. Chotha

Maïssouradzé pour dommage physique et M. Vladimer Kokossadzé pour dommage physique, matériel et moral.

41. Le 9 décembre 1999, l'affaire fut transmise pour complément d'enquête à la police de la ville de Tbilissi. Le 25 décembre 1999, elle fut renvoyée au parquet du district de Gldani. Le 14 janvier 2000, elle fut soumise au parquet de la ville de Tbilissi.

42. Le 26 janvier 2000, l'avocat de M[mes] Nathéla Kobaïdzé, Patman Thabagari, Nino Lélachvili, Ia Tchamaouri, Nora Lélachvili et Zaïra Djikourachvili et de MM. Miriane Arabidzé, Vladimer Kokossadzé, Merab Jijilachvili, Alexi Khitarichvili, Ilia Mantskava et Djoumber Bgarachvili adressa une plainte au procureur de la ville de Tbilissi, soutenant que l'affaire était inutilement renvoyée d'un service à l'autre et que le parquet ne le tenait pas informé.

43. Le 31 janvier 2000, le même avocat saisit le procureur de la ville de Tbilissi et le procureur général d'une plainte concernant l'absence de poursuites pénales contre les auteurs de l'attaque, arguant de ce que l'impunité encourageait d'autres actes de violence.

44. Le 31 janvier 2000, le parquet de la ville de Tbilissi renvoya l'affaire à la police de cette même ville. L'enquêteur de police, M. Kh., déclara qu'étant chrétien orthodoxe il ne pourrait pas être impartial dans cette affaire.

45. M. Kh. conduisit toutefois le 20 avril 2000 une séance d'identification et des interrogatoires croisés de quatre personnes, dont M. Mikhéil Nikolozichvili, agresseur présumé de M. Miriane Arabidzé, requérant. Lors de l'interrogatoire, M. Nikolozichvili menaça à nouveau le requérant, qui identifia M. Nikolozichvili ainsi qu'une autre personne comme étant ses agresseurs.

46. Le 13 juin 2000, M. Kh. informa M. Miriane Arabidzé que, par une décision du 9 juin 2000, il avait été lui-même mis en examen du chef de participation à l'attaque.

47. Le même jour, deux partisanes du père Basile (M[mes] Tsiouri Mghébrichvili et Déspiné Chochitaïchvili), soupçonnées d'avoir brûlé les ouvrages religieux à l'issue de l'attaque, furent également mises en examen.

48. Le 13 septembre 2000, la procédure pénale engagée à la suite de l'attaque des requérants fut suspendue par l'organe d'enquête du district de Gldani, faute d'identification des agresseurs. Cette décision ne fut pas notifiée aux requérants, qui n'eurent donc pas la possibilité de la contester devant les tribunaux.

49. Le même jour, l'avocat mentionné au paragraphe 42 ci-dessus se plaignit au procureur général de l'impunité des auteurs de l'attaque après un an de procédure.

50. Le 24 octobre 2000, la décision du 13 septembre 2000 fut annulée par le parquet de la ville de Tbilissi et les poursuites pénales reprirent. Les requérants n'en furent pas informés.

51. Le 3 décembre 2000, la procédure fut à nouveau suspendue au motif que les auteurs présumés n'avaient pas pu être identifiés. Les requérants n'en furent pas informés. Le 6 décembre 2000, cette décision fut entérinée par le parquet général.

52. Entre-temps, à la suite de sa mise en examen (paragraphe 46 ci-dessus), M. Miriane Arabidzé avait été inculpé d'actes portant atteinte à l'ordre public commis lors de l'attaque litigieuse, notamment de l'« utilisation d'un objet comme arme » contre autrui.

53. Le 16 août 2000, le procès pénal de M. Miriane Arabidzé et de deux partisanes du père Basile (paragraphe 47 ci-dessus) s'ouvrit devant le tribunal de première instance de Gldani-Nadzaladévi de Tbilissi. L'une des accusées confirma qu'elle avait brûlé des livres, comme sa foi et le père Basile le lui avaient commandé. Elle déclara qu'elle était prête à tuer au nom de la religion orthodoxe.

54. Dans l'après-midi, un groupe de religieux dirigés par le père Basile fit irruption dans la salle d'audience. Ils agressèrent les témoins de Jéhovah, les journalistes et les observateurs étrangers présents dans la salle. Ils portaient des croix en fer qu'ils utilisaient comme armes. Ils prirent le contrôle de la salle. Le tribunal ne devait prononcer aucune sanction contre les religieux qui firent preuve de violence à cette occasion.

55. Le film de cette attaque fut diffusé sur les chaînes de télévision « Roustavi-2 » et « Kavkassia ». Il ressort notamment de l'enregistrement d'un journal télévisé diffusé les 16 et 17 août 2000 (produit devant la Cour par les requérants) que, le premier jour, les agressions eurent lieu à l'intérieur de la salle d'audience. On voit le père Basile entrer dans la salle pendant l'audience avec quelques dizaines de ses partisans (quatre-vingts personnes, selon le journaliste) portant une grande croix blanche, des icônes et une cloche qu'un des agresseurs (M. Z. Lomthathidzé, selon les requérants) fait carillonner, alors que les autres attaquent les témoins de Jéhovah, leurs avocats et des observateurs étrangers. Les victimes sont expulsées à coups de poing de la salle. Le lendemain, MM. D.P. et G.B., deux défenseurs des droits de l'homme, sont roués de coups de pied à l'extérieur de la salle et les avocats de M. Miriane Arabidzé sont agressés.

56. A l'issue de ce procès, le 28 septembre 2000, M. Miriane Arabidzé fut reconnu coupable d'actes portant atteinte à l'ordre public commis lors de l'attaque de la Congrégation le 17 octobre 1999 et condamné à trois ans d'emprisonnement avec sursis pour blessures légères infligées à M. M. Nikolozichvili et à un autre membre du groupe du père Basile.

57. Le même jour, le juge décida de ne pas se prononcer sur la culpabilité des deux partisanes du père Basile et de renvoyer cette partie de l'affaire pour complément d'information, afin d'éclaircir notamment qui étaient les propriétaires des ouvrages détruits, quelle en était la valeur et quel était le statut juridique de l'entité ayant réuni les témoins de Jéhovah le 17 octobre 1999.

58. Le 14 mai 2001, la cour d'appel de Tbilissi infirma le jugement de condamnation de M. Miriane Arabidzé et renvoya l'affaire pour complément d'enquête.

59. Le 11 octobre 2001, la Cour suprême de Géorgie annula l'arrêt d'appel et relaxa M. Miriane Arabidzé. Dans son arrêt, elle jugea « établi » que, le 17 octobre 1999, le groupe du père Basile s'était rendu sur le site de Gldani de sa propre initiative et qu'un affrontement entre « personnes de différentes convictions religieuses avait eu lieu. Lors de cet incident, plusieurs personnes avaient été blessées et les ouvrages religieux des témoins de Jéhovah avaient été brûlés ». La Cour suprême estima que la réunion de Gldani n'avait constitué aucun danger pour l'ordre public. Elle constata que les autorités n'avaient décidé d'aucune restriction à cet égard et que, par conséquent, le père Basile n'était pas fondé à s'ingérer dans l'exercice par M. Miriane Arabidzé de son droit garanti par l'article 9 de la Convention et par l'article 19 de la Constitution.

60. Entre-temps, le 13 février 2001, quatorze volumes de pétitions exigeant la protection des témoins de Jéhovah furent déposés auprès du cabinet du Président géorgien. L'attaque des requérants, ainsi que d'autres actes de violence motivés par la religion, furent portés à la connaissance du chef de l'Etat. Par un décret du 22 mars 2001, le Président ordonna au parquet général, au ministère de l'Intérieur et au ministère de la Sécurité de l'Etat de prendre des mesures spéciales afin de mettre fin aux infractions liées à la religion, d'identifier leurs auteurs et de sanctionner les coupables.

61. Le 15 mars 2001, après avoir examiné les plaintes relatives aux actes de violence perpétrés « depuis des années » par le père Basile et M. P. Ivanidzé, le parquet général décida de les joindre et ordonna l'instruction de ce dossier (n° 0100118). Le 30 mars 2001, le père Basile fut mis en examen pour avoir organisé des actions collectives portant atteinte à l'ordre public et pour y avoir participé (article 226 du code pénal), ainsi que pour avoir empêché illégalement l'accomplissement de rites religieux (article 155 § 1 du code pénal).

62. Le 2 avril 2001, l'instructeur chargé de l'affaire saisit le tribunal de première instance de Vaké-Sabourthalo de Tbilissi, sollicitant l'application d'une mesure de détention provisoire à l'égard du père Basile. Le juge ne fit pas droit à cette demande, mais ordonna une mesure préventive plus légère, à savoir le contrôle judiciaire.

63. En réponse à sa lettre du 8 mars 2001 dans laquelle il demandait dans quel service se trouvait le dossier et quel en était l'état d'avancement, l'avocat des requérants fut informé, le 26 avril 2001, que la procédure avait à nouveau été relancée. Il apprit également qu'elle avait été suspendue le 3 décembre 2000 (paragraphe 51 ci-dessus). Le même jour, M^me^ Patman Thabagari et M. Vladimer Kokossadzé, requérants, furent eux aussi avisés par écrit de la reprise de la procédure.

64. Le 8 mai 2001, l'enquêteur informa l'avocat des victimes qu'il n'aurait pas le temps de se pencher sur l'affaire avant décembre 2001.

65. Le 4 octobre 2001, plusieurs affaires furent disjointes du dossier n° 0100118 pour être instruites sous le numéro 1001837 (attaque dans le bureau de la médiatrice de la République, attaque contre le journal « Rézonansi », et autres incidents). Dans ces affaires, le père Basile et M. P. Ivanidzé furent mis en accusation par le procureur de la ville de Tbilissi.

66. Les requérants déclarent que, dans l'émission « 60 minutes » de septembre 2000 diffusée sur la chaîne de télévision « Roustavi-2 », un journaliste qui interrogeait le père Basile lui fit remarquer qu'on l'avait vu entrer plusieurs fois dans le bâtiment du ministère de la Sécurité de l'Etat. Le père Basile répondit :

> « (...) Au KGB, non (...) Sauf en ce qui concerne une attaque contre les témoins de Jéhovah. Ils croyaient que j'allais faire quelque chose d'autre et je suis allé leur expliquer que c'était pour aller à Marnéouli attaquer les témoins. C'est la seule fois. (...) Je les préviens toujours. Je le fais bien sûr et, s'ils sont assez courageux, ils viennent me rejoindre. S'ils ne me soutiennent pas, ils auront ce qu'ils méritent. »

67. Le 11 mai 2001, dans un entretien diffusé sur la chaîne « Roustavi-2 », le père Basile s'exprima ainsi :

> « Je préviens sérieusement la population de toute la Géorgie et, surtout, les représentants de la secte des témoins de Jéhovah, qu'ils ne devront ni se réunir ni tenir leurs rencontres sataniques. Même si l'on m'interdit d'aller les voir comme je le faisais jusqu'ici pour empêcher leurs réunions, je déclare publiquement que je ne me montrerai pas, mais que les membres de ma paroisse viendront et que vont commencer des pogroms terribles. Nous le ferons parce qu'ils sont parachutés par des forces étrangères suspectes et anti-chrétiennes pour détruire la Géorgie. Ils ne devraient donc plus être tolérés. »

68. En dehors de l'incident du 17 octobre 1999, mis en cause en l'espèce, les requérants décrivent plusieurs attaques perpétrées par le père Basile et son groupe pour montrer le contexte général dans lequel la communauté religieuse des témoins de Jéhovah fut amenée à vivre. Il cite notamment les attaques des 8 et 16 septembre 2000 à Zougdidi et à Marnéouli auxquelles, selon eux, des représentants de l'Etat participèrent directement (*Béghélouri et 98 autres c. Géorgie*, n° 28490/02, requête pendante) ; l'attaque dirigée contre le bureau de la médiatrice de la République le 22 janvier 2001 ; l'attaque perpétrée lors du rassemblement des témoins de Jéhovah tenu le 22 janvier 2001 chez un particulier dans l'impasse de Varkhana à Tbilissi ; l'attaque menée contre des témoins de Jéhovah le 27 février 2001 lors de leur rassemblement chez un particulier dans le district du mont Elia à Tbilissi ; l'attaque dont firent l'objet des témoins de Jéhovah réunis les 5 et 6 mars 2001 dans une propriété privée à Satchkhéré ; l'attaque, le 30 avril 2001, du nouveau local de rassemblement des témoins de Jéhovah dans l'impasse de Verkhana à Tbilissi ; l'incendie, le 31 mai 2001 à l'aube, de la

maison d'une famille de témoins de Jéhovah, dont il ne resta qu'un grand tas de cendres et de débris.

Le père Basile déclara à propos de certaines de ces attaques qu'il avait auparavant prévenu la police. A chacune de ces occasions, les lieux de réunion et la littérature religieuse furent détruits.

69. Les requérants considèrent que ces actes de violence sont la conséquence directe de la négligence dont ont fait preuve les autorités à l'égard de l'agression perpétrée contre leur Congrégation le 17 octobre 1999. D'après eux, en laissant ce dangereux précédent d'agression à motif religieux se produire sans que les autorités compétentes réagissent, l'Etat a laissé la situation s'enliser et les actes de violence s'enchaîner en toute impunité. Les services des douanes auraient confisqué plusieurs fois la littérature religieuse des témoins de Jéhovah en provenance de l'étranger et des propriétaires auraient refusé de louer à ceux-ci des salles de réunion, de peur que leurs biens ne soient saccagés lors d'une éventuelle agression.

70. En tout, entre octobre 1999 et novembre 2002, les témoins de Jéhovah auraient fait l'objet de 138 attaques violentes et 784 plaintes auraient été déposées auprès des autorités compétentes. Aucune de ces plaintes n'aurait fait l'objet d'une enquête diligente et sérieuse.

II. LA RÉACTION DES ORGANISATIONS INTERNATIONALES, DES DÉFENSEURS DES DROITS DE L'HOMME ET DE LA COMMUNAUTÉ INTERNATIONALE

71. La Résolution 1257 (2001) de l'Assemblée parlementaire du Conseil de l'Europe énonce notamment :

> « 11. L'Assemblée (...) est (...) extrêmement inquiète par les cas répétés de violence perpétrée par des extrémistes orthodoxes contre les croyants appartenant à des groupes religieux minoritaires tels que les témoins de Jéhovah et les baptistes.
>
> 12. L'Assemblée demande instamment aux autorités géorgiennes de mener une enquête sur tous les cas de violation des droits de l'homme et d'abus de pouvoir, de poursuivre leurs auteurs quelles que soient leurs fonctions, et d'adopter des mesures radicales pour mettre définitivement le pays en conformité avec les principes et normes du Conseil de l'Europe. »

72. Les passages pertinents des Conclusions et recommandations du Comité des Nations unies contre la torture datées du 7 mai 2001 sont ainsi libellés :

> « Le Comité est préoccupé par (...) [l]es actes collectifs de violence contre les minorités religieuses, en particulier les Témoins de Jéhovah, et l'incapacité de la police à intervenir et à prendre des mesures appropriées, malgré l'existence d'outils juridiques pour prévenir et poursuivre de tels agissements et le risque de voir cette impunité apparente aboutir à leur généralisation ; (...) ».

73. La présidente de la délégation du Parlement européen aux commissions de coopération parlementaires Union européenne-Géorgie, M^me^ Ursula Schleicher, a déclaré le 5 septembre 2000 :

> « Au nom de la délégation du Parlement européen, je tiens à exprimer ma consternation devant la dernière d'une série de violentes agressions dirigées contre des journalistes, des défenseurs des droits de l'homme et des témoins de Jéhovah, qui a eu lieu dans un tribunal à Tbilissi le 16 août. Je considère qu'un tel acte constitue une attaque intolérable contre les droits de l'homme, que la Géorgie s'est engagée à défendre en tant que signataire de la Convention européenne de sauvegarde des droits de l'homme et des libertés fondamentales. Permettez-moi de rappeler que, lors de sa réunion du 9 mai 2001, la commission de coopération parlementaire Union européenne-Géorgie a condamné l'intolérance religieuse et l'extrémisme nationaliste, qui sont incompatibles avec la longue tradition de tolérance religieuse et culturelle que connaît la Géorgie. »

74. Le passage pertinent du rapport annuel (2001) de la médiatrice de la République géorgienne est ainsi libellé:

> « (...) la liberté de conscience est l'un des droits qui font l'objet des violations les plus graves en Géorgie. Nous voulons parler des organisations religieuses non traditionnelles, qualifiées de sectes en Géorgie et à ce titre rejetées, attaquées et persécutées de toutes les manières possibles. (...) Je n'écarte ni ne sous-estime le rôle et l'influence de l'Eglise orthodoxe dans notre pays. Cette Eglise a toujours été et continuera d'être le fondement sur lequel repose l'Etat géorgien et, pour ainsi dire, l'existence de la nation même. Toutefois, la Géorgie a toujours été fière de sa tolérance religieuse. Des temples de différentes confessions, par exemple, sont érigés et fonctionnent presque côte à côte dans la capitale géorgienne. On peut également citer comme un brillant exemple de la tolérance qui caractérise la nation géorgienne les excellentes relations de voisinage et d'amitié qu'entretiennent les Géorgiens et les Juifs depuis des millénaires. Dans un tel climat de tolérance, il est réellement intolérable de voir à l'heure actuelle l'apparition d'une vague d'extrémisme dirigée contre des minorités religieuses. Nous pensons aux nombreux actes de violence dont ont été victimes les membres de groupes religieux non traditionnels tels que (surtout) les témoins de Jéhovah, les Baptistes, les adeptes de Krishna et d'autres. (...) ».

75. Dans le rapport annuel mondial (2002) de *Human Rights Watch*, on peut lire :

> « Les autorités géorgiennes ont permis à des groupes organisés de militants civils de mener une campagne soutenue d'agressions violentes et d'intimidation contre les fidèles de plusieurs croyances religieuses autres que la religion orthodoxe, principalement des témoins de Jéhovah, des pentecôtistes et des baptistes. Les agresseurs ont perturbé des services religieux, roué de coups les participants, saccagé ou pillé des maisons et des propriétés, et détruit les ouvrages religieux. Vassili Mkalavichvili, le prêtre orthodoxe géorgien défroqué qui a dirigé la plupart de ces agressions, les a justifiées en affirmant que les croyances charismatiques souillaient la nation et la tradition religieuse géorgiennes. Il s'est vanté de disposer du soutien de la police et des services de sécurité. Dans un contexte marqué par l'inaction ou la complicité des procureurs et de la police et par une décision de la Cour suprême prise en février de cesser de reconnaître aux témoins de Jéhovah la qualité d'entité juridique en Géorgie, la fréquence des agressions collectives s'est accrue en 2001 (...) ».

76. Le 13 mars 2001, plusieurs organisations non gouvernementales – the Association Law and Freedom, Atlantic Council of Georgia, Black Sea Media Institute, Caucasian House, Forensic Examination Foundation, Former Political Prisoners for Human Rights, Georgian Young Lawyers Association, Human Rights Centre, Human Rights Group of Caucasian Institute for Peace, Democracy and Development, Independent Journalists' Club, International Society for Fair Elections and Democracy, Landowners Rights Protection Association, Liberty Institute, Tbilisi Press Club et Transparency International – Georgia – signèrent une déclaration conjointe selon laquelle :

> « Ces deux dernières années, nous assistons à des violations massives de la liberté de religion et à des persécutions des minorités religieuses. Le gouvernement géorgien est totalement incapable de protéger les droits de l'homme et les minorités. De plus, les violations des droits de l'homme se produisent avec l'assentiment tacite de l'Etat et très souvent à son instigation, parfois même avec la participation active d'agents de l'Etat, notamment ceux appartenant aux services d'exécution des lois. Sur la base de ce qui précède, on peut dire sans exagérer que les minorités religieuses en Géorgie sont en butte à un danger permanent, à des mesures d'intimidation et à la terreur. (...) Les témoins de Jéhovah (...) ont été victimes d'agressions, de persécutions, d'insultes et de harcèlement. Des pogroms se produisent fréquemment dans leurs bureaux et leurs églises. Leurs livres, objets sacrés du culte et autres biens sont détruits. (...) Les incidents les plus significatifs se sont produits à Tbilissi, Marnéouli et Zougdidi. La police était informée de ces actes et n'a pas réagi, voire y a participé, tandis que les procureurs et les juges condamnaient les victimes. Vassili Mkalavichvili a ouvertement confirmé à la télévision qu'il prévenait la police et les services de sécurité avant d'effectuer ses pogroms. Le ministre adjoint à la Sécurité de l'Etat a déclaré lors d'une séance devant le Parlement que l'Etat devait limiter les activités des sectes religieuses non traditionnelles. Des déclarations similaires ont été entendues dans la bouche d'autres hauts fonctionnaires de l'Etat, comme le chef de la police de Tbilissi (...) ».

III. LE DROIT INTERNE PERTINENT

1. La Constitution

77. Les dispositions pertinentes de la Constitution sont ainsi libellées :

Article 9

> « L'Etat reconnaît le rôle particulier de l'Eglise orthodoxe géorgienne dans l'histoire de la Géorgie. En même temps, il proclame la liberté totale des confessions et des pratiques religieuses, ainsi que l'indépendance de l'Eglise vis-à-vis de l'Etat. »

Article 19

« 1. Toute personne a droit à la liberté de parole, de pensée, de conscience, de religion et de confession.

2. Nul ne peut être persécuté en raison de son discours, de sa pensée, de sa religion ou de sa confession, ou contraint à s'exprimer à ce sujet.

3. Les libertés prévues au présent article ne peuvent faire l'objet de restrictions, sauf si leur manifestation porte atteinte aux droits d'autrui. »

2. Le code de procédure pénale

78. Les dispositions pertinentes du code de procédure pénale (« CPP »), tel qu'en vigueur à l'époque des faits, se lisaient ainsi :

Article 24 §§ 1, 2 et 4

« Les poursuites pénales par voie de mise en mouvement de l'action publique ont lieu pour toutes les catégories d'infractions pénales.

Ce type de poursuites pénales relève de l'organe d'enquête, du procureur et de l'instructeur qui mettent l'action publique en mouvement en se fondant sur les informations fournies par des personnes physiques ou morales, des notifications des autorités et des organisations non gouvernementales ainsi que sur les informations recueillies au moyen des médias.

L'organe d'enquête, le procureur et l'instructeur sont tenus de mettre en mouvement l'action publique dans tous les cas où les indices d'une infraction pénale sont réunis, de prendre les mesures nécessaires à la manifestation de la vérité et à l'identification de l'auteur de l'infraction et de refuser la mise en examen d'une personne innocente. »

Article 27 § 1

« Concernant les infractions pénales prévues aux articles 120 [atteinte légère intentionnelle à la santé], 125 [violence physique] (...) du code pénal, l'action publique est mise en mouvement seulement sur le fondement de la plainte de la victime ; en cas de règlement amiable entre les parties, cette plainte doit être classée. »

Article 29 § 1 d)

« Les poursuites pénales peuvent être suspendues si (...) la personne devant être mise en examen n'est pas identifiée, et ce jusqu'à ce que cette personne soit identifiée ou que l'action publique soit prescrite. »

Article 66 §§ 1 et 2 a)

« L'organe d'enquête est un organe d'Etat ou un haut représentant de la fonction publique qui a compétence pour procéder aux premiers actes d'instruction et pour effectuer, dans le cadre de l'instruction préparatoire et sur commission de l'instructeur ou du procureur, un acte d'instruction ou tout autre acte ou pour prendre part à la réalisation de ceux-ci.

Les organes d'enquête sont : a) les organes du ministère de l'Intérieur et ses sous-directions dans toutes les affaires pénales, sauf si celles-ci relèvent des autres organes d'enquête ; (...) »

Article 235 §§ 1 et 2

« Toute plainte est déposée auprès de l'organe responsable des poursuites pénales ou du fonctionnaire qui, d'après la loi, est compétent pour l'examiner et prendre une décision. (...)

Une plainte dirigée contre l'action ou la décision de l'enquêteur, de l'organe d'enquête, de l'instructeur ou du chef de l'organe d'instruction est soumise au procureur compétent. Une plainte dirigée contre l'action ou la décision du procureur est transmise au procureur hiérarchiquement supérieur. (...) »

Article 242 § 3

« Les parties au procès peuvent saisir le tribunal contre un acte ou une décision de l'enquêteur ou de l'instructeur une fois que le procureur a rejeté leur plainte ou saisir directement le tribunal de cette plainte (...) »

Article 261 § 1

« Dans tous les cas où il existe des indices d'une infraction, l'instructeur, avec l'accord du procureur, et le procureur, dans les limites de leurs compétences, ont l'obligation de mettre l'action publique en mouvement. »

Article 265 §§ 1 et 4

« Les informations concernant la commission d'une infraction pénale peuvent être communiquées par écrit ou oralement.

Les informations ainsi déposées sont examinées sans délai. Le contrôle de la véracité des informations concernant la commission d'une infraction dont l'auteur présumé est déjà arrêté ainsi que la mise en mouvement de l'action publique doivent avoir lieu dans les 12 heures suivant la présentation de la personne devant la police ou un autre organe d'enquête. Dans les autres cas, la mise en mouvement de l'action publique peut également être précédée d'un contrôle de la véracité des informations reçues, mais ne doit pas durer plus de vingt jours. »

3. Le code pénal

79. Les articles 155 et 166 de ce code punissent de sanctions, y compris de peines d'emprisonnement, quiconque empêche illégalement l'accomplissement de rites religieux en usant de violence ou de menaces de violence, ou empêche illégalement les activités d'une organisation religieuse en usant de violence ou de menaces de violence.

Conformément à l'article 71 § 1 a) de ce code, le délai de prescription pour les infractions prévues aux articles 120 [atteinte légère intentionnelle à la santé], 125 [violence physique], 155 et 166 est de deux ans.

EN DROIT

I. SUR LA VIOLATION ALLÉGUÉE DE L'ARTICLE 3 DE LA CONVENTION

80. Les requérants se disent victimes de violations de l'article 3 de la Convention aux termes duquel :

> « Nul ne peut être soumis à la torture ni à des peines ou traitements inhumains ou dégradants. »

1. Thèses des parties

81. Les requérants soutiennent que les actes dont ils ont fait l'objet lors de l'attaque litigieuse constituent des traitements inhumains et dégradants. D'après eux, les autorités de l'Etat avaient été informées à l'avance de cette attaque et les fonctionnaires de police présents sur place n'ont pas réagi. Les intéressés dénoncent l'absence d'enquête par les autorités compétentes et le manquement délibéré de celles-ci à poursuivre les auteurs des méfaits, parfaitement identifiables. L'Etat n'aurait pris aucune mesure propre à enrayer la généralisation de la violence à leur égard.

82. Les requérants se plaignent par ailleurs de ne pas avoir été informés de la suspension des poursuites pénales les 13 septembre et 3 décembre 2000, ce qui les a empêchés de contester ces décisions devant les tribunaux.

83. Le Gouvernement rétorque qu'aucun fonctionnaire n'a participé aux actes de violence en cause en l'espèce. Dans ses observations initiales, il a rappelé que l'examen des plaintes des requérants avait commencé et qu'à la suite de la décision judiciaire du 28 septembre 2000 (paragraphe 57 ci-dessus) une instruction avait été ouverte contre M[mes] Mghébrichvili et Chochitaïchvili, partisanes du père Basile.

84. Pour illustrer la diligence des autorités compétentes, le Gouvernement rappelle les faits exposés au paragraphe 61 ci-dessus. Il souligne également qu'après l'irruption du père Basile et de ses partisans dans la salle d'audience le 17 août 2000 l'action publique fut mise en mouvement le jour même par l'organe d'enquête du ministère de l'Intérieur du district de Nadzaladévi.

85. Le Gouvernement rappelle par ailleurs qu'après l'occupation du bureau de la médiatrice de la République le 22 janvier 2001 par les mêmes personnes l'action publique fut là encore déclenchée. Elle le fut aussi après l'attaque perpétrée par le père Basile et ses partisans lors d'un rassemblement de témoins de Jéhovah chez un particulier dans l'impasse de Verkhana à Tbilissi, le 22 janvier 2001, après l'attaque commise le 27 février 2001 lors du rassemblement des témoins de Jéhovah chez un particulier dans la rue Niabi à Tbilissi, après la confiscation en mars 2001 par le père Basile des clichés et de la littérature religieuse d'une maison d'édition, qui furent brûlés sur-le-champ, et après les agressions de personnes réunies le 20 mai et le 22 juin 2001 respectivement à Ponitchala et à Moukhiani.

86. Ainsi, selon le Gouvernement, le père Basile et M. P. Ivanidzé, son bras droit, furent poursuivis au pénal en temps utile. Compte tenu du fait que le père Basile, malgré la mesure de contrôle judiciaire dont il faisait l'objet, continuait à commettre des actes de violence, le tribunal de Vaké-Sabourthalo de Tbilissi ordonna son arrestation le 4 juin 2003. Or, le père Basile se serait soustrait à la justice et son arrestation n'aurait pas été possible.

87. Sur ce dernier point, les requérants répliquent que le père Basile a poursuivi ses actes de violence au vu de tous et qu'il est apparu de nombreuses fois à la télévision sans que les autorités réagissent pour exécuter le mandat d'arrêt pris contre lui.

88. Dans ses observations complémentaires (paragraphe 7 ci-dessus), le Gouvernement affirme que, depuis le changement de pouvoir à la suite de la « Révolution des roses » en novembre 2003, les autorités ont adopté une attitude d'intolérance totale envers les actes de violence religieuse. Ainsi, le 12 mars 2004, elles organisèrent une opération spéciale à l'église orthodoxe de Gldani lors de laquelle elles arrêtèrent le père Basile, MM. P. Ivanidzé et M. Nikolozichvili ainsi que quatre autres partisans actifs. Ces personnes furent mises en détention provisoire. L'information ayant été terminée le 10 juin 2004, l'affaire pénale n° 1001837 (paragraphe 65 ci-dessus) fut renvoyée le 9 juillet 2004 devant le tribunal de Vaké-Sabourthalo de Tbilissi.

89. Par ailleurs, le 11 juin 2004, le père Basile fut renvoyé en jugement dans le cadre d'une autre affaire pénale (n° 0203811) concernant les actes de violence commis contre l'Eglise baptiste. Le 13 août 2004, ces deux affaires pénales furent jointes.

90. Le Gouvernement a produit le jugement de condamnation du père Basile, de MM. P. Ivanidzé et M. Nikolozichvili et de quatre autres agresseurs rendu le 31 janvier 2005 par le tribunal de première instance de Vaké-Sabourthalo à Tbilissi. Ces personnes furent reconnues coupables de l'attaque perpétrée dans le bureau de la médiatrice de la République, de celles menées les 22 janvier et 27 février 2001 (paragraphe 85 ci-dessus), de l'attaque et du pillage commis le 3 février 2002 dans un entrepôt de l'Eglise baptiste et de la destruction par le feu des ouvrages religieux qui s'y trouvaient, et de l'attaque, le 24 janvier 2003, de baptistes lors d'une soirée de prière œcuménique. Le père Basile et M. P. Ivanidzé furent condamnés respectivement à six et quatre ans d'emprisonnement et les autres prévenus à des peines de prison avec sursis.

Le Gouvernement estime que ce jugement illustre l'engagement des autorités géorgiennes de ne plus jamais admettre d'actes de violence envers les témoins de Jéhovah qui, après la révolution, n'ont d'ailleurs plus été attaqués.

91. Il ressort du jugement de condamnation en question que le père Basile et M. P. Ivanidzé affirmèrent devant le tribunal qu'ils n'avaient commis aucun acte condamnable et que, dans le cadre de chaque incident, ils avaient agi conformément à la demande des habitants orthodoxes réclamant une protection face au prosélytisme des témoins de Jéhovah et à leurs méthodes inadmissibles d'embrigadement dans leurs activités des jeunes des quartiers dès leur plus jeune âge.

92. Quant à l'affaire pénale relative à l'attaque du 17 octobre 1999 proprement dite, le Gouvernement concède que l'action publique fut mise en mouvement le 18 octobre 1999, mais que l'enquête fut suspendue plus tard en raison de l'impossibilité d'identifier les auteurs des méfaits. Il soutient que, « du point de vue procédural », il n'était plus possible de reprendre les poursuites pénales dans cette affaire. Toutefois, selon lui, le plus important est que les autorités aient enfin enrayé la violence religieuse dans le pays.

93. En réponse, les requérants attirent l'attention de la Cour sur le fait que l'affaire pénale dans laquelle le père Basile et M. P. Ivanidzé furent jugés ne concerne aucun des actes de violence qu'ils dénoncent en l'espèce, mais porte sur d'autres attaques perpétrées par les mêmes personnes.

94. Quant aux poursuites pénales dirigées contre deux partisanes du père Basile, accusées d'avoir brûlé des livres, les requérants rappellent que, lors de l'attaque du 17 octobre 1999, un grand nombre d'actes de violence furent commis, et estiment que l'enquête n'aurait dû se limiter ni à ces deux personnes ni à ces faits.

2. Appréciation de la Cour

a) Principes généraux

95. La Cour rappelle que l'article 3 de la Convention doit être considéré comme l'une des clauses primordiales de la Convention et comme consacrant l'une des valeurs fondamentales des sociétés démocratiques qui forment le Conseil de l'Europe (*Pretty c. Royaume-Uni*, n° 2346/02, § 49, CEDH 2002-III). Contrastant avec les autres dispositions de la Convention, il est libellé en termes absolus, ne prévoyant ni exceptions ni conditions, et d'après l'article 15 de la Convention, il ne souffre nulle dérogation (voir, entre autres, *Chahal c. Royaume-Uni*, arrêt du 15 novembre 1996, *Recueil des arrêts et décisions* 1996-V, p. 1855, § 79). La Cour rappelle également que, pour tomber sous le coup de l'article 3, un mauvais traitement doit atteindre un seuil minimum de gravité. L'appréciation de ce minimum est relative par essence et dépend de l'ensemble des données de la cause (*Labita c. Italie*, arrêt du 6 avril 2000, *Recueil* 2000-IV, § 120).

96. En général, les actes interdits par l'article 3 de la Convention n'engagent la responsabilité d'un Etat contractant que s'ils sont commis par des personnes exerçant une fonction publique. Toutefois, combinée avec l'article 3, l'obligation que l'article 1 de la Convention impose aux Hautes Parties contractantes de garantir à toute personne relevant de leur juridiction les droits et libertés consacrés par la Convention leur commande de prendre des mesures propres à empêcher que lesdites personnes ne soient soumises à des tortures ou à des peines ou traitements inhumains ou dégradants, même administrés par des particuliers (*Pretty*, arrêt précité, §§ 50 et 51). La Cour a conclu, dans un certain nombre d'affaires, à l'existence d'une obligation positive pour l'Etat de fournir une protection contre les traitements inhumains ou dégradants (*A. c. Royaume-Uni*, arrêt du 23 septembre 1998, *Recueil* 1998-VI, p. 2699, § 22, *Z et autres c. Royaume-Uni* [GC], n° 29392/95, § 73, CEDH 2001-V, *M.C. c. Bulgarie*, n° 39272/98, § 149, CEDH 2003-XII).

Cette protection appelle des mesures raisonnables et efficaces, y compris à l'égard des enfants et d'autres personnes vulnérables (*Okkalı c. Turquie*, n° 52067/99, § 70, CEDH 2006-XII (extraits), ainsi que les paragraphes 24-27 ci-dessus), pour empêcher des mauvais traitements dont les autorités avaient ou auraient dû avoir connaissance (*Mubilanzila Mayeka et Kaniki Mitunga c. Belgique*, n° 13178/03, § 53, 12 octobre 2006).

97. Par ailleurs, l'article 3 de la Convention entraîne l'obligation positive de mener une enquête officielle (*Assenov et autres c. Bulgarie*, arrêt du 28 octobre 1998, *Recueil* 1998-VIII, p. 3290, § 102). Une telle obligation positive ne saurait en principe être limitée aux seuls cas de mauvais traitements infligés par des agents de l'Etat (*M.C. c. Bulgarie*, précité, § 151).

Ainsi, les autorités ont l'obligation d'agir dès qu'une plainte officielle est déposée. Même lorsqu'une plainte proprement dite n'est pas formulée, il y a lieu d'ouvrir une enquête s'il existe des indications suffisamment précises donnant à penser qu'on se trouve en présence de cas de torture ou de mauvais traitement. Une exigence de célérité et de diligence raisonnables est implicite dans ce contexte. Une réponse rapide des autorités, lorsqu'il s'agit d'enquêter sur des allégations de mauvais traitement, peut généralement être considérée comme essentielle pour préserver la confiance du public dans le principe de la légalité et pour éviter toute apparence de complicité ou de tolérance relativement à des actes illégaux. Or, la tolérance des autorités envers de tels actes ne peut que miner la confiance du public dans le principe de la légalité et son adhésion à l'Etat de droit (*Batı et autres c. Turquie*, n^{os} 33097/96 et 57834/00, § 136, CEDH 2004-IV (extraits), *Abdülsamet Yaman c. Turquie*, n^{o} 32446/96, § 60, 2 novembre 2004, et, *mutatis mutandis*, *Paul et Audrey Edwards c. Royaume-Uni*, n^{o} 46477/99, § 72, CEDH 2002-II).

b) Application de ces principes au cas d'espèce

i) Quant aux traitements infligés

98. Au vu des éléments en sa possession, la Cour note que les actes de violence dont les requérants se plaignent en l'espèce furent commis le 17 octobre 1999 par un groupe de particuliers orthodoxes dirigés par le père Basile. Le Gouvernement ne conteste pas ce fait.

99. La Cour relève que l'attaque du 17 octobre 1999 était dirigée contre l'ensemble des membres de la Congrégation (au nombre de cent-vingt, selon les requérants), réunis dans un théâtre dans un but religieux. Toutefois, les requérants, au nombre de cent-un, concèdent eux-mêmes qu'une soixantaine seulement de membres de la Congrégation furent battus et seize hospitalisés (paragraphes 15 et 19 ci-dessus). La Cour note que seule une partie des requérants qui affirment avoir été victimes d'actes d'agression physique apportent des éléments de preuve appropriés pour démontrer qu'ils ont subi des traitements prétendument contraires à l'article 3 de la Convention (*Davtian c. Géorgie*, n^{o} 73241/01, § 37, 27 juillet 2006, *Berktay c. Turquie*, n^{o} 22493/93, § 165, 1er mars 2001).

100. Ainsi, les allégations de mauvais traitements formulées par MM. Miriane Arabidzé et Alexi Khitharichvili et par M^{me} Patman Thabagari (paragraphes 16, 18, 20 et 21 ci-dessus) sont étayées par des extraits de leurs carnets de santé et par une expertise médicale. Par ailleurs, les mauvais traitements infligés à MM. Miriane Arabidzé et Alexi Khitharichvili ressortent clairement de l'enregistrement vidéo de l'attaque en possession de la Cour (paragraphe 35 ci-dessus). Les allégations de mauvais traitements de M^{mes} Nora Lélachvili, Nino Lélachvili, Ia Tchamaouri et Zaïra Djikourachvili et de MM. Vladimer Kokossadzé, Merab Jijilachvili et

Ilia Mantskava sont étayées par des extraits de leurs carnets de santé (paragraphes 17 et 21 ci-dessus).

101. En outre, M^mes^ Nathéla Kobaïdzé, Roza Kinkladzé, Nino Djanachvili et Lia Bakhoutachvili (paragraphes 17 et 22 ci-dessus) ainsi que M^mes^ Izolda Pourtséladzé, Ia Vardanichvili, Leïla Mtchédlichvili, Leïla Tsaritov, Raïssa Maïssouradzé, Kéthino Kiméridzé, Amalia Ardgomélachvili, Nathia Milachvili et Iza Khitarichvili et MM. Djoumber Bgarachvili et Chotha Maïssouradzé (paragraphe 24 ci-dessus) fournissent une description précise des mauvais traitements dont ils firent l'objet. Les faits qu'ils exposent n'ont à aucun moment été contestés par le Gouvernement et sont constitutifs d'indices suffisamment graves, précis et concordants pour que la Cour juge établi au-delà de tout « doute raisonnable » (voir, *mutatis mutandis*, *Anguelova c. Bulgarie*, n° 38361/97, § 111, CEDH 2002-IV, *Chamaïev et autres c. Géorgie et Russie*, n° 36378/02, § 338, CEDH 2005-III) que ces personnes ont en effet subi des mauvais traitements.

102. Vu la nature des traitements infligés aux vingt-cinq requérants mentionnés aux paragraphes 100 et 101 ci-dessus, la Cour estime qu'ils atteignent le seuil requis pour être qualifiés d'inhumains au sens de l'article 3 de la Convention (paragraphes 16-18, 20, 21 et 24 ci-dessus).

103. Il en va de même du passage à tabac des enfants de M^mes^ Lia Sidamonidzé et Cécile Gagnidzé, requérantes (paragraphe 26 ci-dessus *in fine*), des traitements réservés aux enfants de M^mes^ Ia Vardanichvili et Leïla Djikourachvili, requérantes (paragraphes 24 et 27 ci-dessus), ainsi que des traitements subis par les fils de M^mes^ Lia Bakhoutachvili (paragraphe 25 ci-dessus) et Raïssa Maissouradzé (paragraphe 24 ci-dessus).

La Cour estime que ces requérantes avaient un intérêt personnel valable à obtenir que l'Etat prenne des mesures raisonnables pour protéger leurs enfants des actes de violence (*Amy c. Belgique*, n° 11684/85, décision de la Commission du 5 octobre 1988, *Güneri c. Turquie* (déc.), n° 42853/98, 8 juillet 2003). Elles peuvent dès lors se prétendre victimes indirectes des traitements infligés à ceux-ci (*Kurt c. Turquie*, arrêt du 25 mai 1998, *Recueil* 1998-III, §§ 133 et 134).

104. En ce qui concerne les quatorze requérants cités au paragraphe 23 ci-dessus, la Cour note que, dans leurs témoignages, ils affirment avoir également subi des actes de violence, sans toutefois préciser la nature et la gravité des traitements infligés ; il est donc impossible d'apprécier si ceux-ci atteignent le seuil requis pour être qualifiés d'inhumains au sens de l'article 3 de la Convention.

105. En tout état de cause, eu égard aux éléments de preuve en sa possession, dont l'enregistrement vidéo de l'attaque litigieuse et les témoignages des requérants, la Cour considère que les traitements infligés à ces quatorze personnes ainsi qu'aux vingt-cinq requérants mentionnés aux paragraphes 100 et 101 ci-dessus relèvent de l'article 3 de la Convention et

s'analysent en des traitements dégradants (paragraphes 24, 30, 31 et 35 ci-dessus).

En effet, il ressort du dossier, et le Gouvernement ne le conteste pas, que le but des agresseurs était d'humilier et de rabaisser publiquement les requérants, de façon à créer chez eux des sentiments de terreur et d'infériorité et que, brisés moralement par cette violence physique et verbale (*Irlande c. Royaume-Uni*, arrêt du 18 janvier 1978, série A n° 25, p. 66, § 167), ils agissent contre leurs volonté et conscience (*mutatis mutandis*, *Raninen c. Finlande*, arrêt du 16 décembre 1997, *Recueil* 1997-VIII, pp. 2821-2822, § 55 ; *Keenan c. Royaume-Uni*, n° 27229/95, § 110, CEDH 2001-III) et ne tiennent plus de réunions religieuses conformes à leur foi jugée inacceptable par le père Basile et ses partisans (paragraphes 13, 31 et 67 ci-dessus). A cet égard, la Cour attache de l'importance au fait que l'attaque en question a été filmée par l'un des membres du groupe d'agresseurs et que ce film était probablement destiné à être montré à des tierces personnes (paragraphe 14 ci-dessus). Par ailleurs, un enregistrement vidéo de l'attaque a été diffusé sur deux chaînes nationales de télévision pendant plusieurs jours (paragraphes 34 et 35 ci-dessus), ce qui a permis à un large public de voir les scènes de violence dont les requérants avaient été l'objet, y compris les actes vexatoires que l'on avait fait subir à M. Alexi Khitarichvili pour des motifs religieux (paragraphe 18 ci-dessus).

106. Quant à M^mes^ Lamara Arsénichvili, Eléné Djodjoua, Kétévane Djanachvili, Thina Makharachvili, Dodo Kakhichvili, Lali Khitarichvili, Nounou Gviniachvili, Néli Guiorgadzé, Eka Kerdzévadzé, Darédjane Kotranova et Chakhina Charipov et MM. Romiko Zourabachvili, Amirane Arabidzé, Zakro Kotchichvili, Djamboul Arabidzé et Datho Gvaramia, requérants (paragraphe 26 ci-dessus), ils déclarent avoir échappé à l'agression.

107. Dès lors, la Cour conclut d'emblée qu'il n'y a pas eu violation de l'article 3 de la Convention dans le chef de ces seize personnes.

108. Quant aux trente-sept requérants cités en annexe au présent arrêt sous les n^os^ 56 à 92 et à M^me^ Nino Gnolidzé, ils ne soumettent aucun témoignage au sujet des traitements qui leur ont été réservés ni ne précisent en quoi aurait consisté, pour chacun d'eux, une violation de l'article 3 de la Convention. Seul le témoignage de M^me^ Nino Djanachvili permet de supposer que cette personne a été agressée (paragraphe 17 ci-dessus). De surcroît, il ne ressort pas du dossier que ces trente-sept requérants et M^me^ Nino Gnolidzé aient saisi, à l'instar des autres requérants, les autorités compétentes pour se plaindre d'avoir subi des traitements contraires à l'article 3 de la Convention. Par ailleurs, la Cour constate que la question de l'identité de cinq requérants, cités sous les n^os^ 93 à 97 dans l'annexe au présent arrêt, reste ambiguë.

109. Dans ces conditions, la Cour conclut qu'il n'y a pas eu violation de l'article 3 de la Convention dans le chef des requérants cités au paragraphe précédent.

ii) Quant à la réaction des autorités et à la suite réservée aux plaintes des quarante-deux requérants concernés (paragraphes 102 à 105 ci-dessus)

110. La Cour relève d'emblée qu'il n'est pas démontré, contrairement aux affirmations des requérants (paragraphe 81 ci-dessus), que la police ait été prévenue par le père Basile avant l'attaque en cause en l'espèce. En outre, l'enregistrement vidéo des faits litigieux, produit par les requérants, ne fait pas apparaître que des fonctionnaires de police aient assisté aux actes d'agression des intéressés. Aucune autre preuve n'ayant été apportée par ailleurs, la Cour ne juge pas établi que des représentants de l'Etat aient été présents sur les lieux lors de l'attaque litigieuse.

111. En revanche, le dossier contient des éléments suffisamment concordants, auxquels le Gouvernement n'oppose d'ailleurs aucun argument valable, concernant le refus des policiers, alertés par les requérants par différents biais et suffisamment tôt (paragraphes 14 *in fine* et 28 ci-dessus), d'intervenir promptement pour mettre fin à la violence et protéger les victimes. Lorsque la police s'est quand même rendue sur place, certains requérants, toujours bloqués à l'intérieur du bâtiment, ont pu s'en échapper (paragraphe 29 ci-dessus), mais il semble que cette intervention n'ait pas été diligente. En effet, à l'arrivée des policiers, un grand nombre d'actes d'agression, y compris les plus violents, avaient déjà eu lieu, les victimes avaient été brimées et insultées, leurs affaires personnelles confisquées et leurs ouvrages religieux brûlés (paragraphes 16 à 18, 20, 24, 25, 27, 30 et 31 ci-dessus).

112. Quant aux événements ultérieurs, la Cour constate, et le Gouvernement ne le nie pas, que ces actes de violence et de brimade ont été plus que suffisamment portés à l'attention des autorités compétentes.

113. Notamment, dès le lendemain de l'attaque, les quarante-deux requérants mentionnés aux paragraphes 100, 101, 103 et 104 ci-dessus ont porté plainte auprès du procureur de la ville de Tbilissi pour dénoncer les actes dont ils avaient fait l'objet (paragraphe 38 ci-dessus). L'action publique a été mise en mouvement, mais seuls onze requérants, MM. Miriane Arabidzé, Ilia Mantskava, Vladimer Kokossadzé et Chotha Maïssouradzé et M^{mes} Nora Lélachvili, Nathéla Kobaïdzé, Patman Thabagari, Nino Lélachvili, Zaïra Djikourachvili, Ia Tchamaouri et Makvala Mamoukadzé, ont été reconnus parties civiles dans l'affaire (paragraphe 40 ci-dessus).

114. Or, il convient de noter que les autorités chargées de l'enquête avaient l'obligation de vérifier sans délai les informations portées à leur connaissance par les trente et un autres requérants également, de déclencher l'action publique en cas d'existence d'indices d'une infraction et de prendre des mesures nécessaires à la manifestation de la vérité (articles 24 § 4, 261

§ 1 et 265 § 4 du CPP). Les autorités ne réservèrent pourtant aucune réponse aux plaintes de ces trente et un requérants qui avaient fourni des détails concrets sur la violence physique subie par eux-mêmes ainsi que par leurs enfants (infraction prévue à l'article 125 du code pénal) et sur le fait que la tenue de leur rassemblement religieux avait été empêchée par la violence (infraction prévue aux articles 155 et 166 du même code).

115. Le Gouvernement ne fournit aucune explication quant à cette absence totale de réaction de la part des autorités.

116. Pour ce qui est des plaintes des onze requérants reconnus parties civiles, entre le 9 décembre 1999, date à laquelle leur dossier fut renvoyé à la police de la ville de Tbilissi, et le 31 janvier 2000, l'affaire a fait l'objet de renvois entre différents services du parquet et de la police avant d'être à nouveau soumise à la police de la ville de Tbilissi (paragraphes 41-44 ci-dessus). Le Gouvernement ne fournit aucune explication quant aux motifs et à l'utilité de ces renvois.

117. L'enquêteur de police saisi de l'affaire à cette dernière date a conduit, plus de trois mois après, une procédure d'identification et des interrogatoires croisés de quatre personnes avec M. Miriane Arabidzé, partie civile. Celui-ci identifia M. M. Nikolozichvili et une autre personne comme étant ses agresseurs. Or, ayant initialement déclaré qu'en raison de sa foi orthodoxe il ne pouvait être impartial (paragraphe 44 ci-dessus), l'enquêteur de police décida de mettre M. Miriane Arabidzé en examen en laissant sans réponse la question de la responsabilité de M. M. Nikolozichvili et du deuxième agresseur présumé. Aucune suite ne fut jamais donnée à l'identification par M. Miriane Arabidzé de ces deux individus comme étant les auteurs de ses mauvais traitements (paragraphes 16 et 21 ci-dessus). Renvoyé en jugement avec deux partisanes du père Basile, soupçonnées d'avoir brûlé les ouvrages religieux, M. Miriane Arabidzé fut reconnu coupable d'avoir porté atteinte à l'ordre public, alors que la question de la culpabilité des deux partisanes du père Basile fut renvoyée pour complément d'enquête, mais cette enquête n'aboutit jamais à une décision quelconque (paragraphes 56, 57 et 83 *in fine* ci-dessus).

118. La Cour déplore que, dans ces conditions, les autorités internes (paragraphes 48 et 51 ci-dessus) ainsi que le Gouvernement devant la Cour (paragraphe 92 ci-dessus) continuent d'affirmer que l'impossibilité de conduire une enquête dans la présente affaire s'explique par la non-identification des auteurs des actes de violence. Une telle justification de l'inactivité des autorités compétentes est d'autant plus choquante que les policiers venus sur les lieux n'interpellèrent aucun agresseur ; que le jour même de l'attaque, le père Basile et M. M. Nikolozichvili étaient présents au commissariat de police aux côtés de M. Miriane Arabidzé, le seul qui fût interpellé ; que les 17, 18 et 19 octobre 1999, les chaînes nationales de télévision diffusèrent des séquences entières illustrant les actes de violence commis sur les requérants ; que l'un de ces enregistrements, en possession

de la Cour, fait ressortir très clairement non seulement l'identité du père Basile et celle de M. P. Ivanidzé, mais aussi, du fait de sa précision, celle de la majorité des agresseurs ; et que, dans l'enregistrement diffusé sur la chaîne nationale « Roustavi-2 » le 18 octobre 1999, le père Basile, interviewé devant le feu dans lequel brûlaient les ouvrages religieux des requérants, se disait satisfait de ses actes et en expliquait le bien-fondé (paragraphes 34 et 35 ci-dessus).

119. Eu égard à l'ensemble des circonstances ci-dessus, la Cour conclut que les autorités compétentes, ayant disposé en temps utile d'éléments de preuve tangibles et suffisants pour accomplir la mission qui leur incombait en vertu de la loi, ont fait preuve de négligence manifeste dans l'identification des responsables présumés (*Indelicato c. Italie*, n° 31143/96, § 37, 18 octobre 2001). Ainsi, elles ont laissé s'écouler le délai de prescription sans raisons valables (paragraphes 64, 78 [articles 27 § 1 et 29 § 1 d) du CPP] et 79 ci-dessus).

120. Après un décret du Président géorgien du 22 mars 2001 et la pression de la communauté internationale (paragraphes 60 et 71 à 73 ci-dessus), le père Basile et M. P. Ivanidzé ont certes été mis en accusation le 4 octobre 2001 dans d'autres affaires de violence religieuse (paragraphes 61, 65, 84, 85 et 90 ci-dessus) et condamnés, de même que quatre autres agresseurs, le 31 janvier 2005, mais cela n'enlève rien au fait que la question de la responsabilité de ces personnes et de plusieurs dizaines d'autres agresseurs en ce qui concerne les actes de violence perpétrés le 17 octobre 1999 contre des requérants n'a jamais fait l'objet d'une enquête sérieuse. Le seul commencement d'une enquête qui, comme en l'espèce, a été interrompue plusieurs fois sans que des raisons que l'on puisse qualifier de valables aient été avancées et qui n'aboutit jamais à une décision quelconque (paragraphes 63, 64 et 119 ci-dessus) ne saurait satisfaire aux exigences de l'article 3 de la Convention (*Davtian c. Géorgie*, n° 73241/01, § 46, 27 juillet 2006 ; *mutatis mutandis*, *Selmouni c. France* [GC], n° 25803/94, §§ 78-79, CEDH 1999-V).

121. Le Gouvernement soutient qu'il n'est plus possible actuellement, « du point de vue procédural », de mener une enquête sur ces faits et que, par ailleurs, les témoins de Jéhovah vivent en paix depuis la révolution de novembre 2003 (paragraphe 88 ci-dessus), mais ces arguments ne modifient en rien ce constat. Sur ce dernier point, la Cour tient à rappeler que seule la responsabilité de l'Etat géorgien dans sa continuité – et non celle d'un gouvernement ou d'un pouvoir politique défini – est en cause devant elle. Elle ne saurait avoir égard aux différends institutionnels ou de politique interne (voir, *mutatis mutandis*, *Assanidzé c. Georgie* [GC], n° 71503/01, § 149, CEDH 2004-II).

122. La Cour relève enfin que les trente et un requérants dont les plaintes n'ont connu aucune suite n'ont jamais été informés des raisons d'une telle inaction. Les onze requérants reconnus parties civiles n'ont pas été tenus au courant de l'avancement de la procédure et des renvois répétés de leur dossier entre différents services (paragraphes 42, 50 et 63 ci-dessus). La décision de suspension de l'enquête prise le 13 septembre 2000 ne leur a pas été notifiée. Après avoir repris le 24 octobre 2000, l'enquête a à nouveau été suspendue le 3 décembre 2000. Cette décision n'a pas non plus été portée à la connaissance des intéressés. L'avocat de certains d'entre eux a appris son existence fortuitement, le 26 avril 2001 (paragraphe 63 ci-dessus).

123. Ainsi, après avoir alerté les autorités compétentes des mauvais traitements subis (articles 235 § 1 et 265 § 1 du CPP), les requérants concernés ont été privés de toute possibilité de se prévaloir des voies de recours hiérarchique et judiciaire que leur ouvraient les articles 235 § 2 et 242 § 2 du CPP pour contester la suspension réitérée de l'enquête qui, selon eux, était injustifiée.

124. En résumé, la Cour constate que la police a refusé d'intervenir promptement sur les lieux pour protéger les requérants concernés et les enfants de certains d'entre eux contre des mauvais traitements (paragraphes 100-105 ci-dessus) et que, par la suite, les intéressés ont été confrontés à l'indifférence totale des autorités compétentes qui, sans aucune raison valable, ont refusé de leur appliquer la loi. Aux yeux de la Cour, cette attitude des autorités, qui avaient l'obligation d'enquêter sur des infractions pénales, a réduit à néant l'effectivité de tout autre recours qui pouvait exister.

125. La Cour conclut dès lors que l'Etat géorgien a manqué à ses obligations positives au titre de l'article 3 de la Convention à l'égard des quarante-deux requérants concernés.

II. SUR LA VIOLATION ALLÉGUÉE DE L'ARTICLE 9 DE LA CONVENTION

126. Invoquant l'article 9 de la Convention, les requérants se plaignent de la méconnaissance de leur droit de manifester leur religion par des prières, des réunions et l'accomplissement collectif des rites.

L'article 9 de la Convention est ainsi libellé :

Article 9

« 1. Toute personne a droit à la liberté de pensée, de conscience et de religion ; ce droit implique la liberté de changer de religion ou de conviction, ainsi que la liberté de manifester sa religion ou sa conviction individuellement ou collectivement, en public ou en privé, par le culte, l'enseignement, les pratiques et l'accomplissement des rites.

2. La liberté de manifester sa religion ou ses convictions ne peut faire l'objet d'autres restrictions que celles qui, prévues par la loi, constituent des mesures nécessaires, dans une société démocratique, à la sécurité publique, à la protection de l'ordre, de la santé ou de la morale publiques, ou à la protection des droits et libertés d'autrui. »

1. Thèses des parties

127. Considérant que les actes de violence dont ils ont fait l'objet ne sont pas justifiés, les requérants jugent superflu de débattre en l'espèce de la question de savoir si l'ingérence était « nécessaire dans une société démocratique ». Ils allèguent que le manquement des autorités à identifier et à punir les auteurs de ces actes a contribué au développement de l'intolérance religieuse à leur égard et les a ensuite empêchés de manifester leur religion librement par les réunions pacifiques et l'accomplissement collectif des rites. Ils dénoncent l'extrémisme religieux, cautionné par la police et renforcé par l'inactivité du parquet, dont ils ont été la cible.

128. Le Gouvernement s'oppose à cette thèse sans toutefois fournir d'arguments spécifiques.

2. Appréciation de la Cour

129. La Cour note que les cent-un requérants assistaient au rassemblement de leur Congrégation lorsque celle-ci fut attaquée. Toutefois, l'identification de cinq d'entre eux, cités sous les n^{os} 92 à 97 dans l'annexe au présent arrêt, pose problème. La Cour conclut dès lors d'emblée qu'il n'y a pas eu violation de l'article 9 de la Convention dans le chef de ces personnes.

130. Pour ce qui est des griefs des quatre-vingt-seize autres requérants, la Cour rappelle que la liberté de religion protégée par l'article 9 représente l'une des assises d'une « société démocratique » au sens de la Convention. Elle figure parmi les éléments les plus essentiels de l'identité des croyants et de leur conception de la vie. La liberté de religion relève d'abord du for intérieur, mais elle « implique » de surcroît, notamment, celle de « manifester sa religion » (*Kokkinakis c. Grèce*, arrêt du 25 mai 1995, série A n^{o} 260, § 31). La participation à la vie d'une communauté religieuse est une manifestation de la religion, qui jouit de la protection de l'article 9 de la Convention (*Hassan et Tchaouch c. Bulgarie* [GC], n^{o} 30985/96, § 62, CEDH 2000-XI).

131. A plusieurs occasions, la Cour a établi que dans l'exercice de son pouvoir de réglementation dans ce domaine et dans sa relation avec les divers cultes, religions et croyances, l'Etat se doit d'être neutre et impartial (*Hassan et Tchaouch*, arrêt précité, § 78 ; *Manoussakis et autres c. Grèce*, arrêt du 26 septembre 1996, *Recueil* 1996-IV, § 47 ; *Eglise métropolitaine de Bessarabie et autres c. Moldova*, n^{o} 45701/99, § 123, CEDH 2001-XII), ce qui est incompatible avec un quelconque pouvoir d'appréciation de sa

part quant à la légitimité des croyances religieuses (voir, *mutatis mutandis*, *Cha'are Shalom Ve Tsedek c. France* [GC], n° 27417/95, § 84, CEDH 2000-VII).

132. La Cour tient à souligner qu'il n'est pas permis, au nom de la liberté de religion, d'exercer des pressions abusives sur autrui dans le désir de promouvoir ses convictions religieuses (*Larissis et autres c. Grèce*, arrêt du 24 février 1998, *Recueil* 1998-I, §§ 54 et 59). Toutefois, le rôle des autorités n'est pas d'enrayer la cause des tensions en éliminant le pluralisme, mais de s'assurer que des groupes opposés l'un à l'autre se tolèrent (*Serif c. Grèce*, n° 38178/97, § 53, CEDH 1999-IX). Ce rôle de l'Etat contribue à assurer l'ordre public, la paix religieuse et la tolérance dans une société démocratique (*Refah Partisi (Parti de la prospérité) et autres c. Turquie* [GC], n°s 41340/98, 41342/98, 41343/98 et 41344/98, § 91, CEDH 2003-II) et ne peut guère être conçu comme susceptible de diminuer le rôle d'une foi ou d'une Eglise auxquelles adhère historiquement et culturellement la population d'un pays défini.

133. En l'espèce, en raison de leur croyance religieuse, jugée inacceptable, les quatre-vingt-seize requérants furent agressés, humiliés et violemment frappés lors du rassemblement de leur Congrégation le 17 octobre 1999. Leurs ouvrages religieux furent confisqués et brûlés et les intéressés eux-mêmes furent forcés à regarder le feu. L'un d'eux, M. A. Khitarichvili, en guise de punition religieuse, eut le crâne rasé par des hommes qui récitaient en même temps des prières. En dépit du traitement ainsi subi, les requérants se heurtèrent ultérieurement à l'indifférence totale et à l'inaction des autorités (paragraphes 119, 123 et 124 ci-dessus) qui, en raison de l'appartenance des intéressés à une communauté religieuse perçue comme dangereuse pour l'orthodoxie chrétienne, ne donnèrent aucune suite à leurs plaintes. Dépourvus de tout recours, les requérants ne purent faire valoir leur droit à la liberté de religion devant les instances nationales. L'attaque des requérants perpétrée le 17 octobre 1999 ayant constitué le premier acte d'agression de grande ampleur dirigé contre des témoins de Jéhovah, la négligence des autorités a permis la généralisation de la violence religieuse dans toute la Géorgie par le même groupe d'agresseurs (paragraphes 43, 61, 65 et 68 ci-dessus). Les requérants ont ainsi été amenés à craindre de faire l'objet d'une violence réitérée dès qu'ils manifesteraient de nouveau leur foi.

134. Eu égard à ces circonstances, la Cour estime que, par leur inactivité, les autorités compétentes ont manqué à leur obligation de prendre les mesures propres à assurer que le groupe d'extrémistes orthodoxes dirigé par le père Basile tolère l'existence de la communauté religieuse des requérants et permette à ceux-ci d'exercer librement leur droit à la liberté de religion.

135. Il y a dès lors eu violation de l'article 9 de la Convention dans le chef de l'ensemble des quatre-vingt-seize requérants.

III. SUR LA VIOLATION ALLÉGUÉE DE L'ARTICLE 13 DE LA CONVENTION

136. Les requérants estiment que l'absence d'enquête au sujet des actes de violence religieuse dont ils ont fait l'objet emporte violation de l'article 13 de la Convention qui est ainsi libellé :

Article 13

> « Toute personne dont les droits et libertés reconnus dans la (...) Convention ont été violés, a droit à l'octroi d'un recours effectif devant une instance nationale, alors même que la violation aurait été commise par des personnes agissant dans l'exercice de leurs fonctions officielles. »

137. Pour la Cour, ce grief des requérants se confond avec ceux tirés des articles 3 et 9 de la Convention. Au vu de ses constats sous l'angle de ces dispositions (paragraphes 125 et 135 ci-dessus), la Cour estime qu'aucune question distincte ne se pose au regard de l'article 13 de la Convention.

IV. SUR LA VIOLATION ALLÉGUÉE DE L'ARTICLE 14 COMBINÉ AVEC LES ARTICLES 3 ET 9 DE LA CONVENTION

138. Les requérants soutiennent que les actes de violence religieuse dirigés contre eux ont été tolérés par les autorités, parce qu'ils ont été commis au nom de la foi orthodoxe contre une minorité religieuse. Les autorités auraient tout simplement refusé de leur appliquer la loi en raison de leur foi.

Article 14

> « La jouissance des droits et libertés reconnus dans la (...) Convention doit être assurée, sans distinction aucune, fondée notamment sur le sexe, la race, la couleur, la langue, la religion, les opinions politiques ou toutes autres opinions, l'origine nationale ou sociale, l'appartenance à une minorité nationale, la fortune, la naissance ou toute autre situation. »

139. La Cour rappelle que la « distinction » prévue à l'article 14 de la Convention est discriminatoire si elle « manque de justification objective et raisonnable », c'est-à-dire si elle ne poursuit pas « un but légitime » ou s'il n'y a pas de « rapport raisonnable de proportionnalité entre les moyens employés et le but visé ». Par ailleurs, les Etats contractants jouissent d'une certaine marge d'appréciation pour déterminer si et dans quelle mesure des différences entre des situations à d'autres égards analogues justifient des distinctions de traitement (*Camp et Bourimi c. Pays-Bas*, n° 28369/95, § 37, CEDH 2000-X ; *Thlimmenos c. Grèce* [GC], n° 34369/97, § 44, CEDH 2000-IV).

140. Ayant examiné l'ensemble des éléments en sa possession, la Cour constate que, en l'espèce, le refus de la police d'intervenir promptement sur les lieux pour protéger les requérants et les enfants de certains d'entre eux contre des actes de violence religieuse, ainsi que l'indifférence subséquente que les autorités compétentes ont opposée aux intéressés sont en grande partie le corollaire des convictions religieuses des requérants. Le Gouvernement n'apporte aucun élément en sens contraire. Pour la Cour, les propos et l'attitude des fonctionnaires alertés au moment de l'attaque ou chargés par la suite de l'enquête y afférente ne sauraient passer pour compatibles avec le principe de l'égalité de tous devant la loi (paragraphes 28 et 44 ci-dessus). Le Gouvernement n'avance aucune justification à ce traitement discriminatoire des intéressés.

141. La Cour estime que la négligence dont ont fait preuve la police et les autorités chargées de l'enquête face à des actes illégaux d'une extrême gravité perpétrés en raison de la foi des requérants a permis au père Basile de continuer de prôner la haine par le biais des médias et de poursuivre, accompagné de ses partisans, des actes de violence religieuse en alléguant que ceux-ci bénéficiaient de l'aval officieux des autorités (paragraphes 36, 54, 55, 66-68, 70 et 85 ci-dessus). La société civile avait donc des raisons de croire que les malfaiteurs bénéficiaient de la complicité des représentants de l'Etat (paragraphe 76 ci-dessus).

142. Dès lors, la Cour conclut que les requérants concernés (paragraphes 125 et 135 ci-dessus) ont été victimes d'une violation de l'article 14 combiné avec les articles 3 et 9 de la Convention.

V. SUR LA VIOLATION ALLÉGUÉE DES ARTICLES 10 ET 11 DE LA CONVENTION

143. Les requérants soutiennent que la destruction de leurs ouvrages religieux lors de l'attaque du 17 octobre 1999 sans qu'aucune sanction ne soit imposée aux auteurs de ce méfait emporte violation de leurs droits garantis par l'article 10 de la Convention. Ils estiment que l'absence de toute mesure de protection de la part des autorités après qu'ils eurent été agressés lors d'une réunion pacifique constitue une violation de l'article 11 de la Convention.

144. Pour la Cour, ces griefs se confondent avec ceux que les requérants tirent des articles 3 et 9 de la Convention. Eu égard au constat de violation de ces dispositions, la Cour estime qu'il ne s'impose pas d'examiner la requête également sous l'angle des articles 10 et 11 de la Convention.

VI. SUR L'APPLICATION DE L'ARTICLE 41 DE LA CONVENTION

145. Aux termes de l'article 41 de la Convention,

> « Si la Cour déclare qu'il y a eu violation de la Convention ou de ses Protocoles, et si le droit interne de la Haute Partie contractante ne permet d'effacer qu'imparfaitement les conséquences de cette violation, la Cour accorde à la partie lésée, s'il y a lieu, une satisfaction équitable. »

A. Dommage moral

1. Arguments des parties

146. Les requérants demandent en premier lieu qu'il soit ordonné au Gouvernement de distribuer l'arrêt de la Cour dans la présente affaire à toutes les autorités chargées d'assurer l'ordre public en leur expliquant clairement en quoi consistent les droits garantis par l'article 9 de la Convention.

147. Ils sollicitent également le versement, en réparation du dommage moral, d'une somme de 25 000 dollars américains (USD – 19 319 euros[1] (EUR)) à l'ensemble des cent-vingt membres de la Congrégation et, de surcroît, une somme de 2 500 USD (1 931 EUR) à chacun des quatre requérants – M. V. Kokossadzé, M^me^ N. Lélachvili, M. A. Khitarichvili et M^me^ L. Djikourachvili. Les requérants soulignent que l'attaque en question leur a causé un stress émotionnel important et que le refus de l'Etat de les protéger les a maintenus dans un état de terreur permanent. Ils estiment que les sommes réclamées sont modiques.

148. Réitérant le raisonnement qui se trouve exposé aux paragraphes 86, 88 et 90 ci-dessus, le Gouvernement souligne que la responsabilité pénale des auteurs de l'attaque litigieuse a été engagée et que l'Etat a éradiqué la pratique de la violence religieuse par l'arrestation du père Basile et de ses partisans le 12 mars 2004. Dès lors, les requérants n'auraient subi aucun dommage moral et il n'y aurait pas lieu de leur allouer une indemnité à ce titre. Un constat éventuel de violation des dispositions de la Convention constituerait une satisfaction équitable suffisante.

149. Si une réparation devait toutefois être allouée pour dommage moral, le Gouvernement soutient que l'ensemble des cent-vingt membres de la Congrégation ne sont pas fondés à la réclamer, les griefs de cent-un seulement d'entre eux ayant été déclarés recevables. Par ailleurs, il juge que les montants réclamés sont exagérés et que, vu la situation socio-économique du pays, une somme de 50 USD (39 EUR) pour chacun des quatre-vingt-dix-sept requérants et de 500 USD (386 EUR) pour chacun des quatre autres requérants susmentionnés serait raisonnable.

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1. Taux de change au 6 février 2007.

150. Pour ce qui est de la demande des requérants figurant au paragraphe 146 ci-dessus, le Gouvernement rappelle que les arrêts de la Cour sont déclaratoires et qu'il n'appartient pas à celle-ci d'indiquer à un Gouvernement la manière dont un arrêt doit être exécuté (voir, entre autres, *Scozzari et Giunta c. Italie* [GC], n^{os} 39221/98 et 41963/98, § 249, CEDH 2000-VIII).

2. Appréciation de la Cour

151. La Cour rappelle qu'elle a conclu à une violation de l'article 3, pris séparément et combiné avec l'article 14 de la Convention, dans le chef de quarante-deux requérants seulement (paragraphes 125 et 142 ci-dessus) et à une violation de l'article 9, pris séparément et combiné avec l'article 14 de la Convention, dans le chef de quatre-vingt-seize requérants (paragraphes 135 et 142 ci-dessus). La question du dommage moral devra dès lors se limiter aux requérants que la Cour a reconnus victimes des violations précitées.

152. La Cour ne partage pas l'avis du Gouvernement selon lequel ces requérants n'auraient subi depuis 1999 aucun préjudice moral du fait des violations de leurs droits, étant donné que l'Etat a enrayé, en mars 2004, la violence envers les témoins de Jéhovah. Au contraire, la Cour estime que les requérants ont subi un préjudice moral certain du fait de l'agression physique et verbale et de l'humiliation dont ils ont été victimes, ainsi que de l'impasse procédurale et de la situation de vulnérabilité particulière dans laquelle l'inactivité des autorités compétentes les a placés par la suite. Ce dommage moral ne saurait être réparé par les seuls constats de violation.

153. Eu égard à des considérations d'équité et au montant réclamé, la Cour octroie aux requérants concernés les sommes ci-dessous, plus tout montant pouvant être dû à titre d'impôt.

a) A raison de la violation de l'article 3, pris séparément et combiné avec l'article 14 de la Convention :

– à M^{me} Patman Thabagari et MM. Miriane Arabidzé et Alexi Khitharichvili, 700 EUR chacun ;

– à M^{mes} Nora Lélachvili, Nino Lélachvili, Zaïra Djikourachvili, Nathéla Kobaïdzé, Roza Kinkladzé, Nino Djanachvili, Lia Bakhoutachvili et Ia Tchamaouri et MM. Vladimer Kokosadzé, Merab Jijilachvili et Ilia Mantskava, ainsi qu'à M^{mes} Izolda Pourtséladzé, Ia Vardanichvili, Leïla Mtchédlichvili, Leïla Tsaritov, Raïssa Maïssouradzé, Kéthino Kiméridzé, Amalia Ardgomélachvili, Nathia Milachvili et Iza Khitarichvili et MM. Djoumber Bgarachvili et Chotha Maïssouradzé, 350 EUR chacun ;

– à MM. Nodar Kholod et Tenguiz Djikourachvili et M^{mes} Béla Kakhichvili, Lia Mantskava, Khathouna Kerdzévadzé, Eléné Mamoukadzé, Nana Pilichvili, Makvala Mamoukadzé, Ether Tchrélachvili, Lamara Mtchédlichvili, Nana Kapanadzé, Pikria Tsariélachvili, Nani Kobaïdzé et Lili Kobéssova, 120 EUR chacun ;

– à M[mes] Lia Bakhoutachvili et Raïssa Maissouradzé, respectivement 300 et 200 EUR pour les traitements subis par leurs fils ;

– à M[mes] Leïla Djikourachvili, Lia Sidamonidzé, Cécile Gagnidzé et Ia Vardanichvili, 160 EUR chacune pour les traitements subis par leurs enfants.

b) A raison de la violation de l'article 9, pris séparément et combiné avec l'article 14 de la Convention :

– 150 EUR à chacun des requérants cités dans l'annexe au présent arrêt sous les n[os] 1 à 92 ainsi qu'à MM. Vladimer Kokossadzé et Alexi Khitarichvili et M[mes] Nino Lélachvili et Leïla Djikourachvili.

154. En ce qui concerne l'indication au Gouvernement de la mesure suggérée par les requérants (paragraphe 146 ci-dessus), la Cour rappelle que l'Etat défendeur reconnu responsable d'une violation de la Convention ou de ses Protocoles est appelé, non seulement à verser aux intéressés les sommes allouées à titre de satisfaction équitable, mais aussi à choisir, sous le contrôle du Comité des Ministres, les mesures générales et/ou, le cas échéant, individuelles à adopter dans son ordre juridique interne afin de mettre un terme à la violation constatée par la Cour et d'en effacer dans la mesure du possible les conséquences de manière à rétablir autant que faire se peut la situation antérieure à celle-ci (*Maestri c. Italie* [GC], n° 39748/98, § 47, CEDH 2004-I).

La Cour n'a donc pas compétence pour enjoindre au Gouvernement de distribuer le présent arrêt et de donner des explications aux autorités chargées d'assurer l'ordre public (voir, entre autres, *Oberschlick c. Autriche (n° 1)*, arrêt du 23 mai 1991, série A n° 204, § 65). Par ailleurs, elle ne discerne pas en l'espèce de circonstances particulières de nature à justifier qu'il soit demandé au Gouvernement de prendre une mesure quelconque (voir, *a contrario*, *Assanidzé*, précité, §§ 202-203).

B. Frais et dépens

1. Arguments des parties

155. Les requérants demandent le remboursement de l'intégralité des frais exposés lors de leurs différentes tentatives pour faire examiner leurs griefs par les autorités internes, ainsi que la totalité des frais relatifs à leur représentation devant la Cour.

156. Leurs intérêts auprès des autorités internes ayant été défendus par M[e] Tchabachvili, les requérants réclament à ce titre une somme de 2 500 USD (1 931 EUR). M[e] Tchabachvili a préparé notamment la base factuelle de l'affaire en rencontrant les victimes séparément, a assisté celles-ci en effectuant les démarches nécessaires et en les représentant devant les différentes autorités. Selon une facture du 1[er] septembre 2003,

adressée à M. V. Kokosadzé, porte-parole de la Congrégation, M^e^ Tchabachvili entend réclamer aux requérants le versement de cette somme ainsi que de celle mentionnée au paragraphe 160 ci-dessous dès le prononcé de l'arrêt de la Cour dans la présente requête.

157. La représentation des requérants devant la Cour a été assurée par M^e^ Carbonneau, avocat canadien, assisté par M^e^ Tchabachvili, M^e^ John M. Burns, avocat canadien, M^e^ Nicos C. Alivizatos, avocat grec, et M^me^ Nuala Mole du Centre AIRE (*Advice on Individual Rights in Europe*) à Londres.

158. M^e^ Carbonneau réclame la somme de 15 750 USD (12 170 EUR) pour le travail qu'il a effectué personnellement (recherche de preuves, assistance à la rédaction de l'exposé des faits concernant chacun des requérants, préparation de la documentation et rédaction de la requête, des observations, des demandes d'application des articles 39, 40 et 41 du règlement de la Cour les 29 juin et 10 octobre 2001, des informations sur l'aggravation de la situation des témoins de Jéhovah en Géorgie et de la demande d'audience publique, etc.). Il produit la facture qu'il a adressée le 1^er^ septembre 2003 à M^e^ Tchabachvili par laquelle il demande que les requérants lui versent cette somme dès le prononcé de l'arrêt de la Cour dans la présente affaire.

159. M^e^ Carbonneau produit par ailleurs une lettre du 11 juillet 2001 par laquelle M^e^ Alivizatos lui réclamait le versement de 1 500 USD (1 159 EUR) sur son compte bancaire pour l'ensemble de l'assistance juridique fournie aux fins de la présente requête et de l'affaire de l'Union des témoins de Jéhovah (*Union des témoins de Jéhovah c. Géorgie*, n^o^ 72874/01, affaire pendante).

160. M^e^ Carbonneau soutient aussi que, pour chacune des tâches effectuées dans la présente affaire, il est redevable à M^es^ Tchabachvili et Burns de 2 325 et 1 000 USD (1 797 et 773 EUR) respectivement au titre des consultations et de l'assistance juridique. A l'appui de cette demande, il produit une lettre du 1^er^ septembre 2003 par laquelle M^e^ Burns lui réclamait ladite somme forfaitaire de 1 000 USD.

161. M^e^ Carbonneau sollicite en outre 4 500 USD (3 477 EUR) pour « frais futurs éventuels » et 1 025 USD (792 EUR) pour la traduction des documents.

162. Les sommes susmentionnées n'incluent pas les taxes.

163. Le Gouvernement estime qu'outre M^es^ Tchabachvili et Carbonneau, la participation de trois autres personnes à la représentation des requérants devant la Cour n'était pas nécessaire. Il demande par conséquent que la partie de la demande relative aux frais concernant l'assistance fournie par M^es^ Burns et Alivizatos et M^me^ Mole soit rejetée.

164. Pour ce qui est des honoraires de M^e^ Tchabachvili, le Gouvernement concède que celui-ci a accompli un travail certain, mais il estime que l'affaire des requérants dont étaient saisies les autorités internes

ne présentait pas une complexité particulière. Il considère dès lors que 500 USD (386 EUR), toutes taxes comprises (« TTC »), constituent une somme suffisante à ce titre.

165. Pour ce qui concerne les sommes réclamées par M^es^ Tchabachvili et Carbonneau pour avoir préparé les demandes d'application des articles 39 et 40 du règlement et pour avoir informé la Cour de l'évolution de la situation des témoins de Jéhovah en Géorgie, le Gouvernement estime qu'il ne s'agit pas de frais exposés pour mettre fin aux violations alléguées. Il invite par conséquent la Cour à rejeter cette partie de la demande. D'après les factures présentées (paragraphes 156 et 158 ci-dessus), ces sommes correspondent à 2 075 USD (1 603 EUR).

166. Quant au reste, le Gouvernement juge exorbitantes les sommes sollicitées par M^es^ Tchabachvili et Carbonneau au titre des frais réellement exposés aux fins de la représentation des requérants devant la Cour et estime que 2 050 USD (1 584 EUR), TTC, constitueraient à cet égard une somme raisonnable et suffisante.

2. Appréciation de la Cour

167. La Cour note que les requérants n'ont pas demandé l'aide judiciaire en vue de leur représentation dans la présente affaire.

168. Elle réitère sa jurisprudence selon laquelle il ne peut être décidé du remboursement des frais que dans la mesure où ils ont été réellement et nécessairement encourus afin de prévenir ou redresser le fait jugé constitutif d'une violation de la Convention (voir, entre autres, *Donadzé c. Géorgie*, n^o^ 74644/01, § 48, 7 mars 2006). Elle rappelle également qu'elle ne s'estime pas liée par les barèmes d'honoraires et pratiques internes, même si elle peut s'en inspirer (voir, entre autres, *M.M. c. Pays-Bas*, n^o^ 39339/98, § 51, 8 avril 2003) et qu'au titre de l'article 41 de la Convention elle rembourse les frais qui sont d'un montant raisonnable (voir, entre autres, *Nikolova c. Bulgarie* [GC], n^o^ 31195/96, § 79, CEDH 1999-II).

169. Aux yeux de la Cour, la présente affaire est complexe du point de vue factuel, ne serait-ce qu'en raison du grand nombre de requérants et du fait que la charge de la preuve, vu l'attitude des autorités, a entièrement pesé sur les intéressés. Devant la Cour, elle a donné lieu à plusieurs séries de mémoires écrits, et M^es^ Carbonneau et Tchabachvili ont été amenés à produire une documentation volumineuse accompagnée de traductions en anglais afin d'étayer les allégations des requérants. La Cour possède des pièces justificatives pertinentes, dont des factures, concernant tant le travail accompli par ces deux avocats que celui effectué aux fins de la présente requête par M^es^ Burns et Alivizatos. En revanche, les requérants n'ont soumis aucun justificatif quant à l'assistance juridique fournie par M^me^ Mole et les pièces du dossier ne fournissent pas plus de précision sur ce point.

170. Statuant en équité, et en application de sa jurisprudence qu'elle a rappelée ci-dessus, la Cour alloue aux requérants 10 000 EUR pour

M^e^ Carbonneau (paragraphes 158 et 161 *in fine* ci-dessus), 3 750 EUR pour M^e^ Tchabachvili (paragraphes 156 et 160 ci-dessus), 773 EUR pour M^e^ Burns (paragraphes 157 et 160 ci-dessus) et 580 EUR pour M^e^ Alivizatos, soit la moitié de la somme réclamée par celui-ci, ce qui correspond au travail accompli aux fins de la présente requête (paragraphe 159 ci-dessus), plus tout montant pouvant être dû au titre de la taxe sur la valeur ajoutée.

C. Intérêts moratoires

171. M^e^ Carbonneau demande que les intérêts moratoires à partir de la date de l'arrêt de la Cour soient fixés à 8 %.

172. La Cour juge approprié de baser le taux des intérêts moratoires sur le taux d'intérêt de la facilité de prêt marginal de la Banque centrale européenne majoré de trois points de pourcentage.

PAR CES MOTIFS, LA COUR, À l'UNANIMITÉ,

1. *Dit* qu'il n'y a pas eu violation de l'article 3 de la Convention dans le chef des requérants cités aux paragraphes 106 et 108 ci-dessus ;

2. *Dit* qu'il y a eu violation de l'article 3, pris séparément et combiné avec l'article 14 de la Convention, dans le chef des requérants mentionnés aux paragraphes 100, 101 et 104 ci-dessus, ainsi que dans celui des six requérantes citées au paragraphe 103 ci-dessus, à raison des traitements infligés à leurs enfants ;

3. *Dit* qu'il y a eu violation de l'article 9, pris séparément et combiné avec l'article 14 de la Convention, dans le chef des quatre-vingt-seize requérants identifiés (voir les paragraphes 129 et 135 ci-dessus) ;

4. *Dit* qu'aucune question distincte ne se pose sur le terrain de l'article 13 de la Convention ;

5. *Dit* qu'il n'est pas nécessaire d'examiner la requête également sous l'angle des articles 10 et 11 de la Convention ;

6. *Dit*,

a) que pour le dommage moral subi à raison de la violation de l'article 3, pris séparément et combiné avec l'article 14 de la Convention, l'Etat défendeur doit verser aux requérants, dans les trois mois à compter du jour où l'arrêt sera devenu définitif conformément à l'article 44 § 2 de

la Convention, les sommes suivantes, à convertir en laris géorgiens au taux applicable à la date du versement :

i. à M^me^ Patman Thabagari et MM. Miriane Arabidzé et Alexi Khitharichvili, 700 EUR chacun ;

ii. à M^mes^ Nora Lélachvili, Nino Lélachvili, Zaïra Djikourachvili, Nathéla Kobaïdzé, Roza Kinkladzé, Nino Djanachvili, Lia Bakhoutachvili et Ia Tchamaouri et MM. Vladimer Kokosadzé, Merab Jijilachvili, Ilia Mantskava, ainsi qu'à M^mes^ Izolda Pourtséladzé, Ia Vardanichvili, Leïla Mtchédlichvili, Leïla Tsaritov, Raïssa Maïssouradzé, Kéthino Kiméridzé, Amalia Ardgomélachvili, Nathia Milachvili et Iza Khitarichvili et MM. Djoumber Bgarachvili et Chotha Maïssouradzé, 350 EUR chacun ;

iii. à MM. Nodar Kholod et Tenguiz Djikourachvili et M^mes^ Béla Kakhichvili, Lia Mantskava, Khathouna Kerdzévadzé, Eléné Mamoukadzé, Nana Pilichvili, Makvala Mamoukadzé, Ether Tchrélachvili, Lamara Mtchédlichvili, Nana Kapanadzé, Pikria Tsariélachvili, Nani Kobaïdzé et Lili Kobéssova, 120 EUR chacun ;

iv. à M^mes^ Lia Bakhoutachvili et Raïssa Maissouradzé, 300 et 200 EUR respectivement, à raison des mauvais traitements infligés à leurs fils ;

v. à M^mes^ Leïla Djikourachvili, Lia Sidamonidzé, Cécile Gagnidzé et Ia Vardanichvili, 160 EUR chacune, à raison des mauvais traitements subis par leurs enfants ;

vi. tout montant pouvant être dû à titre d'impôt sur lesdites sommes ;

b) que, pour le dommage moral subi à raison de la violation de l'article 9, pris séparément et combiné avec l'article 14 de la Convention, l'Etat défendeur doit verser dans les trois mois à compter du jour où l'arrêt sera devenu définitif conformément à l'article 44 § 2 de la Convention, 150 EUR à chacun des requérants cités dans l'annexe au présent arrêt sous les n^os^ 1 à 92 ainsi qu'à chacun des quatre autres requérants – MM. Vladimer Kokossadzé et Alexi Khitarichvili et M^mes^ Nino Lélachvili et Leïla Djikourachvili –, plus tout montant pouvant être dû à titre d'impôt sur lesdites sommes ;

c) que, pour frais et dépens, l'Etat défendeur doit verser aux requérants, conjointement, dans les trois mois à compter du jour où l'arrêt sera devenu définitif conformément à l'article 44 § 2 de la Convention, 10 000 EUR pour M^e^ Carbonneau, 3 750 EUR pour M^e^ Tchabachvili, 773 EUR pour M^e^ Burns et 580 EUR pour M^e^ Alivizatos, à convertir en laris géorgiens au taux applicable à la date du versement, ainsi que tout montant pouvant être dû à titre d'impôt sur lesdites sommes ;

d) qu'à compter de l'expiration dudit délai et jusqu'au versement, ces montants seront à majorer d'un intérêt simple à un taux égal à celui de la

facilité de prêt marginal de la Banque centrale européenne applicable pendant cette période, augmenté de trois points de pourcentage ;

7. *Rejette* la demande de satisfaction équitable pour le surplus.

Fait en français, puis communiqué par écrit le 3 mai 2007 en application de l'article 77 §§ 2 et 3 du règlement.

S. DOLLE
Greffière

J.-P. COSTA
Président

Annexe à l'arrêt

Liste des membres de la Congrégation, requérants
(Extrait du procès-verbal de l'assemblée générale du 10 juin 2001)

1. M^me^ Eléné Mamoukadzé	39. M^me^ Lia Bakhoutachvili
2. M. Amirane Arabidzé	40. M^me^ Lia Sidamonidzé
3. M^me^ Patman Thabagari	41. M^me^ Zaïra Djikourachvili
4. M^me^ Roza Kinkladzé	42. M^me^ Ia Vardanachvili
5. M^me^ Kéthino Kiméridzé	43. M^me^ Ia Tchamaouri
6. M^me^ Darédjane Kotranova	44. M^me^ Lia Mantskava
7. M^me^ Izolda Pourtséladzé	45. M^me^ Nino Djanachvili
8. M^me^ Nounou Gviniachvili	46. M^me^ Béla Kakhichvili
9. M^me^ Makvala Mamoukadzé	47. M. Zakro Kotchichvili
10. M^me^ Eka Kerdzévadzé	48. M^me^ Ether Tchrélachvili
11. M^me^ Thina Makharachvili	49. M^me^ Nathéla Kobaïdzé
12. M^me^ Eléné Djodjoua	50. M. Miriane Arabidzé
13. M^me^ Nana Kapanadzé	51. M^me^ Nathia Milachvili
14. M. Nodar Kholod	52. M^me^ Lamara Mtchédlichvili
15. M^me^ Raïssa Maïssouradzé	53. M^me^ Lali Khitharichvili
16. M. Djamboul Arabidzé	54. M. Datho Gvaramia
17. M. Romiko Zourabachvili	55. M^me^ Leïla Mtchédlichvili
18. M^me^ Amalia Ardgomélachvili	56. M^me^ Nana Mirouachvili
19. M^me^ Chakhina Charipov	57. M^me^ Laréta Gogokhia
20. M^me^ Nora Lélachvili	58. M^me^ Izo Margvélachvili
21. M^me^ Lili Kobéssova	59. M^me^ Néli Tabatadzé
22. M^me^ Néli Guiorgadzé	60. M. Lévane Djodjoua
23. M. Djoumber Bgarachvili	61. M. Lévane Mamiachvili
24. M. Ilia Mantskava	62. M^me^ Irma Guélachvili
25. M^me^ Kétévane Djanachvili	63. M^me^ Nato Pirtskhéliani
26. M^me^ Dodo Kakhichvili	64. M^me^ Miranda Arabidzé
27. M^me^ Iza Khitharichvili	65. M^me^ Makvala Tiguichvili
28. M^me^ Khathouna Kerdzévadzé	66. M^me^ Kétho Guigouachvili
29. M^me^ Leïla Tsaritov	67. M^me^ Elichka Valiéva
30. M. Chotha Maïssouradzé	68. M^me^ Martha Baliachvili
31. M^me^ Nani Kobaïdzé	69. M. Gouga Vatsadzé
32. M^me^ Nino Gnolidzé	70. M^me^ Lia Métrévéli
33. M^me^ Nana Pilichvili	71. M^me^ Dali Gazaev
34. M^me^ Lamara Arsénichvili	72. M^me^ Nino Bouichvili
35. M. Merab Jijilachvili	73. M^me^ Dariko Tsiklaouri
36. M. Thenguiz Djikourachvili	74. M^me^ Sophie Mamatsachvili
37. M^me^ Cécile Gagnidzé	75. M^me^ Zaira Zazarachvili
38. M^me^ Pikria Tsariélachvili	76. M^me^ Assia Assatourian

77. M[me] Marika Varamanian 78. M[me] Khathouna Guiorgadzé 79. M[me] Nino Lékaïdzé 80. M[me] Marina Véchapidzé 81. M[me] Thina Radjav 82. M[me] Thamila Gaprindachvili 83. M[me] Béla Zourabachvili 84. M[me] Nathia Dévidzé 85. M. Guiorgui Mossoulichvili 86. M[me] Tsissana Arabidzé 87. M[me] Méri Kobélachvili 88. M[me] Diana Moudoian 89. M[me] Kéthino Gviniachvili 90. M[me] Irina Karamanian 91. M[me] Dodo Loukaïdzé 92. M[me] Tsiouri Eliachvili	93. M[me] Lali Djikourachvili **(la même personne que Léïla Djikourachvili ?)** 94. M. Aléko Khitharichvili **(la même personne que M. Alexi Khitarishvili ?)** 95. M[me] Kéthino Kiméridzé **(la même personne que celle citée au n° 5 ci-dessus ?)** 96. M. Chotha Maïssouradzé **(la même personne que celle mentionnée sous le numéro 30 ?)** 97. M[me] Lida Gagosh(...), **terminaison du nom de famille illisible**

Public Policies

Office of Public Defender of Georgia
Information on Religious Freedom for the Report of the Secretary General on Combating Defamation of Religions

Georgia's 1995 Constitution mandates the separation of church and state, guarantees religious freedom, and forbids "persecution of an individual for his thoughts, beliefs or religion." The constitution also bans discrimination of any kind, inter alia on grounds of religious appurtenance. Apart from the Constitution, Georgia does not at present have any particular legislation establishing a legal regime to govern religious communities and faith. In practice, however, violations of religious freedom have occurred, especially at the regional level, where local officials have restricted the rights of mainly non-traditional religious minorities, who in past years were subjected to societal violence.

Religious Demography

The country has an area of approximately 25,900 square miles and its population is approximately 4.4 million. Most ethnic Georgians (more than 80 percent of the population, according to the 2002 census) nominally associate themselves with the Georgian Orthodox Church (GOC). The Church maintains 4 theological seminaries, 2 academies, several schools, and 27 church dioceses; it has approximately 700 priests, 250 monks, and 150 nuns. The Church is headed by Catholicos Patriarch, Ilia II; the Patriarchate is located in Tbilisi.

Approximately 9.9 percent of the population is nominally Muslim. There are three main Muslim populations: Ethnic Azeris, ethnic Georgian Muslims of Ajara, and ethnic Chechen Kists in northeastern Georgia. There are four large madrassahs (Muslim religious schools) attached to mosques in eastern Georgia, two of which are Shiite and financed by Iranian religious groups, and two of which are Sunni and financed by Turkish religious groups. There are also several smaller madrassahs in Ajara that are financed by Turkey.

The Armenian Apostolic Church is the third largest religious group. Approximately 3.9 percent of the population belongs to the Armenian Apostolic Church. All other religious groups constitute less than one percent of the population each.

Judaism, which has been present since ancient times, is practiced in a number of communities throughout the country, particularly in the largest cities, Tbilisi and Kutaisi. Approximately 4,000 Jews remain in the country following two large waves of emigration: the first in the early 1970s and the second during perestroyka in the late 1980s.

Status of Freedom of Religion

The Constitution provides for freedom of religion, and the Government generally respects this right in practice; however, local officials, police, and other security officials at times harassed nontraditional religious minority groups and their foreign missionaries. The Constitution recognizes the special role of the Georgian Orthodox Church in the country's history but also stipulates the independence of the Church from the State. A Constitutional Agreement between the Government and the Georgian Autocephalous Orthodox Church (the Concordat) was signed and ratified by Parliament in 2002. The Concordat recognizes the special role of the Georgian Orthodox Church and devolves authority over all religious matters to it, including matters outside the Church. The Georgian Orthodox Church enjoys tax-free status and is often consulted in matters of Government

policy, also grants the Church some approval authority over state school textbooks, the construction of religious buildings and the publication of religious literature. In recent years, Assyrian Chaldean Catholics, Lutherans, Muslims, Old Believers, Jehovah's Witnesses, and Roman Catholics have stated that the Georgian Orthodox Church Patriarchate has often acted to prevent them from acquiring, building, or reclaiming places of worship. The Patriarchate has also reportedly denied permission for Pentecostals, the Salvation Army, and the True Orthodox Church to print some religious literature in Georgia.

Absence of a mechanism for religious groups to obtain legal status means that only one religious community in the country, the Georgian Orthodox Church, enjoys such status as a result of its 2002 concordat with the Georgian government. The leaders of many other religious minority groups also seek recognized legal status, a prerequisite for the community collectively to own property or organize most religious activities. However, the absence of formal legal status generally has not prevented most religious communities from functioning through affiliated nongovernmental organizations (NGOs) that are registered with the government as NGOs or as individual members of the community.

Ombudsman of Georgia has been effective advocate for religious freedom and has made numerous public speeches and appearances in support of minority religious groups.

Georgia celebrates all Orthodox holy days.

Restriction of Religious Freedom

The GOC enjoys a tax-exempt status not available to other religious groups, and lobbied Parliament and the Government for laws that would grant it special status and restrict the activities of missionaries from nontraditional religions. The 2002 Concordat between the Church and State defines relations between the two. The Concordat contained several controversial articles, giving the Patriarch of the Church immunity, granting the Church exclusive access to the military chaplaincy, exempting clergymen from military service, and giving the Church a unique consultative role in government, especially in the sphere of education.

While most citizens practice their religion without restriction, the worship of some, particularly members of nontraditional faiths, has been restricted by threats and intimidation from some local Orthodox priests and congregations. On some occasions local police were slow to prevent the harassment of non-Orthodox religious groups, including members of Jehovah's Witnesses, Baptists, and Pentecostals. Some politicians used the supremacy of the GOC in their platforms and criticized some Protestant groups, particularly evangelical groups, as subversive.

All public schools offered a course on religion, which exclusively taught the theology of Orthodox Christianity. While the course was elective, there was societal pressure for all students to take the course. The Patriarchate reportedly had exclusive influence over the course's material and local Orthodox Priests directed, and sometimes taught, the courses in several schools. Students complained that teachers began most courses, including mathematics and science, by leading the class in a recitation of Orthodox prayers. Those who did not participate, including Muslim students, were sometimes punished. In many classrooms, teachers hung orthodox icons or pictures of Georgian Orthodox religious figures. Some schools reportedly have Orthodox chapels where students are encouraged to pray. On January 22, 2005, the Ministry of Education and the Patriarchate of the GOC signed a joint memorandum reaffirming their cooperation in the field of education. The Memorandum created a joint working group to develop curriculum, choose teachers, and publish material for teaching Orthodox Christianity. In the memorandum, the Ministry agreed to financially assist the Church in its education projects and institutions and to include the Church in the development of new material for religious education. No other religious groups were afforded these privileges.

Teaching the history of religion at schools should have a neutral character. We should know that not only one religion should be taught. Children should get objective information about all leading religions and especially about confessions existing in Georgia.

The Roman Catholic and Armenian Apostolic Churches have been unable to secure the return of churches and other facilities closed during the Soviet period, many of which later were given to the Georgian Orthodox Church by the State. The prominent Armenian Church in Tbilisi, Norashen, remained closed, as did four other smaller Armenian churches in Tbilisi and one in Akhaltsikhe. In addition, the Roman Catholic and Armenian Apostolic Churches, as with Protestant denominations, have had difficulty obtaining permission to construct new churches due to pressure from the GOC.

While there were fewer physical attacks on religious minority groups, harassment continued. Although police rarely facilitated harassment of religious minority groups, they sometimes denied protection to these groups. The Catholic Church continued to face difficulties in attempting to build churches in the towns of Kutaisi, Akhaltsikhe, Chiatura, and Ozurgeti. The Ministry of Internal Affairs (including the police) and Prosecutor's Office did not aggressively pursue criminal cases against Orthodox extremists for their attacks against religious minorities. From 1999 to 2003, followers of defrocked Orthodox priest Basil Mkalavishvili engaged in numerous violent attacks on nontraditional religious minorities, including Baptists, Seventh-day Adventists, and especially Jehovah's Witnesses. On January 31, 2005, Basil Mkalavishvili was sentenced to 6 years' imprisonment, and two other colleagues also received prison sentences. There was sporadic harassment of members of nontraditional religions. Occasionally, local Orthodox priests and their congregation members verbally and physically threatened members of minority groups and prevented them from constructing places of worship and from holding worship services. Representatives of religious minority groups regularly filed complaints with the General Prosecutor and Ombudsman.

Legal Framework

Constitution of Georgia

Article 9

1. The state shall declare complete freedom of belief and religion, as well as shall recognize the special role of the Apostle Autocephalous Orthodox Church of Georgia in the history of Georgia and its independence from the state.
2. The relations between the state of Georgia and the Apostle Autocephalous Orthodox Church of Georgia shall be determined by the Constitutional Agreement. The Constitutional Agreement shall correspond completely to universally recognized principles and norms of international law, in particular, in the field of human rights and fundamental freedoms. *(change is added by the Constitutional Law of Georgia of 30 March 2001)*

Article 14

Everyone is free by birth and is equal before law regardless of race, color, language, sex, religion, political and other opinions, national, ethnic and social belonging, origin, property and title, place of residence.

Article 19

1. Everyone has the right to freedom of speech, thought, conscience, religion and belief.
2. The persecution of a person on the account of his/her speech, thought, religion or belief as well as the compulsion to express his/her opinion about them shall be impermissible.
3. The restriction of the freedoms enumerated in the present Article shall be impermissible unless their manifestation infringes upon the rights of others.

Civil Code and Administrative Violations Code

In 2005 Parliament of Georgia passed an amendment to the Civil Code allowing for the registration of religious groups. Before the law was passed, religious groups were required to register as public (i.e. state-regulated) entities, but the law provided no mechanism to do this. Nevertheless, the Administrative Violations Code stipulated a fine for any unregistered religious groups. Furthermore, because unregistered organizations were not recognized as legal entities, they could not rent office space, import literature, or construct buildings of worship, among other activities. Individual members of unregistered organizations could engage in these activities as individuals, but were exposed to personal legal liability. The new amendment allows for religions to register as private, non-commercial entities. Additionally, Parliament removed the article from the Administrative Violations Code fining unregistered religions. Religious groups that perform humanitarian services may also register as charitable organizations, although religious and other organizations may likewise perform humanitarian services and religious rituals without registration.

Criminal Code of Georgia

Article 155. Illegal Interference into Performing Religious Rite
Illegal interference into performing worship or other religious rites or customs under violence or threat of violence or if it was done by insulting the religious feelings of a believer or servant of God.
2. The same action committed by using one's official position.

Article 156. Persecution
Persecution for speech, opinion, conscience, religious denomination, faith or creed or political, public, professional, religious or scientific pursuits.

Article 166. Obstruction to Creation of Political, Public or Religious Unions or Interference in Their Activities
Illegal obstruction, under violence, threat of violence or by using one's official position, into creating political, public or religious unions or interference into their activities.

Article 407. Genocide
Genocide, i.e. the action perpetrated to carry out an agreed plan for complete or partial razing of any national, ethnic, racial, religious or group united by any other mark, that has been expressed in killing members of such groups, serious health damages, intentionally created hard living conditions, forcible drop in childbearing or forceful transference of a baby from one ethnic group to another.

Law on General Education

In 2005 Parliament passed a new law on general education. The law forbids the display of religious symbols on a public school's grounds unless the purpose is academic. The law also forbids religious indoctrination, proselytizing, forced assimilation, or the teaching of theology in public schools during school hours. Students are allowed to study religion and conduct religious rituals after school hours, but neither a teacher nor any other outside party, such as a priest, may participate unless invited by the students. Prayers and other rituals may no longer be conducted during school hours.

Improvements respect for Religious Freedom

- In 2005, Parliament passed an amendment to the Civil Code allowing for the registration of religious organizations as private entities, giving them previously unobtainable legal status.
- In contrast to previous years, religious groups have significantly less difficulties importing literature or religious material.
- Parliament passed a new law on general education. The law forbids the display of religious symbols on a public school's grounds unless the purpose is academic. The law also forbids religious indoctrination, proselytizing, forced assimilation, or the teaching of theology in public schools during school hours.
- Defrocked Orthodox priest Basil Mkalavishvili was sentenced to six years imprisonment for inciting and conducting religiously motivated violence. His colleagues Petre Ivanidze and Merab Koroshinadze were sentenced to four and one year prison terms, respectively.

Public Defender condemns all the facts of intolerance and religious violence, also the Government's and security forces' irresponsible attitude towards such acts. Public Defender has set up special-purpose centre on freedom of religion, one purpose of which was to receive and consider all complaints about acts of intolerance and religious violence. The Tolerance Center established under the Office of Public Defender of Georgia also evaluates legislative standards on the subject. As part of a series of recommendations, the Public Defender's office believes it is necessary to set up an appropriate governmental facility to look after religious minorities and that the governmental authorities must pay more attention to teaching activities, in particular to foster religious tolerance.

Despite the problems, the situation related to the freedom of religion has significantly improved. First of all the reason for this progress is the adequate reaction of the law enforcers to such incidents, which clearly expresses the will of the authorities not to admit impunity of violence and its escalation on the religious grounds.

We emphasize that, despite the differences in numbers of adherents of the religions present in Georgia, one essential feature of the law on religion should be an acknowledgement that the various religions are of equal status under Georgian law.
At the same time, the level of public tolerance remains quite low. No one should use a political platform to spread messages of religious intolerance. In addition, the press must draw attention to the fact that freedom of speech does not authorize the press to broadcast messages, which might constitute incitement to religious hatred. I wish to stress that religious tolerance can only be acquired if people learn from their earliest childhood about the existence and distinctive characteristics of other religious or faith-based communities. Most situations of religious intolerance, those in Georgia included, stem from ignorance.

Role of Public Defender of Georgia in Protection of Religious Freedoms

According to the Constitution of Georgia, "the protection of human rights and fundamental freedoms within the territory of Georgia shall be supervised by the Public Defender of Georgia who shall be elected for a term of five years by the majority of the total number of the members of the Parliament of Georgia".

The Office of Public Defender of Georgia was established in 1998. The Public defender was elected in the same year as an independent institution for supervising the protection of human rights, thereby setting the framework for enforcing the law on Public Defender adopted in 1996.

One of the most important priorities of Public Defender, among other human rights, is defense of religious rights. There is division for Freedom and Equality in the Office of Public Defender, which works on Civil and political rights, freedom of speech, freedom of religion, discrimination issues, rights of foreigners, rights to manifestations and assembly, rights of women, children, disabled, and minorities.

In February 2006 within the financial Support of the government of Norway and the United Nations Development Program, the Tolerance centre was established under the auspices of the Public Defender unifying two Councils: Religions Council and Council of National Minorities. The Goal of the Tolerance Centre is to support the public Defender in establishment of tolerant environment, fight against all forms of religious and ethnic discrimination and to hold activities in the sphere of civil education regarding the above issues. The Tolerance centre conducts researches, analysis of the religious and ethnic situation, prepares reports, recommendations, conducts seminars, conferences, discussions and round-tables, monitoring.

The Religions Council was established in order to conduct effective and coordinated activities against intolerance and extremism. On June 21, 2005, the memorandum between the Public Defender and Confessions unified in the Religions Council was signed. There are 23 confessions unified in the Religions Council.

The most significant relation of Public Defender with the Government is the fact that two times a year Ombudsman submits annual report on the conditions of human rights in Georgia to the Parliament. The annual report contains information about different fields of human rights protection (socio-economic rights, administrative rights, civil and political rights, women, children and minorities etc.), the activities of the Office of Public Defender, individual cases etc. Report also contains general assessments, conclusions and recommendations concerning the promotion and protection of human rights and freedoms in Georgia.

Public Defender makes recommendations to the parliament concerning various problems of religious minorities. One of the recommendations was made to the Ministry of Culture, Monuments protection and Sports to ensure in the shortest period of time the handover to the Georgian Eparchy of the Armenian Holy Apostolic Church of the temples, the historic origin of which is incontestable and which belonged to the Armenian Church before Georgia's sovietization, out of the officially requested six non-functioning temples. Also recommendations concerning legislation enabling religious organizations to acquire the status of Public Legal Entity; recommendation to the ministry of Education and Science to strictly control the protection of religious rights at schools.

On September 28 2006, Penitentiary Department under the Ministry of Justice and Religious Council signed the Memorandum of Cooperation and Understanding. The memorandum aims to establish cooperation between the Penitentiary Department and Religious Council in order to ensure that rights of the religious minorities in the penitentiary system are protected. After the signing ceremony, the parties will take specific measures.

Integration of religious minorities are further facilitated and dialogue with the Government promoted through roundtable meetings of the representatives of religious minorities, as well as meetings of ethnic minorities with state agencies – Penitentiary Department of the Ministry of Justice, Prosecutor's Office, State Minister of Integration, Ministry of Education, and Mayor's Office.

The progress was made towards the dialogue between Orthodox Church (which is not represented in the Religious Council established under PDO) and other religious minorities, by organising a football championship between the football teams of religious minorities. Football teams of Orthodox, Catholic, Armenian, Baptist, Lutheran Church, Muslim and Judaic communities (12 teams in total) participated In the Tournament. Goal of the Tournament was to draw the representatives of various religions together and to build a bridge between religious majority and minorities.

Competitions for Best Child Painting on Tolerance Issues and Best Journalistic Article on Tolerance Issues were held to promote tolerance notion among young generation and journalists. After the Child Painting competition Tolerance Centre prepared and issued a calendar with the children's paintings.

Public awareness is being raised through monthly "Solidaroba" (Solidarity) magazine published by Tolerance Centre and covering issues of ethnic and religious minorities, children and other vulnerable groups.

Public Defender of Georgia regularly makes recommendations to the Prosecutor's Office and the Ministry of Interior on the facts of violation of the rights of religious minorities. Following the intervention of Ombudsman, many investigations have been launched; people inciting and conducting religiously motivated violence were sentenced to imprisonment. Also, after recommendations of the Public Defender to the Parliament of Georgia, Parliament passed an amendment to the Civil Code allowing for the registration of religious organizations as private entities. In addition, Parliament passed a new law on general education. The law forbids the display of religious symbols at schools, also forbids religious indoctrination, proselytizing, forced assimilation.

Office of Ombudsman and the Tolerance Center have regular meetings with international organizations discussing existing problems in the field, elaborating recommendations and initiating new projects for religious minorities.

Article 1

1. The main principles of the Declaration of Human Rights Protection are incorporated into the Georgian legislation. Georgia has also ratified international documents, which are important for protection of ethnic minorities' right. They include:

- Convention on the Prevention and Punishment of the Crime of Genocide;
- International Covenant on Civil and Political Rights;
- Optional Protocol to the International Covenant on Civil and Political Rights;
- International Covenant on Economic, Social and Cultural Rights;
- Discrimination (Employment and Occupation) Convention;
- Employment Policy Convention;
- European Cultural Convention;
- International Convention on the Elimination of All Forms of Racial Discrimination;
- Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment;
- Optional Protocol of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment;
- European Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment and its Protocols No. 1, 2;
- International Convention on the Suppression and Punishment of the Crime of Apartheid;
- Convention for the Protection of Human Rights and Fundamental Freedoms and its Protocols No. 4, 6, 7, 12;
- Convention on the Political Rights of Women;
- Convention on the Elimination of All Forms of Discrimination against Women;
- Framework Convention for the Protection of National Minorities.

2. All of these documents are integrated in Georgian legislation. For instance, Article 407 of the Georgian Criminal Code forbids genocide which is defined as: "Action which is committed for the realization of the plan of complete or partial termination of the group united according to national, ethnic, racial, religious or any other sign and which is expressed with the homicide, injure of health of the member of such group, creating hard living conditions for them, deliberate reduction of birth or placing a child from one ethnic group to another".

On April 14, 2003, **Article 408** of the Georgian Criminal Code (Crime against Humanity) was changed. Before the change the article read as follows: **"Crime against humanity, i.e. any action which is committed within the large-scale and systematic attack on civil population or person and which is expressed with homicide, mass termination of people, deportation**

or other inhuman action which damages a person's physical and mental conditions". After the change, the article was broadened. The new version forbids racial discrimination and intolerance: **"Crime against humanity, i.e. any action which is committed within the large-scale and systematic attack on civil population or person and which is expressed with homicide, mass termination of people, serious destruction of health, deportation, illegal detention, torture, rape, detention in sexual obedience, forcing prostitution, forced pregnancy, forced sterilization, chasing the group of people according to political, racial, national, ethnic, cultural, religious, gender and other signs, apartheid or other inhuman action which damages a person's physical and mental conditions".**

Article 2

3. Georgian legislation forbids all kinds of racism and racial discrimination, including violence committed on racial bases, xenophobia and intolerance, popularization of such activities and organizations which are trying to popularize racism, racial discrimination, other appearances of xenophobia and intolerance. Articles 142, 142^1, 142^2 deal with these crimes. Penalties vary from imprisonment (restriction of freedom) of six months to the imprisonment (restriction of freedom) of seven years.

Article 142 of Georgian Criminal Code based on the Article 14 of the Constitution of Georgia recognizes that: "Everyone is free by birth and is equal before law regardless of race, color, language, sex, religion, political and other opinions, national, ethnic and social belonging, origin, property and title, place of residence." This constitutional principle together with, the Article 142^1 of the Criminal Code of Georgia is a serious guarantee versus the crimes based on racism.

Until 2005, the Article 126 of the Criminal Code of Georgia forbade torture. Torture was defined as "Regular beating or other violence that has resulted in the physical and psychical suffering of the victim but has not produced the consequence set out in Articles 117 or 118," -. The penalty was oppressed if the crime was based on racial, religious, ethnic and national inadmissibility.

This definition of torture was inconsistent with the principles of human rights protection. Therefore, on June 23, 2005 the Parliament of Georgia changed the Criminal Code of Georgia according to the international standards, particularly to the Article 1 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. Article 144^1 of the Criminal Code of Georgia defines torture as "the treatment of a person, his/her relative or of a person financial or in any other way dependent on him/her, which with its character, intensity and duration causes hard physical pain or mental or moral suffer and which aims to obtain information, evidence or confession, to threaten the person or punish him for his/her or third persons behaviour". The penalty was oppressed if the same crime was committed with the violation of the principle of equality based on racial, lingual, sexual and religious signs, political or other attitudes, national, ethnic or social background, origin, place of residence, financial or social position. Besides new definition of torture, the Article 144^3 was placed into the Criminal Code of Georgia. It refers to the humiliating and inhuman treatment. This article defines the humiliating and inhuman treatment as humiliation of a person in order to put him/her into an inhuman, dignity and respect humiliating condition, which cause him/her to suffer hard physical, mental and moral pain. This action is committed in violation with the principle of human equality because of their race, colour of skin, language, sex, religious belief, political and other attitudes, national, ethnic and social background, origin, place of residence, financial and social position.

Article 3

4. Georgian legislation does not make difference between racism, racial discrimination, xenophobia and related intolerance. The Criminal Code of Georgia regards all these actions as "racial discrimination". The Code defines racial discrimination as an action committed in order to create national and racial hostility and dissidence, to humiliate national dignity and respect, also direct or indirect restriction of human rights because of race, colour of skin, social background, national and ethnic origin, or preferential attitude because of the same signs (Paragraph 1 of Article 142^1 of the Criminal Code of Georgia). This norm exists since June 6, 2003.

Article 4

5. As for terrorism, it is not a widespread crime in Georgia. Georgian legislation is not familiar with any norms concerning terrorism which are discriminatory. Chapter 38 of the Criminal Code of Georgia is talking about terrorism. It does not differentiate committers of terrorism according to their race, colour of skin, social or national or ethnic origin. No discrimination can be spotted in Georgian criminal law practice. All committers of this crime are punished equally regardless their diversity.

Article 5

6. Article 14 of the Constitution of Georgia regards everyone equal in front of the law. It says: "All human beings are free from birth and equal in front of law regardless their race, colour of skin, language, sex, religion, political and other attitudes, national, ethnic and social background, origin, financial and social position, place of residence". The Georgian Criminal Procedural and Civil Procedural Codes also guarantee this principle.

7. Chapter 2 of the constitution of Georgia defines personal, social-economic and political rights of human beings. Political rights include citizens' right to participate in the state administration. This is connected with the citizens' right election, right of creating unions, right on information, right of manifestation, right of petition, freedom of thought.

8. Personal rights are right of life, inviolability of dignity and respect, inviolability of persons freedom, inviolability of private life, right of free movement and choice of residence, right of protection in courts, freedom of conscience, confession and religion, right on asylum.

9. Social-economic rights are freedom of labour, freedom of creativity, family protection, right of social security, right of health protection, right of living in the environment secure for health, right of education, right of property and inheritance.

10. Participation of minorities in local decision-making process is guaranteed by the Georgian law "About Local Self-government" and the General Administrative Code of Georgia. According to Article 2 of Georgian law "About Local Self-government", participation of citizens in local decision-making process is available through the following forms:

a. to elect and be elected in the organs of local self-government;

b. to take any position in the organs of local self-government if are suitable for this position according to the legislation;

c. to receive public information from organs and authorities of local self-government;

d. to get familiar with the projects of decisions of the local self-government organs in advance; to participate in their discussion; to demand publishing of the projects of decisions and their public discussions;

e. to address organs or authorities of local self-government;

f. to realize other rights defined by the Georgian legislation.

11. According to Article 115 of the General Administrative Code of Georgian socially important issues, which refer to selling or buying state and municipal property, granting licence on environment protection and building, standardization and division of telecommunication lines, or if the issue refers to the interests of the wide circle of people, the decision must be made by means of public administrative procedures. This means that the documentation about the issue to be decided must be published publicly; citizens have the right to express opinion about the issue and to participate in the oral hearing, which is held to make an administrative act.

12. Article 26 of the Constitution of Georgia recognizes the equal right of every citizen to create and unite in public unions. This right is also guaranteed by the Civil Code of Georgia, which gives every citizen the right to establish juridical person (non-commercial juridical person) if its aims are not violating legislation, moral norms or constitutional principles. Tax department of the ministry of finances is registering non-commercial juridical persons.

13. According to the Georgian legislation, it is not necessary to include ethnic origin, and original form of name in the ID card.

14. We have already talked about the guarantees included in the Criminal Code of Georgia. Therefore, we will not repeat that again.

15. The constitutional principle of equality is also guaranteed by the Article 9 of the Criminal Procedural Code of Georgia, which says: "Everyone is equal in front of the law and the court regardless race, nation, language, sex, social background, financial and official position, place of residence, attitude to religion, belief and other circumstances".

The principle of equality in front of law is guaranteed by participation of a translator for any participant of the process who does not know the state language. The translator who participates in the criminal process gets his honoraria from the state budget (Articles 17 and 94 of the Criminal Procedural Code of Georgia).

16. According to the Civil Procedural Code of Georgia, translator also participates in a civil process, but here the party who lost the case pays his salary (Articles 9.4 and 53.1 of the Civil Procedural Code of Georgia).

17. According to the General Administrative Code of Georgia, if a member of ethnic minority presents any document on non-state language, the administrative organ gives him time for translating this document (Article 73 of the General Administrative Code of Georgia).

18. According to the Article 22 of the Constitution of Georgia, everyone being in Georgia on legal basis has the right to move freely across the territory of the state and to choose freely place of residence.

19. According to the Criminal Procedural Code of Georgia, organs of Ministry of Internal Affairs investigate the cases of Articles 142 (violation of people's equality) and 142[1] (racial discrimination) of the Georgian Criminal Code. The organs of prosecutor supervise this investigation.

20. Georgian government is guaranteeing fast and effective investigation of the crimes based on ethnic diversity. This is assisted by the legislative innovations of March 25, 2005. According to Article 261 of the Criminal Procedural Code of Georgia, if an investigator or a prosecutor receive information about a committed crime, they are obliged to launch the investigation. The basis for launching the investigation is the information received from an individual or a judicial person, organs or authorities of state or local governments, a person admitting a crime or mass media. Such information can also be obtained by the organs of investigation themselves while investigating another case (Article 263 of the Criminal Procedural Code of Georgia).

21. In the organs handling discrimination cases, serious attention is paid to the trainings of the officials. The Training Centre of the Office of the General Prosecutor has an intensive educational programme, which focuses on the rights of minorities and the importance of their protection.

22. Apart from this, the Code of Ethics of the officials working in the office of prosecutor gives the standards of behaviour which are in accordance with the public interest. The aim of the code is to set the norms, which assist in creation of responsible officials and strengthen the principle of equity; make the criminal process equitable, effective, fair and qualified; to assist realization of aims and objectives of effective justice; to ensure that the officials behave according the law and the human rights protection standards. The Code of Ethics focuses on the issue of discrimination. According to Article 5 of the Code, the officials are obliged to assist elimination of all forms of discrimination.

23. In the office of the prosecutor and in the Ministry of Internal Affairs there exist the departments of human rights, which play a crucial part. Their objective is to monitor the effective investigation of the crimes based on national and religious basis. They also supervise that the process of investigation is held according to the norms of the Criminal Procedural Code of Georgia and give recommendations about the issues of the human rights protection.

Article 6

24. All norms of the Georgian legislation, which talk about the discrimination, besides the discrimination based on race, colour of skin, national and ethnic belonging, are familiar with such discrimination bases as sex, language, religion, political and other attitudes, social background, property, place of residence and other status.

Article 7

25. The definition of racial discrimination given in article 142^1 of the Criminal Code of Georgia includes any action that aims to create national and racial hostility and to humiliate national dignity and respect. The action includes call to national, racial and religious hostility. Therefore, such action is a crime according to the Georgian criminal legislation.

Article 8

26. In most cases, the Criminal Code of Georgia regards committing the crime because of racial, religious, national and ethnic as an oppressive circumstance: Article 109 (manslaughter in

oppressive circumstances), Article 117 (serious damage to health), Article 126 (violence), Article 258 (disrespect to the deceased). Besides this, racial motives of committing the crime are oppressive circumstances according to the new articles of the Criminal Code of Georgia about torture: Article 144^1 (torture), Article 144^3 (humiliating and inhuman treatment). The General part of the code does not include any statement which oppresses the penalty because of racial motives, but the norms of the code guarantee the adequate punishment of the crimes based on racial motives.

Article 9

27. According to Subparagraph "b" of Paragraph 1 of Article 1 of the Georgian Law "About Legal Status of the Foreigners", the aim of this law is to protect the rights of foreigners regardless their race, colour of skin, language, sex, religion, political and other attitudes, national, ethnic and social background, origin, financial and social position. This norm establishes additional guarantees. Of course, other guarantees recognized by the Georgian legislation also protect foreigners.

Article 10

28. Article 19 of the Constitution of Georgia recognizes freedom of expression. According to Paragraph 3 of Article 19 this right can only be restricted if it violates interests of others. Expression of discriminative attitude violates the rights of objects of discrimination guaranteed by Article 14 of Georgia Constitution (the right of equality). Therefore, restriction of such opinions is permitted by the Georgian legislation. As for the expression of discriminative statements by the internet, Georgia has already received the recommendation to ratify Additional Protocol to the Convention on Cyber crime, concerning the criminalization of acts of a racist and xenophobic nature committed through computer systems. We are dealing with this issue now.

Article 11

29. In order to develop interethnic cooperation and mutual respect, also to deepen culture of tolerance, the following activities were held in Georgia:

- Since 2004 Georgian Sports and Youth Issues Department annually holds the programme Youth Summer Camps – "Patriots", in which Georgian citizens from every ethnic group aged 15-22 participate;

- Since March 2006, the Office of Ombudsman publishes a monthly magazine "Solidarity", in which the articles about the problems, culture, history and other relevant topics of ethnic minorities' life are printed. The magazine is published in 3,000 copies and is spread in governmental and non-governmental organizations, including organizations of ethnic minorities;

- In 2006, the Tolerance Centre of the Office of Ombudsman held seminars "Integration and Tolerance" for the young leaders of ethnic minorities. In 2007, four such seminars will be held;

- In 2006, Tbilisi City Hall and the Tolerance Centre of the Office of Ombudsman organized a tournament in mini football – "The Cup of Tolerance". This tournament will be hold in November, 2007 and will become traditional;

- In 2006, the Tolerance Centre of the Office of Ombudsman held a drawing competition in the schools of Tbilisi on the theme of tolerance. Georgian as well as ethnic minority pupils participated in this competition;

- The Office of Ombudsman is preparing "Encyclopedia of Ethnic Diversity in Georgia". It will be published in autumn, 2007. It will describe history, culture, traditions, celebrities and other interesting issues about the ethnic minorities living in Georgia. It will include information about the role of ethnic minorities in Georgian history, art, culture, science, sport and other spheres of life. Georgian scientists and representatives of ethnic minorities are working on this encyclopedia;

- In September 2007, Tbilisi City Hall and a non-governmental organization UN Association of Georgia will hold a festival of tolerance in Tbilisi (Abanotubani). The representatives of all ethnic minorities living in Georgia will participate in it. They will be able to present their folk dances, songs, art, cookery, examples of folk production, other ethnographic peculiarities and traditions.

- Since April 2007, the Public Broadcaster started new talk show, which aims to assist to civil integration of ethnic and religious minorities living in Georgia. The project is realized in partnership with UN Association of Georgia within the programme "Civil Integration and Tolerance in Georgia" financed by the USAID. During the programme, the participants including representatives of ethnic minorities will talk about important issues. The audience will receive this information in an entertaining manner. The talk show is maintained in Georgian, and it will be attractive not only for ethnic minorities, but also for the Georgian audience. This project was made with participation of American journalist and producer Steen Mathew, who has a huge experience of television debates in the US and working on programmes aimed for minorities. The programme is weekly and lasts for 50 minutes.

  Besides this, every Thursday public radio broadcasts the programme "Our Georgia", which describes history, traditions and culture of the ethnic and religious minorities living in Georgia. The aim of the programme is to assist the process of civil integration in Georgia.

Article 12

30. Georgian Constitution recognizes and protects gender equality in Georgia. Article 14 of the Constitution says that "every person is free from birth and equal in front of law regardless ... sex ..." This article is also strengthened by other legislative acts which talk about prohibition of discrimination.

Germany

Criminal Code (1998)

Section 86 a Use of the symbols of inconstitutionnal organisations

Section 130 Agitation of the People

1) Whoever, in a manner that is capable of disturbing the public peace:

a). incites hatred against segments of the population or calls for violent or arbitrary measures against them; or

b) assaults the human dignity of others by insulting, maliciously maligning, or defaming segments of the population,
shall be punished with imprisonment from three months to five years.

2) Whoever:

a). with respect to writings (Section 11 subsection (3)), which incite hatred against segments of the population or a national, racial or religious group, or one characterized by its folk customs, which call for violent or arbitrary measures against them, or which assault the human dignity of others by insulting, maliciously maligning or defaming segments of the population or a previously indicated group:

i) disseminates them;
ii) publicly displays, posts, presents, or otherwise makes them accessible;
iii) offers, gives or makes accessible to a person under eighteen years; or
iv) produces, obtains, supplies, stocks, offers, announces, commends, undertakes to import or export them, in order to use them or copies obtained from them within the meaning of numbers a through c or facilitate such use by another; or

b) disseminates a presentation of the content indicated in number 1 by radio, shall be punished with imprisonment for not more than three years or a fine.

3) Whoever publicly or in a meeting approves of, denies or renders harmless an act committed under the rule of National Socialism of the type indicated in Section 220a subsection (1), in a manner capable of disturbing the public peace shall be punished with imprisonment for not more than five years or a fine.

4) Whoever publicly or in a meeting, violating the dignity of the victims, approves of the National Socialist rule by force and arbitrariness in a manner capable of disturbing the public peace shall be punished with imprisonment for not more than three years or a fine.

5) Subsection (2) shall also apply to writings (Section 11 subsection (3)) with content such as is indicated in subsections (3) and (4).

6) In cases under subsection (2), also in conjunction with subsection (5), and in cases of subsections (3) and (4), Section 86 subsection (3), shall apply correspondingly.

Criminal Code (1998), Section 166 - Insulting of Faiths, Religious Societies and Organizations Dedicated to a Philosophy of Life

1) Whoever publicly or through dissemination of writings (Section 11 subsection (3)) insults the content of others' religious faith or faith related to a philosophy of life in a manner that is capable of disturbing the public peace, shall be punished with imprisonment for not more than three years or a fine.

2 Whoever publicly or through dissemination of writings (Section 11 subsection (3)) insults a church, other religious society, or organization dedicated to a philosophy of life located in Germany, or their institutions or customs in a manner that is capable of disturbing the public peace, shall be similarly punished.

Case Law

BUNDESGERICHTSHOF

BESCHLUSS

2 BJs 53/04-4
StB 5/04

vom

28. Oktober 2004

in dem Ermittlungsverfahren

gegen

1.

2.

3.

wegen Verdachts der Werbung um Mitglieder und Unterstützer einer ausländischen terroristischen Vereinigung u. a.

Der 3. Strafsenat des Bundesgerichtshofs hat am 28. Oktober 2004 gemäß § 304 Abs. 5 StPO beschlossen:

Die Beschwerde des Generalbundesanwalts gegen den Beschluß des Ermittlungsrichters des Bundesgerichtshofs vom 21. September 2004 - 2 BGs 126/04 - wird verworfen.

Gründe:

I.

Der Generalbundesanwalt führt gegen die Beschuldigten ein Ermittlungsverfahren wegen des Verdachts der Werbung um Mitglieder und Unterstützer einer ausländischen terroristischen Vereinigung (§ 129 a Abs. 5 Satz 2, § 129 b Abs. 1 StGB) bzw. der Aufforderung zur Unterstützung einer ausländischen terroristischen Vereinigung (§ 111 StGB). Die Tathandlung sieht er in der Veröffentlichung eines Aufrufs im Internet zur Teilnahme am "1. Islamischen Kongreß in Europa" vom 1. bis 3. Oktober 2004 in Berlin. Den Tatverdacht gegen die Beschuldigten leitet er daraus ab, daß diese in dem Aufruf als "Koordinatoren" des Kongresses genannt sind.

Der Aufruf hat in deutscher Übersetzung folgenden Wortlaut:

"Menschheit an die Macht

Der Erste arabische, islamische Kongress in Europa

Die Rundreise der gesegneten Al-Aqsa & Intifada

Alle guten Wünsche den Helden der Opposition des Imperialismus in Assissi/Italien

Das wichtigste Dokument der Erklärung zum Berliner Aufruf 2004

Stehe auf und leiste Widerstand

Wenn du selbst nicht frei bist, aus einer freien Nation, dann ist die Freiheit der Nationen eine Schande für dich.

Die Titel des Dokuments

1. Die tatsächliche Lage der Nation und die Notwendigkeit des Widerstands.

Die arabische und islamische Welt sowie die Mehrheit der gesamten Menschheit leiden unter dem Hass, unter den Katastrophen, unter blutigen Massakern und unter der Besatzung und Unterdrückung seit der Verletzung des ersten Quadratmeters der Erde von Palästina durch die zionistisch-terroristischen Banden Ende des 19. Jahrhunderts.
Seit jener Zeit (…) der Kampf der verschiedenen Kräfte des Guten und Rechten innerhalb der arabischen Welt, die ihre legitimen Rechte verteidigt, zu aller erst die Widerstandsarmeen des arabischen Volkes gegen die Verletzung und den Besatzungsfeind in Palästina, in Syrien, im Libanon und im Irak, und die Kräfte der Ungerechtigkeit, der Besatzung und Aggression, die in der Verletzung und Besatzung der zionistischen Einheit innewohnt und die einen globalen Krieg der Ausweisung und der Vertreibung und der physischen Liquidation von Menschen betreibt, ein Krieg der Vernichtung von Häusern und Territorien, und ein Krieg der kollektiven Ausrottung, mit Hilfe aller materieller, personeller, finanzieller und politischer Mittel, die den imperialistischen Streitkräften zur Verfügung stehen, vor allen den USA, ohne Rücksicht auf die Gefühle und Rechte der Menschen, unter Missachtung des internationalen Rechts und seiner Normen, und in dem Versuch, die Besatzung zu diktieren und den Status-quo umzusetzen mit Hilfe von Gewalt und Unterdrückung und unter Entrechtung der legitimen Landbesitzer, durch Unterdrückung und Ausweisung des Volkes, und durch Entehrung seiner himmlischen Zufluchtstätten und durch Entfernung seiner Kulturstätten und Verfälschung seiner Geschichte und Kultur.

2. Die gegenwärtige Lage und die Herausforderungen unserer Zeit

Die Feinde verbinden noch die letzten Ketten ihres infernalischen Plans und barbarischen Projekts. Ihr Ziel ist die Vernichtung der Widerstandsbewegung, die das legitime und veritable Recht ihrer bestehenden Völker verteidigt, Freiheit und Souveränität. Ihr Ziel ist es, jede Art von Widerstand innerhalb des Landes und im Ausland auszulöschen und zu beenden; ihre Beleidigung, Aggression und Ziele wurden ausgedehnt, um die arabischen und islamischen Gemeinden in den Einwanderungsländern zu erreichen. Die Feinde geben sich nicht zufrieden mit der Unterdrückung und Diskriminierungskampagnen gegen sie, sie arbeiten darauf hin, sie einzukesseln, zu teilen und zu isolieren, selbst ihnen die Stimme zu verbieten, damit sie nicht gegen Aggression und Ungerechtigkeit aufschreien. Sie stören und attackieren jeden Versuch, sie in Würde und Frieden auf Ebene gleicher Menschen- und politischen Rechte leben zu lassen, zusammen mit den Menschen in der Welt, die für Unabhängigkeit kämpfen, für Recht auf Selbstbestimmung und für die Souveränität über ihre Ressourcen.
Angesichts dieser Tatsache ist es eine historische und wichtige Verantwortung der ganzen Welt, gegen Okkupation, Verletzung zu opponieren und sich der Ungerechtigkeit und Unterdrückung zu stellen.

3. Die allgemeinen Ziele und die festen Prinzipien

Die festen Prinzipien, die die Grundlage und den Geist des geplanten Ersten Arabischen, Islamischen Kongresses in Europa bilden, lauten wie folgt:

a) Beseitigung des Schwerts des amerikanischen und zionistischen Terrors, das über dem Hals unseres Volkes und unserer Familien in allen Ländern unserer Nation und in den Einwanderungsländern erhoben ist.

b) Herstellen und Festigen der Schicksalsbindung und Bruderschaft zwischen den Kindern der selben und einen Nation in den Einwanderungsländern und das Aufzeigen von Wegen zur Verbesserung der Rahmenbedingungen des Aufbaus von Einheit und Unterstützung für unsere unterdrückten Menschen in unserem Heimatland.

c) Einsetzen des ersten populären arabisch, islamisch und europäischen Dialogs, getragen von der breiten Volkspartnerschaft auf Grundlage gegenseitigen Respekts und Verbundenheit, um die Rechte der arabischen und muslimischen Gemeinden in Europa zu sichern und zu konsolidieren und Unterstützung des Aufbaus gleichwertiger Partnerschaften und eines gerechten

Friedens in der Welt und Errichtung eines arabisch-islamischen Zirkels innerhalb der weltweit vereinigten Front, um sich der terroristischen amerikanisch-zionistischen Allianz und Hegemonie entgegenzustellen.

d) Aussenden der deutlichen Botschaft an alle, dass die arabisch-islamistischen Gemeinden in Europa tief verwandt sind mit ihren Herkunftsländern und dass sie wohl belastet sind mit dem täglichen Leid des Volkes und seinem Flehen und seinen missachteten Rechten, zu aller erst in Palästina und im Irak, und dass sie sich direkt befassen mit der Unterstützung ihrer Leute, um wieder ihre Unabhängigkeit, Freiheit und volle und umfassende Souveränität über ihre Länder und ihre Ressourcen zu erlangen.

4. Prinzipien und Ansprüche

Wir sagen deutlich und klar NEIN:

Zum Kolonialismus, zur Sklaverei, zum Zionismus und Rassismus, zum Imperialismus, zur amerikanischen Hegemonie, zum Forstgesetz, zur Globalisierung von Tod und Aggression, zur Vernichtung von Moral und Tugend, zum Handel mit Sklaven und Ländern, zum amerikanisch-zionistischem Terror, zu der Politik des Tötens und Aushungerns, zu der Wegnahme der Rechte von Menschen, zur Übertretung von Ländern und ihrer Souveränität, zur Okkupation, zum Propagandakrieg gegen die Kräfte des Friedens, zu der Isolierungskampagne gegen die himmlische Religion des Islams und gegen die muslimischen Gemeinden.

Wir sagen deutlich und klar JA:

Zur Bildung einer breiten, weltweiten Widerstandsbewegung des Volkes für Freiheit, Unabhängigkeit und gerechten Frieden,
und zu der Befreiung aller besetzten Territorien und Länder im Kampf gegen die amerikanisch-zionistische Hegemonie und Besatzung.
Zu einer patriotischen, nationalen, arabischen und islamischen Befreiungsbewegung.
Zur Bildung einer vereinigten arabisch-islamischen Gemeinde in den Auswanderungsländern, sodass unsere Kultur, Tradition und Religion gerettet wird und der Wohlstand und die Ehre unserer Menschen und kommender Generationen gesichert wird.

Unsere Arbeit ist zum Wohle von:

Palästina und Irak - zum Wohle des Widerstands und der Intifada
Bis zum Aufgang der Sonne der Freiheit und Unabhängigkeit
Und für das Projekt der Union der arabischen und islamischen Institutionen und Gemeinden

5. Aufruf zur Teilnahme

Auf Grundlage der obigen Prinzipien rufen wir auf zur Teilnahme am Ersten Arabisch Islamischen Kongress in Europa, um die unbestreitbare Volkslegitimität auszuüben und um erfolgreich eine Union der arabisch, islamischen und befreundeten Institutionen und Gemeinden in Europa zu errichten: Jede Person, jede Persönlichkeit, jede Vereinigung, jede Institution und Gruppe, jede politische, kulturelle und parlamentarische Kraft und Gruppierung, jeder, der den Kongress bereichern kann.

Die Hand Gottes ist bei der Union

'Yadu-l Lahi Ma'as-l Jama'as'

Unser Treffen in Berlin mit den Zielen und festen Prinzipien wird eine neue Herausforderung schaffen, um den Weg zu korrigieren und um die Regression unserer Nation und unseres Volkes zu stoppen und um die praktischen Werkzeuge zu schaffen, um seine Existenz und seine Rechte zu verteidigen.

Es ist der erste, ernsthafte Schritt in der Praxis, den Araber und Muslime in Europa unternehmen, um für die folgenden Ansprüche zu arbeiten:

a) Stärkung der arabisch-islamischen Präsenz in Europa, Vereinigung ihrer Institutionen und Sicherung ihrer Rechte;

b) Unterstützung der Widerstandsbewegung gegen Aggression und Okkupation in Palästina und dem Irak und Unterstützung der Standhaftigkeit des Volkes, dass alle Arten von Unterdrückung und Schikanen und Folter erleidet unter der Politik der eisernen Faust und das für seine Freiheit und Souveränität in allen arabischen und islamischen Ländern kämpft.

c) Einrichtung eines ehrenvollen und fairen arabisch-islamisch-europäischen Volksdialogs, um eine Plattform gemeinsamer Werte und Prinzipien zu schaffen, die sich auf das Recht der Unterstützung und des Widerstands

gegen Unterdrückung und Ungerechtigkeit stützen, und die Unterstützung der Welt fordert auf dem Weg zu Gleichheit und Frieden.

d) Schaffung einer arabisch-islamischen Kette innerhalb der vereinigten Weltfront zur Opposition gegen Hegemonie.

Wir sind alle eingeladen, das palästinensische und irakische Volk zu treffen und zu unterstützen.

Ort: Deutsche Hauptstadt, Berlin
Datum: Freitag, Samstag und Sonntag, 1., 2. und 3. Oktober 2004

Beachten: Angaben zu Sitzungen, Zeiten und Orten und weitere Einzelheiten werden auf folgender Internet Domain veröffentlicht: www. ……..
sowie über direkte elektronische Mail an alle interessierten Teilnehmer und an die regionalen und internationalen Massenmedien.

6. Programm des Kongresses

a) Im Folgenden geben wir die Termine der vorbereitenden Ausschüsse bekannt, an denen jeder teilnehmen darf bis zur Eröffnung des eigentlichen Kongresses:

b)

- Allgemeiner Vorbereitungsausschuss. Dabei sind politische Parteien, Volks- und Gemeindeinstitutionen, Organisationen, Gruppierungen, Vereinigungen. Er tritt zusammen, um die letzte Planung im Programmablauf des Kongresses vorzunehmen.
  Samstag, 4. September in Berlin

- Organisationskomitee. Dabei sind arabische und islamische Vereine in Berlin und dem Umland. Es nimmt die täglichen Anträge und Beiträge bis zum Ende des Kongresses entgegen. Ein letztes Planungstreffen findet statt, um den Organisationsplan der Sitzungen und des Kongresses festzulegen.
  Sonntag, 5. September in Berlin.

- Kommunikations- und Public Relation Ausschuss. Dabei sind Vertreter der arabischen und islamischen Persönlichkeiten und Kräfte im Heimatland und im Ausland. Letzte Planungssitzung zur Koordination der Arbeit der eingeladenen Massenmedien, Betreuung der VIPs, Planung von Veranstaltungen.

Samstag, 11. September in Berlin

- Informations- & Kulturausschuss. Dabei sind Schriftsteller, Denker, Literaten, Journalisten und Medienleute. Es findet eine Planungssitzung statt, auf der die Dokumentation und die Themenfelder festgelegt werden, die dem Kongress vorgetragen werden. Er plant auch die Pressebekanntgaben zum Kongress und koordiniert die Arbeit der anwesenden Medien.
  Sonntag, 12. September in Berlin

- Finanzausschuss: Dabei sind Vertreter der beitragenden Institutionen, Organisationen und Vereinen. Er sammelt Beiträge ein und erstellt einen Ausgabenplan.
  Sonnabend, 28. August in Berlin.

7. Die Arbeitssitzungen des Kongresses

Der Kongress legt besonderen Wert auf Arbeitssitzungen. Sie werden vor Beginn des Kongresses eingerichtet, sind offen für die Teilnehmer während des Kongresses und tagen nach dem Kongress weiter. Diese Sitzungen sind als Offene Sonderausschüsse konzipiert und sollen weiter bestehen als Ständige Ausschüsse:

1. Ausschuss der Selbstkritik
2. Ausschuss zur Unterstützung des Widerstands
3. Politischer Ausschuss
4. Ausschuss zum Verstoß gegen Zionismus und Globalisierung
5. Ausschuss zum Urteil über Kriegsverbrecher
6. Ausschuss für Information und Kultur
7. Ausschuss für Menschenrechte, Festgenommene und Gefangene
8. Ausschuss für Flüchtlinge und Ausgestoßene
9. Ausschuss für auswärtige Beziehungen
10. Ausschuss für die Annäherung an Ideologien und Ideen
11. Wirtschaftsausschuss
12. Jugend- und Studentenausschuss
13. Ausschuss für weibliche Kreise
14. Ausschuss für Dokumentation, Statistik und Datenbank
15. Ausschuss für Verfassungs- und Justizangelegenheiten

8. Teilnahmebedingungen

Jeder arabische, muslimische und europäische Bürger kann teilnehmen und die Sitzungen und Veranstaltungen des Kongresses besuchen, wenn er sich verpflichtet, die folgenden Prinzipien einzuhalten:

1. Nichtanerkennung jeglicher Okkupation oder Verletzung des Landes in Palästina, dem Irak, Syrien, dem Libanon oder irgend eines anderen Territoriums in der gesamten arabischen Welt.

2. Verweigerung jeglicher Kollaboration oder Kooperation mit den amerikanisch-britisch-zionistischen Kräften der Besatzung und Verletzung und ihren entsprechenden militärischen, politischen und institutionellen Organisationen und Einrichtungen.

3. Die irakische Widerstandsbewegung ist der wahre Vertreter des irakischen Volkes. Sie hat die Legitimität, sich aller legitimen Mittel zu bedienen, um gegen die erobernden und besetzenden amerikanischen Streitkräfte und ihre Alliierten und ihren kriecherisch kollaborierenden 'Regierungsrat' vorzugehen, der nicht den Willen des irakischen Volkes repräsentiert.

4. Der palästinensische und irakische Widerstand sowie auch die gegen die Besetzung opponierenden Kräfte erfüllen nur ihre legitime, heilige und grundsätzliche Pflicht.

5. Der Teilnehmer muss mindestens an einer der Arbeitsausschüsse teilnehmen.

6. Ablehnung einer Unterscheidung auf Grund eines religiösen Bekenntnisses; Ablehnung der Infiltration politischer oder ideologischer Linien, die das Diktat ausländischer Hegemonialinteressen einführen wollen unter dem Vorwand von Frieden, Zusammenleben, demokratischer Reformen und ausländischer Kultur.

7. Ablehnung der Trennung zwischen der Widerstandsbewegung in Palästina und dem Irak oder jeglichem anderen arabischen Land. Unser Land ist eins, unsere Besatzer sind eins, und unser Widerstand ist eins.

8. Totale Unterstützung für die Einheit der arabischen und islamischen Vereinigungen und Institutionen in Europa. Dieses Ziel hat Vorrang vor allen anderen Interessen.

9. Teilnahmegebühren:
   a. Arabische und islamische Länder: 75 €

b. Europäische Länder:	50 €
c. Deutschland:	15 €
d. Andere Länder:	25 €

Alle Gebühren sind im Voraus zu entrichten auf das Sonderkonto des Kongresses ab dem 1. September 2004.

9. Diskussionsthemen

Zur allgemeinen Diskussion stehen die folgenden Themenbereiche:

a) patriotische und nationale Angelegenheiten
b) Einwanderungsangelegenheiten und die so genannten Anti-Terror-Gesetze

c) Rolle der internationalen und humanen Institutionen und Organisationen zur Unterstützung des pakistanischen und irakischen Volks.

Darüber hinaus gibt es Sondersitzungen für Experten und Fachleute zu folgenden Themen:

a) Historisches Gedächtnis und der Kern des Kampfes gegen Landbesetzung und Rechtsverletzung.

b) Rolle von Information und den Medien zur Unterstützung des Widerstands und in der Opposition gegen die Propaganda der Globalisierung und bei der Feststellung des wahren Terrors.

c) Zionistische Repressionen, die Konturen des Antisemitismus und die wahren Opfer.

10. Wichtige Hinweise

- Zur Eröffnung des Kongresses gibt es einen Empfang, auf dem alle Teilnehmer des Kongresses willkommen geheißen werden. Wir wollen einige hochrangige internationale Gäste vorstellen und planen folkloristische Vorführungen.

- Der Teilnehmerempfang bei den Sitzungen und Ausschüssen beginnt zu den entsprechenden Sitzungszeiten, vor und während des Kongresses.

- Wir verhandeln mit einigen Hotels über gute und herabgesetzte Unterkünfte für die Teilnehmer. Darüber hinaus können wir einige Teilnehmer privat bei Familien der arabischen und islamischen Gemeinde unterbringen, sollte das erwünscht sein. Wenn ja, ist das Organisationskomitee bis zum 20. September 2004 zu unterrichten.

- Über unsere Homepage www.anamogawem.org. informieren wir über herabgesetzte Flugpreise.

- Teilnehmer, die nicht aus Deutschland kommen, zahlen weder Eintritt noch Teilnahmegebühren.

- Weitere Vorschläge sind bis zum 10. September 04 willkommen.

- Jeder Teilnehmer ist selbst verantwortlich für ein Einreisevisum, falls erforderlich. Das Organisationskomitee leistet auf Anforderung soweit wie möglich Hilfestellung dabei. Ein Visum sollte vor dem 15. September 2004 ausgestellt sein.

Elektronische Mail ist an den Ersten Koordinator zu richten:
Kämpfer, Bruder M.
M. @l. .com

Koordinator für Kommunikations & Public Relations Ausschuss:
D.

Koordinator für Finanzausschuss:
Bruder K.

Vorbereitungsbüros:
…

Email Kontaktadressen:
…

Ab dem 1. September 2004 erscheint ein Informationsbulletin für die teilnehmenden Organisationen und Institutionen.

Der Kongress ist ein Ergebnis der gemeinsamen arabisch-islamischen Kampfmühen; er ist das Eigentum unserer Eltern und Menschen. Dein Beitrag, deine Unterstützung und nicht zuletzt dein finanzieller Beitrag zur Deckung der hohen Kongresskosten sind Ausdruck deines Engagements für das Recht auf Kampf und Fortschritt. Siehe obige Anschriften wegen finanzieller Beiträge.

Erstellt von dem Allgemeinen Vorbereitungsausschuss des Widerstandskongresses in Berlin.

Das ist das Engagement des treuen, kämpfenden Volks.
Unser Widerstand und Intifada geht weiter gegen alle Arten von Unterdrükkung, Ungerechtigkeit und Aggression. Lasst uns eine einheitliche Richtung aufbauen und einen einheitlichen Blick voll treuem Heldentum, der von der richtigen Idee getragen wird, um einer würdevollen Nation ein Leben in Würde

und Wohlstand zu ermöglichen, die stolz ist auf ihre loyalen Söhne und Töchter und Märtyrer, die von Wert sind, der gegenwärtigen Generation und der noch ungeborenen nächsten Generation ein würdevolles Leben zu ermöglichen.
Wenn du zu den Menschen gehörst, die sich in den Widerstand und die Intifada verliebt haben, wenn du dich intensiv an den Diskussionen und Aktivitäten der weltweiten Widerstandsbewegung gegen das amerikanische und zionistische Nazitum beteiligen willst, wenn du die Neuigkeiten der Widerstandsbewegung in allen Teilen der Welt folgen willst, in allen Sprachen, für die Freiheit und Unabhängigkeit des palästinensischen und irakischen Volks und der anderen Völker, ihre Freiheit von Kolonialismus und von amerikanisch-zionistischer Sklaverei, dann beachte: das ist der geringste der Kämpfe.
Denke daran: Du bist verantwortlich vor Gott, vor der Nation und vor der Geschichte."

Zur weiteren Aufklärung des Sachverhalts hat der Generalbundesanwalt beim Ermittlungsrichter des Bundesgerichtshofs die Durchsuchung der Wohnungen der Beschuldigten beantragt. Er erwartet hierdurch unter anderem Erkenntnisse darüber, ob allein der Beschuldigte M. für die Internetveröffentlichung verantwortlich war oder ob auch die beiden anderen Beschuldigten daran beteiligt waren und für welche konkreten gewaltbereiten Organisationen die Beschuldigten Mitglieder oder Unterstützer werben wollten.

Der Ermittlungsrichter hat den Erlaß des beantragten Beschlusses abgelehnt, weil es "an dem für die beantragte Durchsuchungsanordnung erforderlichen Anfangsverdacht" fehle. Der hiergegen vom Generalbundesanwalt eingelegten Beschwerde hat er nicht abgeholfen.

II.

Die zulässige Beschwerde (§ 304 Abs. 5 StP O) bleibt ohne Erfolg. Der Ermittlungsrichter hat den Erlaß der Durchsuchungsanordnung zutreffend abgelehnt, denn es besteht kein Verdacht im Sinne des § 102 StPO.

1. Das Vorliegen des für die Anordnung der Durchsuchung vorausgesetzten Tatverdachts hatte der Ermittlungsrichter eigenständig zu prüfen; denn bei dieser Untersuchungshandlung handelt es sich um einen Eingriff in verfassungsrechtlich geschützte Rechtspositionen der von der Maßnahme Betroffenen, deren Gestattung grundsätzlich dem Richter vorbehalten ist. Es versteht sich daher von selbst, daß dieser die gesetzlichen Voraussetzungen des Eingriffs ohne Bindung an die Beurteilung der Verdachtslage durch die ermittelnde Staatsanwaltschaft zu prüfen hat (BVerfG NJW 2004, 3171; Wache in KK 5. Aufl. § 162 Rdn. 19). Die Beurteilung des Tatverdachts unterliegt demgemäß auch der Überprüfung durch den Senat in der Beschwerdeinstanz.

Soweit der Ermittlungsrichter den erforderlichen Verdacht mit "Anfangsverdacht" bezeichnet hat, steht dies in Übereinstimmung mit den Begriffsbestimmungen in der Kommentarliteratur (vgl. Schäfer in LR, 25. Aufl. § 102 Rdn. 5; inhaltlich auch Meyer-Goßner, StPO 47. Aufl. § 102 Rdn. 2 und Lemke in HK-StPO 3. Aufl. § 102 Rdn. 3). Die Verneinung dieses Verdachts im angefochtenen Beschluß sollte - entgegen der in der Beschwerdeschrift des Generalbundesanwalts geäußerten Besorgnis - erkennbar nicht dessen Berechtigung zur Einleitung des Ermittlungsverfahrens in Zweifel ziehen.

2. Die Beschuldigten sind nicht im Sinne des § 102 StPO als Täter oder Teilnehmer einer Straftat nach § 129 a Abs. 5 Satz 2, § 129 b Abs. 1 StGB bzw. nach § 111 StGB verdächtig. Der Internetaufruf beinhaltet weder ein Werben für Mitglieder und Unterstützer einer ausländischen terroristischen Vereinigung noch eine öffentliche Aufforderung zur Unterstützung einer ausländischen terroristischen Vereinigung. Dies steht ohne weitere

terroristischen Vereinigung. Dies steht ohne weitere Ermittlungen bereits jetzt fest, da sich das Vorliegen dieser Äußerungsdelikte allein aus dem Inhalt der Veröffentlichung ergeben könnte.

Im Hinblick auf § 129 a Abs. 5 Satz 2, § 129 b Abs. 1 StGB erscheint bereits zweifelhaft, ob der Aufruf in einzelnen Passagen oder nach seiner Gesamtaussage dahin verstanden werden kann, der Leser solle terroristische Bewegungen im Nahen Osten unterstützen bzw. sich als Mitglied an ihnen beteiligen, oder ob er sich in der Aufforderung zur Teilnahme an dem geplanten Kongreß, verbunden mit einer nicht mehr von § 129 a Abs. 5 Satz 2 StGB erfaßten Sympathiewerbung, erschöpft. Dies bedarf indessen keiner abschließenden Beurteilung. Jedenfalls fehlt es - wie der Ermittlungsrichter zutreffend dargelegt hat - an dem erforderlichen Bezug zu einer konkreten - oder zumindest anhand der Umstände konkretisierbaren - terroristischen Vereinigung. Der Aufruf läßt in keiner Weise erkennen, welcher Organisation der Angesprochene gegebenenfalls beitreten oder Unterstützung leisten soll. Ein solcher konkreter Organisationsbezug ist indes materiellrechtliche Voraussetzung der Strafbarkeit nach § 129 a Abs. 5 Satz 2, § 129 b Abs. 1 Satz 1 StGB; nur wenn er gegeben ist, kann im übrigen geprüft werden, ob die durch die Werbung unterstützte Organisation die Voraussetzungen des § 129 a StGB erfüllt und ob im Falle einer ausländischen Vereinigung nach § 129 b Abs. 1 Satz 3 StGB die erforderliche Ermächtigung vorliegt oder (bei Entscheidungen über strafprozessuale Eingriffsmaßnahmen, soweit dies erforderlich ist; vgl. einerseits Wache aaO; andererseits Nack in KK 5. Aufl. § 102 Rdn. 1) zumindest zu erwarten ist. Entscheidend kommt hinzu, daß ansonsten der bereits weit im Vorfeld der möglichen Verletzung eines Individualrechtsguts eingreifende Tatbestand in einer

unter dem Aspekt des Rechtsgüterschutzes nicht mehr zu legitimierenden Weise ausgedehnt würde.

Der erforderliche Organisationsbezug kann zwar - je nach den Umständen - auch dann gegeben sein, wenn die werbende Äußerung nicht nur eine Vereinigung benennt, sondern auf die Förderung von mehreren (bestimmten oder bestimmbaren) terroristischen Vereinigungen abzielt und dem Adressaten anheimstellt, welcher von ihnen er sich als Mitglied anschließt bzw. welche er unterstützt. Eine Werbung, die hinsichtlich der zu fördernden Organisation aber keinerlei Festlegungen enthält ("irgendeine Vereinigung, die gegen die Unfreiheit in der Welt mit Bomben kämpft") oder durch eine vage Beschreibung eine Vielzahl von terroristischen Vereinigungen als förderungswürdig anspricht, ohne deren Kreis durch weitere Empfehlungen oder Hinweise an den Adressaten einzuschränken, kann indes aus den genannten Gründen nicht genügen. Dementsprechend wäre hier ein Werben um Mitglieder oder Unterstützer einer ausländischen terroristischen Vereinigung selbst dann zu verneinen, wenn der Aufruf dahin verstanden werden könnte, daß sich der Leser irgendeiner der zahlreichen, in den verschiedenen Ländern des Nahen Ostens aktiven militanten terroristischen Organisationen als Mitglied anschließen oder ihr Unterstützung leisten soll.

Aus denselben Gründen entfällt auch eine Strafbarkeit nach § 111 StGB (durch Aufforderung, sich an einer terroristischen Vereinigung als Mitglied zu beteiligen oder sie zu unterstützen).

3. Die beantragte Durchsuchungsanordnung darf daher nicht erlassen werden.

Tolksdorf Miebach Becker

2. Article 5 (Freedom of Expression)

2.1 Related case-law: BVerfG, 13 April 1994, NJW 1994, 1779-1781.

In this case the complainant organised an assembly. The main speaker of the assembly was a revisionist historian propagating the theory of the Auschwitz Hoax. The competent authorities required the complainant to take appropriate measures to ensure that no criminal offences would be committed at the assembly, in particular those contained in §§ 130, 185, 189 and 194 StGB. The legal basis for the imposition of these measures is § 5 n° 4 of the Assembly Act. The appellant claimed that this decision violated his rights to freedom of expression under Art. 5 (1) of the Constitution. The court held that this was not the case.

First, statements of fact are not protected to the same extent as expressions of opinion. In fact, where these statements are deliberately or demonstrably untrue, they fall outside the scope of the guarantee of freedom of expression.

Where a factual statement and an expression of an opinion are so closely linked that no clear separation can be made, it should in principle enjoy protection under Art. 5 (1) of the Constitution. However, freedom of expression is not guaranteed without limitation, as is made clear by Art. 5 (2).

§ 5 n° 4 of the Assembly Act contains such a limitation. It is constitutionally valid because it is not directed against certain expressions of opinion but rather complements the limitations contained in the Criminal Code. Accordingly, measures under § 5 n° 4 of the Assembly Act can only be taken when it is likely that offences which are punishable in any case will be committed.

Judicial interpretation and application of § 5 n° 4 of the Assembly Act, read in conjunction with § 185 of the Criminal Code, did not violate the complainant's rights either. In this context, the court confirmed the position consistently taken by the courts, that denial of the persecution of Jews under the National Socialist regime constitutes an insult to Jews living in Germany.

The complainant's right of freedom of expression had to be balanced against the potential injury to their right to protection of their honour. Given the weight of the insult, the authorities were right in ranking the protection of personality before the freedom of expression.

Since this was sufficient to reject the complainant's submission, the court did not treat any issues in the context of paragraphs 189 or 130 of the Criminal Code.

The Court pointed out that the same principles hold true for the relationship between the freedom of assembly and the rights of personality.

[ECRI, Germany – General overview, "Legal measures to combat racism and intolerance in the member Sates of the Council of Europe", Situation as of 31 December 2002, pp. 14-15]

BGH
Urteil vom 12.12.2000

1 StR 184/00

"Auschwitzlüge" im Internet

JurPC Web-Dok. 38/2001, Abs. 1 - 70

StGB §§ 9 Abs. 1 3. Alt., 130

Leitsatz

Stellt ein Ausländer von ihm verfaßte Äußerungen, die den Tatbestand der Volksverhetzung im Sinne des § 130 Abs. 1 oder des § 130 Abs. 3 StGB erfüllen ("Auschwitzlüge"), auf einem ausländischen Server in das Internet, der Internetnutzern in Deutschland zugänglich ist, so tritt ein zum Tatbestand gehörender Erfolg (§ 9 Abs. 1 3. Alternative StGB) im Inland ein, wenn diese Äußerungen konkret zur Friedensstörung im Inland geeignet sind.

Gründe

Das Landgericht hat den Angeklagten wegen Beleidigung in Tateinheit mit Verunglimpfung des Andenkens Verstorbener in drei Fällen, in einem Fall (II.2) zudem in weiterer Tateinheit mit Volksverhetzung, zu einer Gesamtfreiheitsstrafe von zehn Monaten verurteilt. *(JurPC Web-Dok. - 38/2001, Abs. 1)*

Die Staatsanwaltschaft greift mit ihrer zuungunsten des Angeklagten eingelegten Revision den Schuldspruch in den Internet-Fällen II.1 und II.3 mit der Begründung an, der Angeklagte hätte auch in diesen Fällen wegen Volksverhetzung verurteilt werden müssen. Zudem beanstandet sie die Strafzumessung. Der Angeklagte erhebt eine Verfahrensrüge und die allgemeine Sachrüge. Die Revision der Staatsanwaltschaft hat insoweit Erfolg, als die Verurteilung auch wegen Volksverhetzung erstrebt wird; die Revision des Angeklagten hat mit einer Verfahrensrüge Erfolg. *(Abs. 2)*

A.

I. Der 1944 in Deutschland geborene Angeklagte ist australischer Staatsbürger. Er emigrierte 1954 mit seinen Eltern nach Australien. Nachdem er dort Philosophie, Deutsch und Englisch studiert hatte, kam er 1970/1971 nach Deutschland, wo er als Lehrer an einer Werkschule tätig war. Anschließend studierte er in Deutschland. 1977 begab er sich nach Afrika, 1980 kehrte er nach Australien zurück und war dort als Lehrer tätig. *(Abs. 3)*

1996 schloß sich der Angeklagte mit Gleichgesinnten in Australien zum "Adelaide Institute" zusammen, dessen Direktor er ist. Seit 1992 befaßte er sich mit dem Holocaust. Er verfaßte Rundbriefe und Artikel, die er über das Internet zugänglich machte, in denen er "revisionistische" Thesen vertrat. Darin wurde unter dem Vorwand wissenschaftlicher Forschung die unter der Herrschaft des Nationalsozialismus begangene Ermordung der Juden bestritten und als Erfindung "jüdischer Kreise" dargestellt, die damit finanzielle Forderungen durchsetzen und Deutsche politisch diffamieren wollten. *(Abs. 4)*

II. Drei Publikationen des Angeklagten sind Gegenstand der Verurteilung: *(Abs. 5)*

1. Internet-Fall II.1: Zwischen April 1997 und März 1999 - der genaue Zeitpunkt ist nicht festgestellt - speicherte der Angeklagte Webseiten auf einem australischen Server, die von der homepage des Adelaide Institutes über dessen Internetadresse abgerufen werden konnten. Diese Seiten enthielten drei englischsprachige Artikel des Angeklagten mit den Überschriften "Über das Adelaide Institut", "Eindrücke von Auschwitz" und "Mehr Eindrücke von Auschwitz". Darin heißt es unter anderem: "In der Zwischenzeit haben wir festgestellt, daß die ursprüngliche Zahl von vier Millionen Toten von Auschwitz ... auf höchstens 800.000 gesenkt wurde. Dies allein ist schon eine gute Nachricht, bedeutet es doch, daß ca. 3,2 Millionen Menschen nicht in Auschwitz gestorben sind - ein Grund zum Feiern." "Wir erklären stolz, daß es bis heute keinen Beweis dafür gibt, daß Millionen von Menschen in Menschengaskammern umgebracht wurden." "Keine dieser Behauptungen ist je durch irgendwelche Tatsachen oder schriftliche Unterlagen belegt worden, mit Ausnahme der fragwürdigen Zeugenaussagen, welche häufig fiebrigen Gehirnen entsprungen sind, die es auf eine Rente vom deutschen Staat abgesehen haben." *(Abs. 6)*

2. Fall II.2: Im August 1998 verurteilte eine Amtsrichterin Günter Deckert, weil dieser Max Mannheimer, einen Überlebenden von Auschwitz, beleidigt hatte. Darauf schrieb der Angeklagte aus Australien einen "offenen Brief" an die Richterin und versandte diesen zugleich an zahlreiche weitere Adressaten, auch in Deutschland, unter anderem an die Berliner Zeitschrift "Sleipnir". Den englischsprachigen Text des Briefes stellte er in die homepage des Adelaide Institutes ein. In dem Brief warf er Mannheimer vor, Lügen über Auschwitz zu erzählen, und er schrieb unter anderem: "Ich habe Auschwitz im April 1997 besucht und bin aufgrund meiner eigenen Nachforschungen jetzt zu der Schlußfolgerung gelangt, daß das Lager in den Kriegsjahren niemals Menschengaskammern in Betrieb hatte". *(Abs. 7)*

3. Internet-Fall II.3: Ende Dezember 1998/Anfang Januar 1999 stellte der Angeklagte eine weitere Webseite in die homepage des Adelaide Institutes ein. Diese Seite enthielt einen englischsprachigen Artikel des Angeklagten mit der Überschrift "Fredrick Töbens Neujahrsgedanken 1999". Darin heißt es unter anderem: "In diesem ersten Monat des vorletzten Jahres der Jahrtausendwende können wir auf eine fünfjährige Arbeit zurückblicken und mit Sicherheit feststellen: die Deutschen haben niemals europäische Juden in todbringenden Gaskammern im Konzentrationslager Auschwitz oder an anderen Orten vernichtet. Daher können alle Deutschen und Deutschstämmigen ohne den aufgezwungenen Schuldkomplex leben, mit dem sie eine bösartige Denkweise ein halbes

Jahrhundert lang versklavt hat." "Auch wenn die Deutschen jetzt aufatmen können, müssen sie sich doch darauf gefaßt machen, daß sie weiterhin diffamiert werden, da Leute wie Jeremy Jones von den organisierten Juden Australiens sich nicht über Nacht grundlegend ändern. Ihre Auschwitz-Keule war ein gutes Instrument für sie, das sie gegen alle diejenigen geschwungen haben, die mit ihrer politischen Überzeugung nicht einverstanden sind, um sie ‚funktionsfähig zu machen', wie Jones sich äußerte." *(Abs. 8)*

Das Landgericht konnte bei den Internet-Fällen weder feststellen, daß der Angeklagte von sich aus Online-Anschlußinhaber in Deutschland oder anderswo angewählt hätte, um ihnen die genannten Webseiten zu übermitteln (zu "pushen"), noch daß - außer dem ermittelnden Polizeibeamten - Internetnutzer in Deutschland die homepage des Adelaide Institutes angewählt hatten. *(Abs. 9)*

III. Die Publikationen des Angeklagten hat das Landgericht wie folgt rechtlich gewürdigt: *(Abs. 10)*

1. In allen drei Fällen hat das Landgericht den Angeklagten wegen Beleidigung (der überlebenden Juden) in Tateinheit mit Verunglimpfung des Andenkens Verstorbener verurteilt. *(Abs. 11)*

2. In allen drei Fällen habe der Angeklagte das Verfolgungsschicksal der ermordeten und überlebenden Insassen des Konzentrationslagers Auschwitz geleugnet. In den Fällen II.1 und II.3 habe er den Holocaust als erfundenes Druckmittel zur Erlangung politischer Vorteile und im Fall II.3 zusätzlich auch zur Erlangung finanzieller Vorteile bezeichnet. *(Abs. 12)*

Durch das von vornherein beabsichtigte öffentliche Zugänglichmachen dieser die Menschenwürde verletzenden Beleidigungen und Verunglimpfungen habe der Angeklagte zugleich auch die Gefahr begründet, daß dadurch der öffentliche Friede gestört würde. Seine ins Internet gestellten Artikel seien geeignet gewesen, das Sicherheitsempfinden und das Vertrauen in die Rechtssicherheit insbesondere der jüdischen Mitbürger empfindlich zu stören. *(Abs. 13)*

Das erfülle zwar den Tatbestand der Volksverhetzung nach § 130 Abs. 1 Nr. 2 StGB. Aber lediglich im Fall II.2 (offener Brief) könne eine Verurteilung auch wegen Volksverhetzung erfolgen. Nur hier läge eine Inlandstat vor, für die deutsches Strafrecht gelte. Für die Internet-Fälle (II.1 und II.3) gelte das deutsche Strafrecht indessen nicht, soweit es die Volksverhetzung betrifft (§ 3 StGB). Insoweit sei kein inländischer Ort der Tat (§ 9 StGB) gegeben, denn gehandelt (§ 9 Abs. 1 1. Alt. StGB) habe der Angeklagte nur in Australien, und einen zum Tatbestand gehörenden Erfolg (§ 9 Abs. 1 3. Alt. StGB) könne es bei einem abstrakten Gefährdungsdelikt wie der Volksverhetzung nicht geben. Auch sonst (§§ 5 bis 7 StGB) gelte das deutsche Strafrecht nicht. *(Abs. 14)*

B.

Presserechtliche Verjährung ist auch bei dem Fall II.1 schon deshalb nicht eingetreten, weil kein Presseinhaltsdelikt vorliegt, denn es geht nicht um die körperliche Verbreitung eines an ein Druckwerk gegenständlich gebundenen strafbaren Inhalts (vgl. BGH NStZ 1996, 492). *(Abs. 15)*

C. Revision des Angeklagten *(Abs. 16)*

Die Revision des Angeklagten hat mit einer Verfahrensrüge Erfolg. *(Abs. 17)*

I. Dem liegt folgendes Verfahrensgeschehen zugrunde: *(Abs. 18)*

1. Rechtsanwalt B. , der Wahlverteidiger des Angeklagten vor dem Landgericht, war am 25. März 1999 wegen Volksverhetzung verurteilt worden, weil er in einem anderen Strafverfahren gegen den dortigen Angeklagten Deckert einen Beweisantrag gestellt hatte, mit dem er den Völkermord an der jüdischen Bevölkerung unter der Herrschaft des Nationalsozialismus verharmlost hatte. Die Revisionen der Staatsanwaltschaft und des Angeklagten hat der Bundesgerichtshof in der Revisionshauptverhandlung vom 6. April 2000 verworfen (BGHSt 46, 36). *(Abs. 19)*

2. Unter Hinweis auf das gegen ihn anhängige Revisionsverfahren hatte der Verteidiger deshalb am 3. November 1999 - noch vor Beginn der zweitägigen Hauptverhandlung am 8. November 1999 - sein Wahlmandat niedergelegt und darum gebeten, ihn auch nicht als Verteidiger zu bestellen, weil er sich nicht in der Lage sehe, eine effiziente Verteidigung zu führen. Gleichwohl bestellte der Vorsitzende der Strafkammer am 4. November 1999 Rechtsanwalt B. als Verteidiger nach § 140 Abs. 1 Nr. 1 StPO mit der Begründung, dieser sei nicht gehindert, an der ordnungsgemäßen Durchführung des Strafverfahrens durch sachdienliche Verteidigung des Angeklagten mitzuwirken. *(Abs. 20)*

Am ersten Hauptverhandlungstag gab Rechtsanwalt B. nach Feststellung der Personalien des Angeklagten eine Erklärung ab, in der er konkret darlegte, daß er zu einer substantiierten Verteidigung nicht in der Lage sei. In der jetzigen Lage gäbe es für ihn - aus Angst vor weiterer Strafverfolgung - nur die Möglichkeit, die Hauptverhandlung zu verlassen oder schweigend zu verbleiben. Er werde jedoch die Hauptverhandlung, solange er beigeordnet sei, nicht verlassen. Die Verantwortung, ob der Angeklagte sachdienlich verteidigt sei, liege daher beim Vorsitzenden. Am zweiten Hauptverhandlungstag stellte der Angeklagte den Antrag auf Zurücknahme der Bestellung von Rechtsanwalt B. und auf Beiordnung eines namentlich benannten anderen Verteidigers. Der vorgeschlagene Verteidiger lehnte jedoch die Verteidigung wegen Arbeitsüberlastung ab. Die Bestellung von Rechtsanwalt B. nahm der Vorsitzende nicht zurück. Rechtsanwalt B. sei nicht gehindert, den Angeklagten im Rahmen der Gesetze zu verteidigen. Das Vertrauensverhältnis sei ersichtlich nicht gestört. Im übrigen sei dem Angeklagten die persönliche Situation seines Verteidigers bekannt gewesen; gleichwohl habe er keinen anderen Verteidiger beauftragt. Im Hinblick auf das Beschleunigungsgebot komme eine Zurücknahme der Bestellung nicht in Betracht. *(Abs. 21)*

Rechtsanwalt B. stellte in der Hauptverhandlung keine Beweisanträge; nach dem Schluß der Beweisaufnahme machte er keine Ausführungen und stellte auch keinen Antrag. *(Abs. 22)*

3. Rechtsanwalt B. legte für den Angeklagten Revision ein. Nachdem der Bundesgerichtshof in dem Verfahren gegen Rechtsanwalt B. den Termin für die Revisionshauptverhandlung bestimmt hatte, wies Rechtsanwalt B. das Landgericht darauf hin, daß mit einer Entscheidung des Bundesgerichtshofs erst nach Ablauf der Revisionsbegründungsfrist zu rechnen sei, und beantragte erneut die Bestellung eines anderen Verteidigers. Der Vorsitzende der Strafkammer lehnte den Antrag ab. In der von ihm verfaßten Revisionsbegründungsschrift erhob Rechtsanwalt B. lediglich die allgemeine Sachrüge. Er machte unter Hinweis auf die oben geschilderten Vorgänge geltend, er sei gehindert, die Sachrüge näher auszuführen, und beantragte die Bestellung eines anderen Verteidigers zur weiteren Revisionsbegründung, insbesondere zu der Frage, ob der Angeklagte vor dem Landgericht ordnungsgemäß verteidigt war. Diesen Antrag ließ der Vorsitzende der Strafkammer unbeschieden. Der Vorsitzende des erkennenden Senats hat mit Verfügung vom 25. Juli 2000 die Bestellung von Rechtsanwalt B. zurückgenommen und dem Angeklagten einen anderen Verteidiger bestellt, der die Verfahrensrüge erhoben und insoweit Wiedereinsetzung in den vorigen Stand erhalten hat. *(Abs. 23)*

II. Mit dieser Verfahrensrüge wird der absolute Revisionsgrund des § 338 Nr. 5 StPO geltend gemacht. Rechtsanwalt B. sei aus Furcht vor eigener Bestrafung daran gehindert gewesen, den Angeklagten sachgerecht und effektiv zu verteidigen. Er sei zwar körperlich anwesend gewesen, in der Hauptverhandlung jedoch untätig geblieben, insbesondere habe er keinen Schlußvortrag gehalten (§ 145 Abs. 1 StPO). *(Abs. 24)*

III. Der Senat kann offen lassen, ob der absolute Revisionsgrund des § 338 Nr. 5 StPO gegeben ist (vgl. BGHSt 39, 310, 313; BGH NStZ 1992, 503), denn sowohl in den Entscheidungen des Vorsitzenden der Strafkammer über die Auswahl und Bestellung als auch über die Nichtzurücknahme der Bestellung liegt ein Verfahrensverstoß, auf dem das Urteil beruhen kann. *(Abs. 25)*

1. In der Rechtsprechung des Bundesgerichtshofs ist anerkannt, daß die Verfügung des Vorsitzenden, durch die ein Verteidiger bestellt wird, als Vorentscheidung gemäß § 336 StPO unmittelbar der Überprüfung durch das Revisionsgericht unterliegt, weil das Urteil auf ihr beruhen kann. Die Statthaftigkeit einer solchen Rüge hängt nicht davon ab, daß der Angeklagte zuvor eine Entscheidung des Gerichts herbeigeführt hat. Dies gilt in gleicher Weise für eine Entscheidung des Vorsitzenden, mit der die Zurücknahme der Bestellung abgelehnt worden ist (BGHSt 39, 310, 311; BGH NStZ 1992, 292; NStZ 1995, 296 jew. m.w.N.; vgl. auch BGH StV 1995, 641; NStZ 1997, 401; StV 1997, 565). *(Abs. 26)*

2. Die Entscheidungen des Vorsitzenden verletzten § 140 und § 141 StPO und damit das Recht des Angeklagten auf wirksame Verteidigung (vgl. auch Art. 6 Abs. 3 Buchstabe c

MRK). Sie verstießen zudem gegen den Grundsatz des fairen Verfahrens (vgl. BGHSt 39, 310, 312). Es lag ein wichtiger Grund vor, Rechtsanwalt B. nicht zu bestellen und dessen Bestellung zurückzunehmen. *(Abs. 27)*

Als wichtiger Grund für die Bestellung oder die Zurücknahme der Bestellung kommt jeder Umstand in Frage, der den Zweck der Verteidigung, dem Beschuldigten einen geeigneten Beistand zu sichern und den ordnungsgemäßen Verfahrensablauf zu gewährleisten, ernsthaft gefährdet. Die Fürsorgepflicht gegenüber dem Angeklagten wird es dem Vorsitzenden regelmäßig verbieten, einen Verteidiger zu bestellen, der die Verteidigung wegen eines Interessenkonflikts möglicherweise nicht mit vollem Einsatz führen kann (BVerfG - Kammer - NJW 1998, 444). *(Abs. 28)*

Bei Rechtsanwalt B. lag ein solcher Interessenkonflikt offensichtlich vor. Er konnte den Angeklagten im Hinblick auf sein eigenes Strafverfahren nicht unbefangen verteidigen. Da die Maßstäbe für die Grenzen eines zulässigen Verteidigerverhaltens in Fällen der vorliegenden Art (§ 130 Abs. 5 StGB) höchstrichterlich noch nicht geklärt waren, konnte er keine effektive Verteidigung führen, denn er mußte besorgen, sich selbst strafbar zu machen. *(Abs. 29)*

IV. Für die neue Hauptverhandlung weist der Senat darauf hin, daß im Fall II.2 zu prüfen sein wird, ob neben dem Leugnungstatbestand (§ 130 Abs. 3 StGB) auch eine qualifizierte Auschwitzlüge (§ 130 Abs. 1 StGB) vorliegt. *(Abs. 30)*

D. Revision der Staatsanwaltschaft

Die Revision der Staatsanwaltschaft hat mit der Sachrüge überwiegend Erfolg; auch für die in den Internet-Fällen II.1 und II.3 tateinheitlich begangene Volksverhetzung gilt das deutsche Strafrecht. *(Abs. 31)*

I. Die Äußerungen in den Internet-Fällen II.1 und II.3 haben einen volksverhetzenden Inhalt, und zwar sowohl nach § 130 Abs. 1 Nr. 1 und Nr. 2 StGB als auch nach § 130 Abs. 3 StGB. *(Abs. 32)*

1. In beiden Internet-Fällen liegt die sog. qualifizierte Auschwitzlüge (BGH NStZ 1994, 140; BGHSt 40, 97) vor, die den Tatbestand des § 130 Abs. 1 Nr. 1 StGB (Beschimpfungs-Alternative) und des § 130 Abs. 1 Nr. 2 StGB (Aufstachelungs-Alternative) erfüllt. *(Abs. 33)*

a) Mit offenkundig unwahren Tatsachenbehauptungen (BVerfGE 90, 241; BGH NStZ 1994, 140; 1995, 340) wird nicht nur das Schicksal der Juden unter der Herrschaft des Nationalsozialismus als Lügengeschichte dargestellt, sondern diese Behauptung wird auch mit dem Motiv der angeblichen Knebelung und Ausbeutung Deutschlands zugunsten der Juden verbunden. Im Fall II.1 wird die Qualifizierung insbesondere deutlich durch die Formulierung: "... häufig fiebrigen Gehirnen entsprungen sind, die es auf eine Rente vom deutschen Staat abgesehen haben.". Im Fall II.3 insbesondere durch die Formulierungen "Schuldkomplex", "versklavt" und "Auschwitz-Keule". *(Abs. 34)*

b) Rechtsfehlerfrei hat das Landgericht deshalb angenommen, daß der Äußerungstatbestand des § 130 Abs. 1 Nr. 2 StGB, zumindest in der Form des Beschimpfens (vgl. von Bubnoff in LK 11. Aufl. § 130 Rdn. 22), gegeben ist. Es liegt eine besonders verletzende Form der Mißachtung vor. Im Fall II.1 insbesondere durch die Formulierung "ein Grund zum Feiern" und im Fall II.3 insbesondere durch die Formulierung "mit dem sie eine bösartige Denkungsweise ein halbes Jahrhundert lang versklavt hat". Da die Behauptungen darauf ausgingen, feindliche Gefühle gegen die Juden im allgemeinen und gegen die in Deutschland lebenden Juden zu erwecken und zu schüren, liegt auch ein Angriff gegen die Menschenwürde vor (BGH NStZ 1981, 258; vgl. auch BGHSt 40, 97, 100; von Bubnoff aaO § 130 Rdn. 12, 18; Lenckner in Schönke/Schröder, StGB 25. Aufl. § 130 Rdn. 7). *(Abs. 35)*

c) Nach den Feststellungen liegt aber auch - was dem Angeklagten bereits in der Anklage vorgeworfen wurde - eine Volksverhetzung im Sinne des § 130 Abs. 1 Nr. 1 StGB vor (vgl. dazu BGHSt 31, 226, 231; 40, 97, 100; BGH NStZ 1981, 258; 1994, 140; von Bubnoff aaO § 130 Rdn. 18; Lenckner aaO § 130 Rdn. 5a; Lackner/Kühl, StGB 23. Aufl. § 130 Rdn. 4; Tröndle/Fischer, StGB 49. Aufl. § 130 Rdn. 5, 20b). Die Feststellungen belegen (vgl. UA S. 21), daß die Äußerungen dazu bestimmt waren, eine gesteigerte, über die bloße Ablehnung und Verachtung hinausgehende feindselige Haltung gegen die in Deutschland lebenden Juden zu erzeugen (vgl. BGHSt 40, 97, 102). *(Abs. 36)*

2. Zugleich wird - was gleichfalls angeklagt ist - eine unter der Herrschaft des Nationalsozialismus begangene Handlung der in § 220a Abs. 1 StGB bezeichneten Art geleugnet und verharmlost (§ 130 Abs. 3 StGB). Die vom Angeklagten persönlich verfaßten Internetseiten waren für einen nach Zahl und Individualität unbestimmten Kreis von Personen unmittelbar wahrnehmbar und damit öffentlich (Lackner/Kühl aaO § 80a Rdn. 2). Der Leugnungstatbestand des § 130 Abs. 3 StGB steht in Tateinheit zum Äußerungstatbestand des § 130 Abs. 1 StGB (von Bubnoff aaO § 130 Rdn. 50). *(Abs. 37)*

3. Soweit daneben der Schriftenverbreitungstatbestand des § 130 Abs. 2 Nr. 1 Buchstabe b StGB erfüllt sein sollte, wird er von § 130 Abs. 1 StGB verdrängt, wenn sich - wie hier - die Äußerung gegen Teile der (inländischen) Bevölkerung richtet (Lenckner aaO § 130 Rdn. 27; für Tateinheit auch insoweit wohl von Bubnoff aaO § 130 Rdn. 50). *(Abs. 38)*

4. Die Voraussetzungen der Tatbestandsausschlußklausel des § 130 Abs. 5 StGB i.V.m. § 86 Abs. 3 StGB (vgl. dazu BGHSt 46, 36) liegen nicht vor. Die Äußerungen dienen nicht der Wissenschaft, Forschung oder Lehre (BVerfG - Kammer - Beschluß vom 30. November 1988 - 1 BvR 900/88 -; BVerwG NVwZ 1988, 933); sie sind auch nicht durch das Grundrecht auf freie Meinungsäußerung geschützt (BVerfGE 90, 241; BVerfG - Kammer - Beschluß vom 6. September 2000 - 1 BvR 1056/95 -). *(Abs. 39)*

5. Die Eignung zur Friedensstörung ist gemeinsames Tatbestandsmerkmal von § 130 Abs. 1 und Abs. 3 StGB, die zusätzlich zu der Äußerung hinzutreten muß. *(Abs. 40)*

a) Mit der Eignungsformel wird die Volksverhetzung nach § 130 Abs. 1 und Abs. 3 StGB zu einem abstrakt-konkreten Gefährdungsdelikt (vgl. Senat in BGHSt 39, 371 zum Freisetzen ionisierender Strahlen nach § 311 Abs. 1 StGB und in NJW 1999, 2129 zur Straftat nach § 34 Abs. 2 Nr. 3 AWG); teilweise wird diese Deliktsform auch als "potentielles Gefährdungsdelikt" bezeichnet (BGH NJW 1994, 2161; vgl. auch Sieber NJW 1999, 2065, 2067 m.w.N.). Dabei ist die Deliktsbezeichnung von untergeordneter Bedeutung; solche Gefährdungsdelikte sind jedenfalls eine Untergruppe der abstrakten Gefährdungsdelikte (Senat NJW 1999, 2129). *(Abs. 41)*

b) Für die Eignung zur Friedensstörung ist deshalb zwar der Eintritt einer konkreten Gefahr nicht erforderlich (so aber Rudolphi in SK-StGB 6. Aufl. § 130 Rdn. 10; Roxin Strafrecht AT Bd. 1 3. Aufl. § 11 Rdn. 28; Schmidhäuser, Strafrecht BT 2. Aufl. S. 147; Gallas in der Festschrift für Heinitz S. 181). Vom Tatrichter verlangt wird aber die Prüfung, ob die jeweilige Handlung bei genereller Betrachtung gefahrengeeignet ist (vgl. BGH NJW 1999, 2129 zu § 34 Abs. 2 Nr. 3 AWG). *(Abs. 42)*

Notwendig ist allerdings eine konkrete Eignung zur Friedensstörung; sie darf nicht nur abstrakt bestehen und muß - wenn auch aufgrund generalisierender Betrachtung - konkret festgestellt sein (HansOLG Hamburg MDR 1981, 71; OLG Koblenz MDR 1977, 334; OLG Köln NJW 1981, 1280; von Bubnoff aaO § 130 Rdn. 4; Tröndle/Fischer aaO § 130 Rdn. 2; Lenckner aaO § 130 Rdn. 11; Lackner/Kühl aaO § 130 Rdn. 19 i.V.m § 126 Rdn. 4; Streng in der Festschrift für Lackner S. 140). Deshalb bleibt der Gegenbeweis der nicht gegebenen Eignung zur Friedensstörung im Einzelfall möglich. *(Abs. 43)*

c) Dieses Verständnis von der Eignung zur Friedensstörung entspricht auch der Rechtsprechung des Bundesgerichtshofs zu vergleichbaren Eignungsdelikten wie dem Freisetzen ionisierender Strahlen nach § 311 Abs. 1 StGB (BGHSt 39, 371; NJW 1994, 2161) oder der Straftat nach § 34 Abs. 2 Nr. 3 AWG (BGH NJW 1999, 2129). Ähnliches gilt für den unerlaubten Umgang mit gefährlichen Abfällen nach § 326 Abs. 1 Nr. 4 StGB (vgl. BGHSt 39, 381, 385; BGH NStZ 1994, 436; 1997, 189). *(Abs. 44)*

d) Für die Eignung zur Friedensstörung genügt es danach, daß berechtigte - mithin konkrete - Gründe für die Befürchtung vorliegen, der Angriff werde das Vertrauen in die öffentliche Rechtssicherheit erschüttern (BGHSt 29, 26; BGH NStZ 2000, 530, zur Veröffentlichung in BGHSt 46, 36 bestimmt, BGH NStZ 1981, 258). *(Abs. 45)*

6. Die Taten waren geeignet, den öffentlichen Frieden zu stören. *(Abs. 46)*

a) Eine solche Eignung wird durch die bisherigen Feststellungen belegt. Im Hinblick auf die Informationsmöglichkeiten des Internets, also aufgrund konkreter Umstände, mußte damit gerechnet werden - und darauf kam es dem Angeklagten nach den bisherigen Feststellungen auch an -, daß die Publikationen einer breiteren Öffentlichkeit in Deutschland bekannt werden. *(Abs. 47)*

b) Der Angeklagte verfolgte das Ziel, revisionistische Thesen zu verbreiten (UA S. 3, 4) und er wollte auch, daß jedermann weltweit und damit auch in Deutschland die Artikel

lesen konnte (UA S. 18; die mißverständlichen Ausführungen auf UA S. 43 widersprechen dem nicht). Er wollte damit auch aktiv in die Meinungsbildung bei der Verbreitung der Thesen in Kreisen deutscher "Revisionisten" eingreifen, wie der "offene Brief" mit seinem Verteilerkreis im Fall II.2 zeigt. *(Abs. 48)*

c) Es ist offenkundig, daß jedem Internet-Nutzer in Deutschland die Publikationen des Angeklagten ohne weiteres zugänglich waren. Die Publikationen konnten zudem von deutschen Nutzern im Inland weiter verbreitet werden. Daß gerade deutsche Internet-Nutzer - unbeschadet der Abfassung in englischer Sprache - zum Adressatenkreis der Publikationen gehörten und gehören sollten, ergibt sich insbesondere auch aus ihrem Inhalt, der einen nahezu ausschließlichen Bezug zu Deutschland hat (etwa: "untersuchen wir die Behauptung, daß die Deutschen systematisch sechs Millionen Juden umgebracht haben"; "Die Jagdsaison auf die Deutschen ist eröffnet"; "Daher können alle Deutschen und Deutschstämmigen ohne den aufgezwungenen Schuldkomplex leben"; "Die Deutschen können wieder stolz sein"). *(Abs. 49)*

d) Das Landgericht hat daher zu Recht angenommen, daß der Angeklagte eine Gefahrenquelle schuf, die geeignet war, das gedeihliche Miteinander zwischen Juden und anderen Bevölkerungsgruppen empfindlich zu stören und die Juden in ihrem Sicherheitsgefühl und in ihrem Vertrauen auf Rechtssicherheit zu beeinträchtigen (UA S. 21). *(Abs. 50)*

II. Das deutsche Strafrecht gilt für das abstrakt-konkrete Gefährdungsdelikt der Volksverhetzung nach § 130 Abs. 1 und Abs. 3 StGB auch in den Internet-Fällen. Seine Anwendbarkeit ergibt sich aus § 3 StGB in Verbindung mit § 9 StGB. Denn hier liegt eine Inlandstat (§ 3 StGB) vor, weil der zum Tatbestand gehörende Erfolg in der Bundesrepublik eingetreten ist (§ 9 Abs. 1 3. Alt. StGB). *(Abs. 51)*

1. Die Auslegung des Merkmals "zum Tatbestand gehörender Erfolg" muß sich an der ratio legis des § 9 StGB ausrichten. Nach dem Grundgedanken der Vorschrift soll deutsches Strafrecht - auch bei Vornahme der Tathandlung im Ausland - Anwendung finden, sofern es im Inland zu der Schädigung von Rechtsgütern oder zu Gefährdungen kommt, deren Vermeidung Zweck der jeweiligen Strafvorschrift ist (BGHSt 42, 235, 242; Gribbohm in LK 11. Aufl. § 9 Rdn. 24). Daraus folgt, daß das Merkmal "zum Tatbestand gehörender Erfolg" im Sinne des § 9 StGB nicht ausgehend von der Begriffsbildung der allgemeinen Tatbestandslehre ermittelt werden kann. *(Abs. 52)*

2. Die Vorverlagerung der Strafbarkeit kann der Gesetzgeber durch verschiedene Ausgestaltungen eines Gefährdungsdelikts vornehmen. Er kann konkrete Gefährdungsdelikte schaffen (wie § 315c StGB), oder aber abstrakt-konkrete (wie § 130 Abs. 1 und Abs. 3, § 311 Abs. 1 StGB, § 34 AWG) und rein abstrakte Gefährdungstatbestände (wie § 316 StGB). Wie der Gesetzgeber den Deliktscharakter bestimmt, hängt häufig vom Rang des Rechtsguts und der spezifischen Gefährdungslage ab. *(Abs. 53)*

Daß konkrete Gefährdungsdelikte - als Untergruppe der Erfolgsdelikte - dort, wo es zur konkreten Gefahr gekommen ist, einen Erfolgsort haben, ist weitgehend unbestritten (vgl. nur Gribbohm aaO § 9 Rdn. 20 und Hilgendorf NJW 1997, 1873, 1875 m.w.N.). Abstrakt-konkrete Gefährdungsdelikte stehen zwischen konkreten und rein abstrakten Gefährdungsdelikten. Sie sind unter dem hier relevanten rechtlichen Gesichtspunkt des Erfolgsorts mit konkreten Gefährdungsdelikten vergleichbar, weil der Gesetzgeber auch hier eine zu vermeidende Gefährdung - den Erfolg - im Tatbestand der Norm ausdrücklich bezeichnet. Ob bei rein abstrakten Gefährdungsdelikten ein Erfolgsort jedenfalls dann anzunehmen wäre, wenn die Gefahr sich realisiert hat, braucht der Senat nicht zu entscheiden. *(Abs. 54)*

3. Bei abstrakt-konkreten Gefährdungsdelikten ist ein Erfolg im Sinne des § 9 StGB dort eingetreten, wo die konkrete Tat ihre Gefährlichkeit im Hinblick auf das im Tatbestand umschriebene Rechtsgut entfalten kann. Bei der Volksverhetzung nach § 130 Abs. 1 und Abs. 3 StGB ist das die konkrete Eignung zur Friedensstörung in der Bundesrepublik Deutschland (Collardin CR 1995, 618: speziell zur Auschwitzlüge, wenn der Täter in Deutschland wirken will; Kuner CR 1996, 453, 455: zu Äußerungen im Internet; Beisel/Heinrich JR 1996, 95; Heinrich mit beachtlichen Argumenten in GA 1999, 72; ähnlich Martin ZRP 1992, 19: zu grenzüberschreitenden Umweltdelikten). *(Abs. 55)*

a) Dies entspricht auch der Intention des Gesetzgebers bei Schaffung des Volksverhetzungstatbestandes im Jahre 1960 (vgl. dazu Streng aaO). Schon im Vorfeld von unmittelbaren Menschenwürdeverletzungen wollte er dem Ingangsetzen einer historisch als gefährlich nachgewiesenen Eigendynamik entgegenwirken und schon den Anfängen wehren (Streng aaO S. 508: "Klimaschutz"). *(Abs. 56)*

Mit der Einfügung des Leugnungstatbestandes des § 130 Abs. 3 StGB im Jahre 1994 betonte der Gesetzgeber nochmals die Intention, "eine Vergiftung des politischen Klimas durch die Verharmlosung der nationalsozialistischen Gewalt- und Willkürherrschaft zu verhindern" (Bericht des Rechtsausschusses des Deutschen Bundestages, BTDrucks. 12/8588 S. 8; vgl. auch Bundesministerin der Justiz bei der 1. Beratung des Gesetzentwurfs zur Strafbarkeit der Leugnung des nationalsozialistischen Völkermordes - BTDrucks. 12/7421 - am 18. Mai 1994, Plenarprotokoll der 227. Sitzung des Deutschen Bundestages, S. 19671). Der Gesetzgeber wollte somit den strafrechtlichen Schutz vorverlagern; schon die "Vergiftung des politischen Klimas" sollte unterbunden werden. Die Vorverlagerung der Strafbarkeit war - wie das Abstellen auf das "politische Klima" zeigt - auch davon bestimmt, daß eine konkrete Gefährdung oder gar eine individuelle Rechtsgutverletzung nur sehr selten unmittelbar auf eine einzelne Äußerung zurückgeführt werden könne (vgl. Streng aaO S. 512, der zusätzlich darauf hinweist, daß die Menschenwürde anderer nur angegriffen, nicht aber verletzt werden muß). *(Abs. 57)*

b) Auch sonst wird der Begriff des Erfolgsorts nicht im Sinne der allgemeinen Tatbestandslehre verstanden. *(Abs. 58)*

So hat der Bundesgerichtshof bei abstrakten Gefährdungsdelikten einen "zum Tatbestand gehörenden Erfolg" im Sinne des § 78a Satz 2 StGB (Verjährungsbeginn) durchaus für

möglich gehalten: "Bei diesen Delikten [§ 326 Abs. 1 StGB, abstraktes Gefährdungsdelikt] tritt mit der Begehung zugleich der Erfolg der Tat ein, der in der eingetretenen Gefährdung, nicht in einer aus der Gefährdung möglicherweise später erwachsenden Verletzung besteht" (BGHSt 36, 255, 257; siehe auch Jähnke in LK 11. Aufl. § 78a Rdn. 11). *(Abs. 59)*

Auch kann ein abstraktes Gefährdungsdelikt durch Unterlassen begangen werden. Dabei setzt § 13 StGB gleichfalls einen Erfolg voraus, "der zum Tatbestand eines Strafgesetzes gehört" (vgl. BGH NStZ 1997, 545: Tatbestandsverwirklichung des § 326 Abs. 1 StGB durch Unterlassung, die lediglich nicht fahrlässig war; BGHSt 38, 325, 338: die tatbestandlichen Voraussetzungen des § 326 Abs. 1 Nr. 3 StGB waren durch Unterlassen erfüllt, dieser Tatbestand wurde allerdings von § 324 StGB verdrängt). Das entspricht auch der überwiegenden Auffassung in der Literatur (Tröndle/Fischer aaO § 13 Rdn. 2; Lackner/Kühl aaO § 13 Rdn. 6; Stree in Schönke/Schröder, StGB 25. Aufl. § 13 Rdn. 3; aA Jescheck in LK 11. Aufl. § 13 Rdn. 2, 15). *(Abs. 60)*

c) Soweit von einer verbreiteten Meinung die Auffassung vertreten wird, abstrakte Gefährdungsdelikte könnten keinen Erfolgsort im Sinne des § 9 StGB haben (OLG München StV 1991, 504: zur Hehlerei als schlichtem Tätigkeitsdelikt; KG NJW 1999, 3500; Gribbohm aaO § 9 Rdn. 20; Tröndle/Fischer aaO § 9 Rdn. 3; Eser in Schönke/Schröder, StGB 25. Aufl. § 9 Rdn. 6; Lackner/Kühl aaO § 9 Rdn. 2; Jakobs Strafrecht AT 2. Aufl. S. 117; Horn/Hoyer JZ 1987, 965, 966; Tiedemann/Kindhäuser NStZ 1988, 337, 346; Cornils JZ 1999, 394: speziell zur Volksverhetzung im Internet), wird nicht immer hinreichend zwischen rein abstrakten und abstrakt-konkreten Gefährdungsdelikten differenziert. Aber auch dort, wo die Auffassung vertreten wird, daß abstrakt-konkrete bzw. potentielle Gefährdungsdelikte - als Unterfall der abstrakten Gefährdungsdelikte - keinen Erfolgsort hätten (Hilgendorf NJW 1997, 1873; Satzger NStZ 1998, 112), vermag das nicht zu überzeugen. *(Abs. 61)*

Die Verneinung eines Erfolgsorts bei abstrakten Gefährdungsdelikten wird zumeist nicht näher begründet, stützt sich aber ersichtlich auf den geänderten Wortlaut des § 9 StGB. Durch das 2. StrRG vom 4. Juli 1969 (BGBl I S. 717), in Kraft getreten am 1. Januar 1975 (BGBl I 1973 S. 909), wurde der Erfolgsort nicht mehr nur mit dem "Erfolg", sondern mit dem "zum Tatbestand gehörenden Erfolg" umschrieben. Da eine konkrete Gefahr oder gar eine Gefahrverwirklichung gerade nicht zum Tatbestand eines abstrakten Gefährdungsdelikts gehöre, könne auch der Ort der Gefährdung nicht Tatort sein. *(Abs. 62)*

Allerdings war das Ziel der Gesetzesänderung nicht, eine Begrenzung des § 9 Abs. 1 3. Alt. StGB auf Erfolgsdelikte vorzunehmen, wie Sieber (NJW 1999, 2065, 2069) überzeugend dargelegt hat. Das Merkmal "zum Tatbestand gehörender Erfolg" sollte lediglich klarstellen, daß der Eintritt des Erfolges in enger Beziehung zum Straftatbestand zu sehen ist (Kielwein in: Niederschriften über die Sitzung der Großen Strafrechtskommission IV, AT, 38. bis 52. Sitzung, 1958, S. 20). *(Abs. 63)*

Mit der Aufnahme der (konkreten) Eignung zur Friedensstörung in den Tatbestand des § 130 Abs. 1 und Abs. 3 StGB hat der Gesetzgeber indes die enge Beziehung des Eintritts des Erfolges zum Straftatbestand umschrieben und damit den zum Tatbestand gehörenden Erfolg selbst bestimmt. *(Abs. 64)*

d) Auch die vermittelnden Meinungen von Oehler (Internationales Strafrecht 2. Aufl. Rdn. 257), Jescheck (Lehrbuch des Strafrechts AT 4. Aufl. S. 160; nicht eindeutig Jescheck/Weigend, Lehrbuch des Strafrechts AT 5. Aufl. S. 178) und Sieber (NJW 1999, 2065), die bei der hier vorliegenden Fallgestaltung zu einer Verneinung des Erfolgsorts führen würden, vermögen an dem gefundenen Ergebnis nichts zu ändern. *(Abs. 65)*

4. Für die Anwendung des deutschen Strafrechts bei der Volksverhetzung nach § 130 Abs. 1 und Abs. 3 StGB in Fällen der vorliegenden Art liegt auch ein völkerrechtlich legitimierender Anknüpfungspunkt vor. Denn die Tat betrifft ein gewichtiges inländisches Rechtsgut, das zudem objektiv einen besonderen Bezug auf das Gebiet der Bundesrepublik Deutschland aufweist (vgl. Jescheck/Weigend aaO S. 179; Hilgendorf NJW 1997, 1873, 1876; Derksen NJW 1997, 1878, 1880; Martin ZRP 1992, 19, 22). Auch soll die Verletzung dieses Rechtsguts gerade von dieser Strafvorschrift unterbunden werden. *(Abs. 66)*

Das Äußerungsdelikt nach § 130 Abs. 1 StGB schützt Teile der inländischen Bevölkerung schon im Vorfeld von unmittelbaren Menschenwürdeverletzungen und will - wegen der besonderen Geschichte Deutschlands - dem Ingangsetzen einer historisch als gefährlich nachgewiesenen Eigendynamik entgegenwirken. Der Leugnungstatbestand des § 130 Abs. 3 StGB hat aufgrund der Einzigartigkeit der unter der Herrschaft des Nationalsozialismus an den Juden begangenen Verbrechen einen besonderen Bezug zur Bundesrepublik Deutschland (vgl. von Bubnoff aaO § 130 Rdn. 45; Lackner/Kühl aaO § 130 Rdn. 8a; Gemeinsame Maßnahme des Rates der Europäischen Union betreffend die Bekämpfung von Rassismus und Fremdenfeindlichkeit vom 15. Juli 1996, Amtsblatt der Europäischen Gemeinschaften vom 24. Juli 1996, Nr. L 185/5). *(Abs. 67)*

5. Es kann offen bleiben, ob der Angeklagte auch im Inland gehandelt haben könnte (§ 9 Abs. 1 1. Alt. StGB), wenn ein inländischer Internet-Nutzer die Seiten auf dem australischen Server aufgerufen und damit die Dateien nach Deutschland "heruntergeladen" hätte. Der Senat hätte allerdings Bedenken, eine auch bis ins Inland wirkende Handlung darin zu sehen, daß der Angeklagte sich eines ihm zuzurechnenden Werkzeugs (der Rechner einschließlich der Proxy-Server, Datenleitungen und der Übertragungssoftware des Internets) zur - physikalischen - "Beförderung" der Dateien ins Inland bedient hätte. Eine Übertragung des im Zusammenhang mit der Versendung eines Briefes (vgl. dazu Gribbohm aaO § 9 Rdn. 39) entwickelten Handlungsbegriffes (zu Rundfunk- und Fernsehübertragungen siehe auch KG NJW 1999, 3500) auf die Datenübertragung des Internets liegt eher fern. *(Abs. 68)*

III. Das deutsche Strafrecht gilt auch für die Erfolgsdelikte der Beleidigung (vgl. Tröndle/Fischer aaO § 185 Rdn. 15; Roxin aaO § 10 Rdn. 102; Hilgendorf NJW 1997, 1783, 1876) und der Verunglimpfung des Andenkens Verstorbener (vgl. Tröndle/Fischer

aaO § 189 Rdn. 2) in den Internet-Fällen. Die Ehrverletzung (zu den Grenzen der Meinungsfreiheit vgl. BVerfG - Kammer - Beschluß vom 6. September 2000 - 1 BvR 1056/95 -) trat jedenfalls mit der Kenntniserlangung des ermittelnden Polizeibeamten ein (vgl. BGHSt 9, 17; Tröndle/Fischer aaO § 185 Rdn. 15; Lenckner aaO § 185 Rdn. 5, 16). Hierbei handelte es sich nicht etwa um vertrauliche Äußerungen, von denen sich der Staat Kenntnis verschafft hat (vgl. BVerfGE 90, 255). *(Abs. 69)*

IV. Die somit entsprechend § 354 Abs. 1 StPO vorzunehmende Änderung des Schuldspruchs in den Fällen II.1 und II.3 führt zur Aufhebung der in diesen Fällen verhängten Einzelstrafen und der Gesamtstrafe. Da der Schuldspruch im Fall II.2 von der Revision der Staatsanwaltschaft nicht angegriffen wird, war die in diesem Fall verhängte Einsatzstrafe nicht aufzuheben, denn insoweit enthält die Strafzumessung keinen den Angeklagten begünstigenden Rechtsfehler. *(JurPC Web-Dok. 38/2001, Abs. 70)*

[online seit: 22.01.2001]

BGH, 12 December 2000[1]

On that date, the German Federal Court of Justice heard a case which has often been cited and which sheds light on the issues arising in connection with racism on Internet. An Australian citizen of German origin wrote an article and a circular letter, in which he denied the attempted extermination of the Jews (*actus reus* of the offence referred to as the "Auschwitz lie") and published these on the Internet in Australia and in the English language. The Australian citizen was arrested upon entering Germany. The question presented for judicial review by the Federal Court of Justice was whether German criminal law could and should be applied in this case, given that the place of commission was obviously not Germany, but in Australia.

The offence of public incitement to hatred under § 130, paras. 1 und 3 StGB, which was considered by the Federal Court of Justice, is an example of an offence of potential endangerment (*potentielles Gefährdungsdelikt*), which is in turn a subcategory under the heading of offences of abstract endangerment (*abstrakte Gefährdungsdelikte*)[2]. There is an unresolved debate in respect of endangerment offences as to whether it is even possible to commit the predicate offence. German criminal law theory distinguishes between endangerment offences and injurious offences (*Verletzungsdelikte*), a substantive element of which is the actual infringement of the protected right or freedom[3]. The particular characteristic of abstract endangerment offences, like the one with which the Federal Court of Justice was concerned in this case, is that they do not involve any substantive requirement of the accused having actually endangered the protected right of freedom. Instead, the legislature has chosen to punish the creation of an abstract danger, because it considers that conduct to be dangerous in itself. Against that background, most of the commentators proceed on the assumption that the successful realisation of the accused's intentions is not an element of an abstract endangerment offence[4]. The Federal Court of Justice came to a different conclusion, however: proceeding from the *ratio legis* of § 9 StGB, it held that German criminal law – even when the *actus reus* is committed abroad and particularly in internet cases – is to be applied whenever an infringement or endangerment, the avoidance of which is the purpose of the relevant provision, occurs within the country. That means, according to the Court, that the meaning of the concept of "successful completion as an element of the offence", as used in § 9 StGB, cannot be determined on the basis of the general definitional principles applicable to criminal offences. In these circumstances, the Court considered that the characterisation of the particular offence as an injurious offence or as a concrete or abstract endangerment offence is not decisive. Instead, each offence must be individually analysed in order to identify the successful completion which corresponds to the particular elements of the offence. According to the Court, the meaning of

[1] Summary and commentary of the judgment of the German Federal Court of Justice quoted above.
[2] BGH 12.12.2000, in JurPC, Abs. 41. Refer also to Tröndle/Fischer, *Kommentar zum StGB*, 49. Aufl. München 1999, § 130, Rn. 2.
[3] Refer to Tröndle/Fischer, *Kommentar zum StGB*, 49. Aufl. München 1999, § 13, Rn. 13. Injurious offences by their nature require that the protected right or freedom has been actually infringed and that constitutes the successful conclusion of the offence in the sense of § 9 StGB. The offence is deemed to have been committed at the place at which the infringement occurred. For this purpose, concrete endangerment offences are included within the category of injurious offences, because they involve a requirement, additional to the accused's conduct, of the creation of a real danger to the protected right or freedom, which danger is more likely than not to be realised.
[4] Refer to Tröndle/Fischer, *Kommentar zum StGB*, 49. Aufl. München 1999, § 9, Rn. 3.

"successful completion", as that term is used in § 9 Abs. 1 Var. 3 StGB, is not limited to the infliction of an injury or the creation of a concrete danger, but may in the context of a particular offence refer to one of the acts of the accused. The offence of public incitement to hatred under § 130 Abs. 1 und 3 StGB, which had to be analysed by the Court in the current proceedings, requires as its *actus reus* some conduct which is concretely capable of disturbing public order. The Court identified that requirement as constituting the necessary element of successful completion in the sense employed in § 9 Abs. 1 Var. 3 StGB.

[ECRI, Germany – General overview, "Legal measures to combat racism and intolerance in the member Sates of the Council of Europe", Situation as of 31 December 2002, pp. 29-30]

Germany (Race / insult)

BGH 28 February 1958, BGHSt 11, 207 and BGH 8 June 1983, BGHSt 32, 9: An insulting statement about the Jews as a group is punishable under § 185.

BGH 18 September 1979, BGHZ 75, 160: Calling the mass extermination of Jews under the Third Reich a "zionist lie" (Auschwitz Hoax) is an insult under § 185.

BVerfG, 13 April 1994: § 185 does not violate the freedom of expression to the extent that it prohibits denial of the Holocaust.

BayOblG, 17.12.1996, NStZ 1997, 283: The simple denial of the mass extermination of Jews can constitute a criminal offence under §§ 185, 189. There are no requirements as to the manner in which the denial was expressed, for example in a dogmatic or apodictic way.

[ECRI, Germany – General overview, "Legal measures to combat racism and intolerance in the member Sates of the Council of Europe", Situation as of 31 December 2002, p. 22]

Germany (Incitement to hatred and violence against segments of the population)

OLG Celle, 17 February 1982, NJW 1982, 1545: Denying the mass extermination of Jews during the Third Reich (Auschwitz Hoax) is not per se an "attack on human dignity".

BGH, 26 January 1983, BGHSt 31, 231 and BGH, 15 March 1994, NJW 1994, 1421: Blaming the Jews for having created the "legend of extermination" is an attack on human dignity and constitutes a crime punishable under § 130 (1) n° 1 (and n° 3 of the old legislation which corresponds to n° 2 of the new legislation).

OLG Frankfurt, 8 January 1985, NJW 1985, 1720: A sign in front of a restaurant prohibiting Turks from entering is not an "attack on human dignity" but a mere discrimination against the Turks living in Germany.

BGH, 6 April 2000, NJW 2000, 2217; BGH 10 April 2002, 5 Str 485/01: A denial may also take the form of pleadings entered by an attorney at law. An attorney can only rely upon the right to defend his client if his statements are actually made in defence of the client and not for purposes unrelated to legal representation.

[ECRI, Germany – General overview, "Legal measures to combat racism and intolerance in the member Sates of the Council of Europe", Situation as of 31 December 2002, pp. 20-21]

Article :	CERD-4-a / CERD-6
Subject :	states parties shall declare an offence punishable by law / dissemination of ideas based on racial superiority or hatred / states parties shall assure effective remedies
Keywords :	discrimination / race / freedom of expression / obligations of states / effective remedy
Communication :	038/2006
Parties :	**Zentralrat Deutscher Sinti und Roma et al. v. Germany**
Reference :	Opinion of 22 February 2008

Facts :

1.1 The petitioners are the association *Zentralrat Deutscher Sinti und Roma*, acting on its own behalf and on behalf of G. W.; the association *Verband Deutscher Sinti und Roma - Landesverband Bayern*; R. R.; and F. R. They claim to be victims of a violation by Germany [Footnote: 1. The Convention was ratified by Germany on 16 May 1969, and the declaration under article 14 was made on 30 August 2001.] of articles 4 (a) and (c); and 6 of the Convention on the Elimination of All Forms of Racial Discrimination. They are represented by counsel.

1.2 In conformity with article 14, paragraph 6 (a), of the Convention, the Committee transmitted the communication to the State party on 14 September 2006.

AUTHOR'S SUBMISSIONS:

2.1 Detective Superintendent G. W., a member of the Sinti and Roma minority, wrote an article entitled "Sinti and Roma - Since 600 years in Germany", which was published in the July/August 2005 issue of the journal of the Association of German Detective Police Officers (BDK), "The Criminalist". In the October 2005 issue of the journal, a letter to the editor written by P. L., vice-chairman of the Bavarian section of the BDK and Detective Superintendent of the Criminal Inspection of the city of Fürth, was published as a reply to Weiss' article. The authors indicated that "The Criminalist" was a journal distributed to more than 20,000 members of one of the biggest police associations in Germany. The text of the letter by P. L. reads as follows:

> "With interest I read the article by colleague W., himself also a Sinti, but I cannot leave this non-contradicted. Even at a time where minority protection is put above everything else and the sins of the Nazi-era still affect ensuing generations, one need not accept everything that is so one-sided. As an officer handling offences against property I have dealt repeatedly with the culture, the separate and partly conspirative way of living as well as the criminality of the Sinti and Roma. We infiltrated the life of criminal gypsies through working groups and also with the help of under-cover agents ("Aussteiger"). We were told by Sinti that one feels like a "maggot in bacon" ("Made im Speck") in the welfare system of the Federal Republic of Germany. One should use the rationalisation for theft, fraud and social parasitism without any bad conscience because of the persecution during the Third Reich. The references to the atrocities against the Jews, homosexuals, Christians and dissidents who did not become criminal, were considered not relevant. As W. states there are no statistics about the share of criminal Sinti and Roma in Germany. If they existed, he could not have written such an article. But it is sure that this group of people, even if only about 100,000, occupies the authorities disproportionately by comparison.
>
> Who for example commits nationwide thefts largely to the disadvantage of old people? Who pretends to be a police officer to steal the scarce savings of pensioners which were hidden for the funeral in the kitchen cupboard or in the laundry locker? Who shows disabled and blind persons tablecloths and opens the door to accomplices? What about the trick with the glass of water and the paper trick?
>
> Is it really a prejudice when citizens complain about the fact that Sinti drive up with a Mercedes in front of the social welfare office? Is it not true that hardly any Roma works regularly and pays social insurance? Why does this group separate itself in such a way and for example inter-marries without the registry office? Why are fathers of Sinti children not named to the youth welfare office?
>
> (...)
>
> Whoever does not want to integrate but lives from the benefits of and outside this society cannot claim a sense of community. My lines do not only reflect my opinion as I learned by talking to many colleagues. They are not only a record of prejudices, generalisations ("Pauschalisierungen") or accusations but a daily reality of criminal activity.
>
> It is totally incomprehensible for me that a police officer who knows about this situation is so partial in his argumentation. His origins excuse him partly and his career deserves praise, but he should stick to the truth."

2.2 The authors claimed that P. L.'s letter contained numerous discriminatory statements against Sinti and Roma. They argue that P. L. used racist and degrading stereotypes, going as far as stating that criminality was a key characteristic of Sinti and Roma. In particular, they noted that the terms "maggot" and "parasitism" were used in the Nazi propaganda against Jews and Sinti and Roma. The authors claim that such a publication fuels hatred against the Sinti and Roma community, increases the danger of hostile attitude by police officers, and reinforces the minority's social exclusion.

2.3 In November 2005, after a public protest organized by the *Zentralrat Deutscher Sinti und Roma*, the Bavarian Ministry of the Interior suspended P. L. from his function in the police commissariat of Fürth, stating that generally negative statements about identifiable groups of the population, like the Sinti and Roma in the present case, were not acceptable.

2.4 On 24 November 2005, the *Zentralrat Deutscher Sinti und Roma* and R. R. lodged a complaint with the District Attorney of Heidelberg, and on 1 December 2005, the *Verband Deutscher Sinti und Roma - Landesverband Bayern* and F. R. filed a complaint before the District Attorney of Nürnberg-Fürth. Both complaints were then transferred to the competent authority: the District Attorney of Neuruppin in Brandenburg. The District Attorney of Neuruppin dismissed the first complaint on 4 January 2006 and the second one on 12 January 2006 with the same reasoning, namely that the elements constitutive of the offence under article 130 of the German Criminal Code were missing, refusing to charge P. L. with an offence under the German Criminal Code (GCC).

2.5 On 12 January 2006, the authors lodged an appeal with the General Procurator (*Generalstaatsanwaltschaft*) of the Land of Brandenburg against the two decisions of the District Attorney of Neuruppin. This was dismissed on 20 February 2006.

2.6 On 20 March 2006, the authors appealed to the Supreme Court of Brandenburg. Their appeal was rejected on 15 May 2006. As regards the individuals, the Court found the claim to be without merits. As regards the *Zentralrat Deutscher Sinti und Roma* and *Verband Deutscher Sinti und Roma - Landesverband Bayern*, the Supreme Court found the claim inadmissible on the grounds that, as associations, their rights could only have been affected indirectly.

2.7 The authors argue that, since the judicial authorities refused to initiate criminal proceedings, German Sinti and Roma were left unprotected against racial discrimination. By so doing, the State party would be tolerating a repetition of such discriminatory practices. The authors highlight a similar case involving discriminatory public statements against Jews, in which the Supreme Court of the Land of Hessen had stated that, in the past, the terms "parasite" and "social parasitism" had been used maliciously and in a defamatory way against Jews, and held that such public statements denied members of a minority the right to be considered as equals in the community.

THE COMPLAINT:
3. The authors claim that Germany violated their rights as individuals and groups of individuals under articles 4 (a) and (c); and 6 of the Convention on the Elimination of All Forms of Racial Discrimination, as the State party does not afford the protection under its Criminal Code against publications which contain insults directed against Sinti and Roma.

STATE PARTY'S OBSERVATIONS:
(...)

4.3 On the merits, the State party denies that there was a violation of articles 4, paragraph (a) and (c) and 6 of the Convention. As regards article 4(a), it maintains that all categories of misconduct under that provision are subject to criminal sanctions under German criminal law, particularly through the offence of incitement to racial or ethnic hatred ("*Volksverhetzung*") in article 130 of the GCC. [Footnote: 3. Article 130. Incitement to racial or ethnic hatred. (1) Whoever, in a manner that is capable of disturbing the public peace: 1. incites hatred against segments of the population or calls for violent or arbitrary measures against them; or 2. assaults the human dignity of others by insulting, maliciously maligning, or defaming segments of the population, shall be punished with imprisonment from three months to five years. (2) Whoever: 1. with respect to writings (article 11, para. 3), which incite hatred against segments of the population or a national, racial or religious group, or one characterized by its folk customs, which call for violent or arbitrary measures against them, or which assault the human dignity of others by insulting, maliciously maligning or defaming segments of the population or a previously indicated group: (a) disseminates them; (...)] In addition, the GCC contains other provisions that

criminalise racist and xenophobic offences, e.g. in article. 86 (dissemination of propaganda by unconstitutional organisations) and article 86(a) (use of symbols by unconstitutional organisations). The obligations arising from article 4 paragraph (a) of the Convention have thus been completely fulfilled by art. 130 of the GCC; there is no protection gap in this respect. That some discriminatory acts are not covered by the provision is not contrary to the Convention. The list in article 4 paragraph (a) of the Convention does not enumerate all conceivable discriminatory acts, but rather acts in which violence is used or where racist propaganda is the goal.

4.4 The State party adds that in accordance with General Recommendation No. XV, para. 2, article 130 of the GCC is effectively enforced. Under German criminal law, the principle of mandatory prosecution applies, by which prosecutorial authorities must investigate a suspect *ex officio* and bring public charges when necessary. In the present case, the State party submits that prosecutorial authorities reacted immediately, and that the situation was investigated thoroughly until the proceedings were terminated by the District Attorney of Neuruppin.

4.5 Regarding the interpretation and application of article 130 of the GCC, the State party notes that the District Attorney of Neuruppin, the Brandenburg General Prosecutor and the Brandenburg Supreme Court did not find that the elements constitutive of the offences under art. 130 or art. 185 GCC were met. These decisions show that not every discriminatory statement fulfils the elements of the offence of incitement to racial or ethnic hatred, but that there must be a certain targeting element for incitement of racial hatred. The State party recalls that all the above decisions referred to the wording of the letter as "inappropriate", "tasteless" and "outrageous and impudent". The State party points out that the central question is whether the courts correctly interpreted the relevant provisions of the GCC. It recalls that States parties have some discretion in the implementation of the obligations arising from the Convention and particularly as regards the interpretation of their national legal standards. With respect to the consequences suffered by P. L., it indicates that disciplinary measures were indeed taken against him.

(...)

4.7 Finally, with respect to article 6 of the Convention, the State party maintains that in the present case the criminal prosecution authorities acted quickly and fully discharged their obligation of effective protection through the prompt initiation of an investigation against P. L. After an in-depth examination the authorities concluded that the offence of incitement to racial or ethnic hatred could not be established and closed the proceedings.

AUTHOR'S SUBMISSIONS:
5.1 On 7 March 2007 the authors commented on the State party's submission. They note that the German authorities did not investigate the matter *ex officio*, but that they were prompted to act by a complaint from one of the complainants (*Zentralrat Deutscher Sinti und Roma*). They add that, to the present day, the police union has not disassociated itself in any way from the article of P. L.

5.2 The authors claim state that, although the organizations which co-authored the complaint have not been attacked by name in P. L.'s article, their own rights are harmed by such a sweeping criminalization of the entire Sinti and Roma minority. They claim that the derogation of the social reputation of the minority has consequences for the reputation and the possibility of the organisations to exert political influence, especially since they act publicly as advocates of the minority and are funded by the State party to do so.

5.3 On exhaustion of domestic remedies, the authors claim that a complaint to the Federal Constitutional Court would not only be declared inadmissible but would have no prospect of success, based on that Court's established jurisprudence. They state that they know of no case in which the Federal Constitutional Court accepted a complaint against a decision concerning a legal enforcement procedure.

5.4 As regards the provisions of the GCC, the authors doubt that articles 130 and 185, with their strict requirements, are sufficient to combat racist propaganda effectively. They doubt that the intent of the responsible party "to incite hatred against segments of the population" (as required by art. 130) is absent in the present case, given that P. L. is a police officer.

5.5 The authors reiterate that characterizations made in the article represent an attack on the human dignity of members of the Sinti and Roma communities, and that they cannot be considered to be a "permissible statement of opinion", nor the "subjective feelings and impressions of a police officer". Had those characterizations been made against Jews, massive judicial intervention would have resulted. The authors add that the State party approves of its police officers globally criminalizing an entire population group. The approval of such public

statements carries the danger that other police officers adopt a similar attitude against Sinti and Roma.

STATE PARTY'S OBSERVATIONS: / AUTHOR'S SUBMISSIONS:
6. By submissions dated 31 May 2007 and 16 November 2007, the State party generally reiterated the points made in the initial submission. In particular, it states that article 130 of the GCC has been successfully used in the past to act against instances of extreme right-wing extremist propaganda. By submission of 27 June 2007, the complainants replied to the State party's comments, restating the arguments previously offered.

Decision on admissibility:

7.1 Before considering any claims contained in a petition, the Committee on the Elimination of Racial Discrimination must, in accordance with rule 91 of its rules of procedure, decide whether or not it is admissible under the Convention.

(...)

7.6 In light of the above, the Committee declares the case admissible inasmuch as it relates to articles 4(a) and 6 of the Convention and proceeds to examine the merits.

Views:

7.7 On the merits, the main issue before the Committee is whether the provisions in the GCC provide effective protection against acts of racial discrimination. The petitioners argue that the existing legal framework and its application leave Sinti and Roma without effective protection. The Committee had noted the State party's contention that the provisions of its Criminal Code are sufficient to provide effective legal sanctions to combat incitement to racial discrimination, in accordance with article 4 of the Convention. It considers that it is not the Committee's task to decide in abstract whether or not national legislation is compatible with the Convention but to consider whether there has been a violation in the particular case. [Footnote: 7. See Communication No. 40/2007, *Er v. Denmark*, decision of 8 August 2007, para. 7.2.] The material before the Committee does not reveal that the decisions of the District Attorney and General Prosecutor, as well as that of the Brandenburg Supreme Court, were manifestly arbitrary or amounted to denial of justice. In addition, the Committee notes that the article in "The Criminalist" has carried consequences for its author, as disciplinary measures were taken against him. [Footnote: 8. See para. 2.3.]

8. The Committee on the Elimination of Racial Discrimination, acting under article 14, paragraph 7, of the Convention on the Elimination of All Forms of Racial Discrimination, is of the view that the facts before it do not disclose a violation of articles 4(a) and 6 of the Convention.

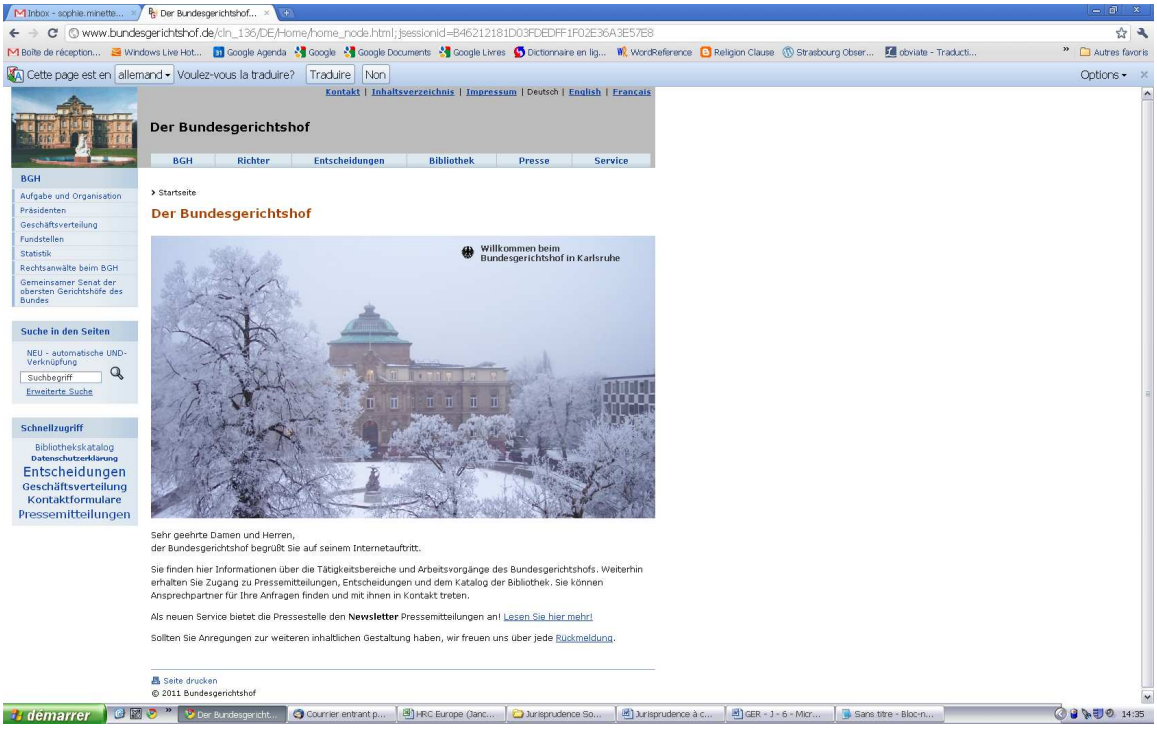
Remedy proposed :

9. Notwithstanding, the Committee recalls that P. L.'s article was perceived as insulting and offensive not only by the petitioners, but also by the prosecutorial and judicial authorities who dealt with the case. The Committee wishes to call the State party's attention to (i) the discriminatory, insulting and defamatory nature of the comments made by P. L. in his reply published by "The Criminalist" and of the particular weight of such comments if made by a police officer, whose duty is to serve and protect individuals; and (ii) General Recommendation 27, adopted at its fifty-seventh session, on discrimination against Roma.

Individual Opinion :

Germany

Bundesgerichtshof :
http://www.bundesgerichtshof.de/cln_136/DE/Home/home_node.html;jsessionid=B46212181D03FDEDFF1F02E36A3E57E8

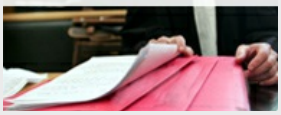


Public Policies

Beratungsformular

Häufig gestellte Fragen

Rechtsprechung



Forschungsprojekte

Newsletter

Grußwort

Herzlich Willkommen bei der Antidiskriminierungsstelle des Bundes!

Jeder Mensch, unabhängig von ethnischer Herkunft, Geschlecht, Behinderung, Religion, Weltanschauung, Alter und sexueller Identität, ist gleich wichtig und hat die gleichen Rechte.

Unser Ziel ist es, Bürgerinnen und Bürger davon zu überzeugen, dass Vielfalt uns alle voranbringt. Eine diskriminierungsfreie Gesellschaft ist nicht nur lebenswerter, sondern auch leistungsfähiger.

mehr ›

Aktuelles

Guide de la Loi générale sur l'égalité de traitement - AGG-Wegweiser jetzt auch auf Französisch

Die ADS hat ihr fremdsprachiges Informationsangebot über das Allgemeine Gleichbehandlungsgesetz (AGG) weiter ausbaut: Der 66 Seiten starke AGG-Wegweiser liegt gedruckt nun auch in französischer Sprache vor. Die Broschüre kann darüber hinaus auch in Deutsch, Englisch, und Türkisch bestellt werden. Downloadmöglichkeiten gibt es in Spanisch und Arabisch sowie in einer für Vorlese-Software optimierten Version.

mehr ›

Internationaler Tag der Migranten: Lüders warnt vor zunehmender Diskriminierung

Anlässlich des Internationalen Tages der Migranten am 18. Dezember warnt die Leiterin der ADS, Christine Lüders, vor einer zunehmenden Diskriminierung aufgrund ethnischer Herkunft und mahnt mehr Toleranz im Umgang mit anderen Kulturen an. Die stetige Wiederholung von Versäumnissen und Fehlern befördere nicht die Integration, sondern spalte die Gesellschaft. Lüders betonte: "Jede fünfte der inzwischen mehr als 12.000 Anfragen an uns bezieht sich auf Benachteiligungen wegen der ethnischen Herkunft oder der Religion. Die Tendenz ist weiter steigend."

mehr ›

Sieger im EU-Journalistenwettbewerb gegen Diskriminierung gekürt

Die nationalen Sieger des diesjährigen Journalistenpreises der EU-Kommission "Gemeinsam gegen Diskriminierung" stehen fest: Ein Preisgeld von 1.000 Euro erhält die Autorin Ruth Lemmer für eine Reportage in der "Wirtschaftswoche". Sie nimmt mit ihrem Text zudem am europäischen Wettbewerb der 27 nationalen Sieger teil. Wegen der Vielzahl qualitativ hochwertiger Beiträge unter den 41 Wettbewerbsarbeiten entschloss sich die Antidiskriminierungsstelle des Bundes, zwei Sonderpreise im Wert von jeweils 500 Euro zu stiften.

mehr ›

Pressemitteilungen

› **Antidiskriminierungsstelle des Bundes legt ersten Bericht an den**

Im Blickpunkt

Anonymisierte Bewerbungs-verfahren

Informationen in Gebärdensprache

Informationen in leichter Sprache

Bundesnetzwerk gegen Diskriminierung

Publikationen

Guide de la Loi générale sur l'égalité de traitement - explications et exemples de la Loi générale sur l'égalité de traitement

Expertise "Benachteiligung von Trans*Personen, insbesondere im Arbeitsleben"

Dokumentation der Fachtagung: "Gleiche Rechte! Gleiche Chancen? – Herausforderungen effektiver Antidiskriminierungsarbeit"

Guide to the General Equal Treatment Act

Bundestag vor – Empfehlungen zu mehrdimensionaler Diskriminierung

- **Lüders warnt anlässlich des Internationalen Tages der Migranten vor zunehmender Diskriminierung – Informationsangebot ausgebaut**
- **Nationale Gewinner des Europäischen Journalistenpreises gegen Diskriminierung ausgezeichnet – ADS stiftet zwei Sonderpreise**
- **Lüders: „Diskriminierungsschutz muss auch in Verwaltung vorangetrieben werden" – Start für EU-gefördertes Projekt**

Alle Pressemitteilungen

Artikel und Interviews

- **Süddeutsche Zeitung "Anonyme Bewerbungen - Augen zu und durch"**
- **Hannoversche Allgemeine Zeitung "Celler Stadtverwaltung testet anonymisierte Bewerbungen"**
- **kobinet "Verwaltungen sollen Diskriminierungsschutz voranbringen"**

Alle Artikel und Interviews

European Commission against Racism and Intolerance
Commission européenne contre le racisme et l'intolérance

CRI(2009)19

ECRI REPORT ON GERMANY

(fourth monitoring cycle)

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ECRI Secretariat
Directorate General of Human Rights and Legal Affairs
Council of Europe
F-67075 STRASBOURG Cedex
Tel.: + 33 (0) 388 41 29 64
Fax: + 33 (0) 388 41 39 87
E-Mail: combat.racism@coe.int

www.coe.int/ecri

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FOREWORD

The European Commission against Racism and Intolerance (ECRI) was established by the Council of Europe. It is an independent human rights monitoring body specialised in questions relating to racism and intolerance. It is composed of independent and impartial members, who are appointed on the basis of their moral authority and recognised expertise in dealing with racism, xenophobia, antisemitism and intolerance.

In the framework of its statutory activities, ECRI conducts country-by-country monitoring work, which analyses the situation in each of the member States regarding racism and intolerance and draws up suggestions and proposals for dealing with the problems identified.

ECRI's country-by-country monitoring deals with all member States of the Council of Europe on an equal footing. The work is taking place in 5 year cycles, covering 9/10 countries per year. The reports of the first round were completed at the end of 1998, those of the second round at the end of 2002, and those of the third round at the end of the year 2007. Work on the fourth round reports started in January 2008.

The working methods for the preparation of the reports involve documentary analyses, a contact visit in the country concerned, and then a confidential dialogue with the national authorities.

ECRI's reports are not the result of inquiries or testimonial evidences. They are analyses based on a great deal of information gathered from a wide variety of sources. Documentary studies are based on an important number of national and international written sources. The in situ visit allows for meeting directly the concerned circles (governmental and non-governmental) with a view to gathering detailed information. The process of confidential dialogue with the national authorities allows the latter to provide, if they consider it necessary, comments on the draft report, with a view to correcting any possible factual errors which the report might contain. At the end of the dialogue, the national authorities may request, if they so wish, that their viewpoints be appended to the final report of ECRI.

The fourth round country-by-country reports focus on implementation and evaluation. They examine the extent to which ECRI's main recommendations from previous reports have been followed and include an evaluation of policies adopted and measures taken. These reports also contain an analysis of new developments in the country in question.

Priority implementation is requested for a number of specific recommendations chosen from those made in the new report of the fourth round. No later than two years following the publication of this report, ECRI will implement a process of interim follow-up concerning these specific recommendations.

The following report was drawn up by ECRI under its own and full responsibility. It covers the situation as of 19 December 2008 and any development subsequent to this date is not covered in the following analysis nor taken into account in the conclusions and proposal made by ECRI.

SUMMARY

Since the publication of ECRI's third report on Germany on 8 June 2004, progress has been made in a number of fields covered by that report.

The new General Equal Treatment Act (AGG) came into force on 18 August 2006. Its purpose is to prevent or to put an end to discrimination on the grounds of race or ethnic origin, gender, religion or belief, disability, age or sexual orientation. The AGG extends protection against discrimination on the basis of all of the grounds covered to a number of private-law fields as well as to public employment. It sets out the manner in which victims of discrimination may enforce their rights, and establishes a Federal Anti-Discrimination Agency entrusted with dealing with individual complaints, raising public awareness, taking measures to prevent discrimination and carrying out academic research into discrimination.

In the field of criminal law, the authorities have been active in investigating and prosecuting members of neo-Nazi groups. Section 130 of the Criminal Code was strengthened in March 2006, with respect to the expression of racist views at public gatherings. The number of demonstrations by neo-Nazi organisations is reported to have decreased in 2007 thanks to this change. Section 129 of the Criminal Code has also been successfully used to sentence the members of a right-wing extremist music group. Successes in fighting racist, xenophobic or antisemitic speech on the internet have also been achieved.

The German authorities regularly condemn antisemitic crimes, pursue perpetrators and bring them to justice where possible. At same time, a wide range of measures are taken to atone for the past and ensure remembrance of the victims of the Holocaust. ECRI salutes the authorities' commitment to denouncing and combating all forms of antisemitism and to supporting Jewish culture in Germany, although it notes that, with antisemitic crimes apparently on the rise at present in Germany, even more intensive efforts may be needed to reverse such a trend.

Beyond prosecuting individual offences, the authorities have adopted a range of measures aimed at fighting right-wing extremist, xenophobic and antisemitic crimes. These include supporting victims, assisting perpetrators to break out of extremist groups and seeking to prevent young people from going down the path of extremist activity. The police are also taking an increasingly active role in working to prevent racist, xenophobic and antisemitic crime. Local programmes continue to be funded, although some on only a short-term basis. At the time of writing, debates were also occurring on the possibility of introducing racist motivations as a specific aggravating circumstance under section 46 of the Criminal Code.

In recent years the authorities have expressly recognised that Germany is a country of immigration and have begun to develop a strong new focus on integration, aiming to help immigrants to master German and encourage them to participate fully in society. The new National Integration Plan has as its cornerstone the provision of integration courses for adult migrants, primarily focused on language learning. Successful participants in integration courses are eligible to apply for naturalisation earlier than other non-citizens. The National Integration Plan also includes measures in other fields, such as efforts to promote innovative television programmes with an integration approach.

The German authorities have taken a number of measures to eliminate inequalities or discrimination in the field of education and employment. These include efforts to promote and foster the linguistic abilities of children from the very earliest stages, as a key means of improving their school outcomes overall. At the same time, preventive

measures against exclusion and discrimination on the labour market and in society are the focus of the "XENOS – Integration and Diversity" programme, to run from 2007 to 2013.

As regards the situation of minority groups, the creation of the German Islam Conference is an important symbol of change. The goal of the Conference is to promote inclusive and constructive forms of community, and to ensure better integration of Muslims in Germany. It is intended to show that Muslims have become a part of German society, to counteract segregation of Muslims in Germany, and to prevent Islamism and extremism. In 2008, the election of a German of Turkish origin as one of the leaders of a German political party was also hailed as a landmark event. The state has also taken welcome steps to recognise officially the suffering experienced by Roma and Sinti communities during the Holocaust.

Since ECRI's third report, provisions have been enacted that have made it possible for persons who have been living in Germany with tolerated status for some years to be granted a trial residence permit. Recognised refugees are now allowed to choose where they reside.

ECRI welcomes these positive developments in Germany. However, despite the progress achieved, some issues continue to give rise to concern.

Since ECRI's third report, asylum-seekers and members of the Jewish, Black and Sinti/Roma communities have continued to be targeted in violent racist, xenophobic and antisemitic attacks. ECRI is concerned that, due to the narrow understanding of racism that currently prevails in Germany, unless the perpetrators of crimes are clearly identifiable as members of right-wing extremist groups or sympathisers of such groups, crimes based on racist motivations may not always be investigated or prosecuted as such. The absence of a precise reference in the Criminal Code to racist motivations as an aggravating circumstance for ordinary offences may also contribute to this phenomenon. In addition, the lack of an independent investigation mechanism to deal with complaints against the police may give rise to increased speculation as to a possible racist context, in particular in cases where members of visible minorities have died while in police custody.

The success in local and regional elections of certain parties expressing racist, antisemitic or revisionist views is worrying, and support for such parties has increased in recent years. At the same time, and despite the considerable efforts of the authorities to combat racism, xenophobia and antisemitism and promote a tolerant society, incidents of hate speech continue to occur, including racist propaganda on the internet, and neither the prevalence of racist expression on the internet nor the number of Neo-Nazis and other right-wing extremists appear to have decreased.

While the enactment of the AGG is a welcome step forward in ensuring that victims of discrimination have justiciable rights in Germany, some aspects of the AGG, in particular as regards its application to the field of housing, may leave room for improvements. The AGG remains largely unknown among potential victims and the time-limit of 2 months for initiating a complaint may be too short. This issue is compounded by the limited role afforded to NGOs under the law. At the same time, the Federal Anti-Discrimination Agency is perceived as distant from victims and lacking an understanding of their perspective; and, with a relatively small staff and annual budget, would for the moment appear to have relatively few resources to carry out its statutory tasks.

In daily life, children with a migration background continue to have significantly lower chances of success in the school system than other children, and some teachers are reported to display discriminatory attitudes in the classroom, in particular towards Turkish and Muslim children. This is of particular concern given the central role played by teachers in Germany in directing students towards the different streams of

secondary education. At the same time, the employment rate of immigrants remains significantly lower than that of native-born Germans and in the labour market, and visible differences are reportedly a significant factor in discrimination in access to employment. In the housing sector, discriminatory practices of landlords and property managers are reported, and studies indicate that migrants are disadvantaged in this sector, in some cases facing so-called "ghettoisation".

Discrimination in daily life is reported by members of the Muslim, Turkish, Black and Sinti/Roma communities. With regard to the exercise of the Muslim faith, the construction of mosques has often been surrounded by controversy and Muslim women report that, since laws were passed in certain *Länder* banning the wearing of headscarves in all or some parts of the public sector, it has also become increasingly difficult for women who choose to wear a headscarf to find employment in the private sector. Since the events of 11 September 2001, Muslims report that they have also increasingly been identified with crimes, and more specifically with terrorism. At the same time, members of the Black community continue to be especially vulnerable to racist violence. Black persons report that there are "no-go areas" in some *Länder* to which they avoid going alone, or avoid going altogether.

While significant improvements have been introduced since ECRI's third report with respect to asylum applications, some concerns remain with respect to expedited airport procedures. ECRI is also concerned that some persons with refugee status may see this status prematurely terminated, and that restrictions on freedom of movement of asylum-seekers may place the latter in situations of undue hardship.

With respect to integration courses, the investment of resources in the National Integration Plan is noteworthy. ECRI is concerned, however, that the possibility of imposing sanctions on persons obliged to attend integration courses if they fail to attend sufficiently regularly may have a stigmatising effect. It is also concerned that such sanctions may be damaging to individuals' rights, as they may lead to a refusal to extend a residence permit or to a reduction in welfare payments. At the same time, and while the introduction of a single, national, transparent test is a clear improvement on the previous situation, the introduction of naturalisation tests is an additional process applicable to those who wish to obtain German citizenship and is seen by some NGOs as sending an underlying message of exclusion rather than inclusion. ECRI is also concerned that some non-citizens may be discouraged from seeking to acquire German citizenship through naturalisation due to the requirement that they relinquish their present nationality, with the flow-on effect that they are prevented from participating effectively in German political life.

In this report, ECRI recommends that the German authorities take further action in a number of areas; in this context, it makes a series of recommendations including the following.

ECRI strongly recommends that the German authorities make specific provision in the criminal law for racist motivations for ordinary offences to constitute an aggravating circumstance. It also recommends that the German authorities intensify their efforts to provide training to police officers, prosecutors and judges on issues pertaining to the implementation of criminal legislation addressing racism and racial discrimination.

ECRI recommends that the German authorities keep under review the impact of the AGG in preventing and sanctioning discrimination, and revise the legislation if necessary. It also recommends that the authorities ensure that sufficient resources are available to the Federal Anti-Discrimination Agency to enable it to carry out its current and any future tasks.

ECRI strongly recommends that the German authorities take a more proactive role in raising awareness of the legal framework now in force against racial discrimination, notably among groups who are especially vulnerable to this phenomenon. To this end,

ECRI recommends that the authorities run an awareness-raising campaign specifically targeted at ensuring that potential victims of racial discrimination are aware of the existence and scope of the General Equal Treatment Act (AGG) and of the mechanisms for invoking their rights before the courts.*

Bearing in mind that no immediate move away from the present streaming system for secondary schooling in Germany has been envisaged, ECRI recommends that the German authorities take urgent steps to implement targeted training programmes to ensure that all teachers have the capacity to assess objectively the skills of students due to enter the secondary school system, in order to ensure that students are not sent to schools in the lower academic streams unless this is strictly necessary.*

ECRI strongly encourages the German authorities to continue and intensify their efforts to ensure that no children suffer disadvantage in the school system due to inequalities in their linguistic skills in German. It recommends that the authorities step up the provision of training programmes to teachers and other school staff, in order to equip them to work effectively in increasingly diverse classrooms.

ECRI strongly recommends that, as part of their ongoing efforts towards creating a workplace free of racism, the German authorities launch an awareness-raising campaign aimed specifically at changing employers' attitudes towards persons with an immigrant background. This campaign should focus not only on employers' obligations and liabilities under the new General Equal Treatment Act (AGG) but also on the positive aspects of diversity in the workplace. It could form part of a regular series of such campaigns.*

ECRI encourages the German authorities in their efforts to ban organisations which resort to racist, xenophobic and antisemitic actions and propaganda, to intensify their efforts to counter racist, xenophobic and antisemitic activities on the internet, and to implement measures aimed at ensuring the media are better equipped to deal with the diversity of present-day German society.

ECRI makes a series of recommendations to bolster the fight against racist, xenophobic and antisemitic violence, and encourages the German authorities to pursue their efforts to take a more comprehensive approach to this phenomenon.

With respect to minority groups, ECRI strongly recommends that the German authorities intensify their efforts to combat and prevent racism and discrimination vis-à-vis Muslims in Germany effectively. It also recommends that further steps be taken to improve the situation of Roma and Sinti in Germany, in consultation with representatives of these communities. ECRI also makes a series of recommendations concerning the situation of asylum-seekers.

ECRI strongly encourages the German authorities in their efforts to assist migrants to learn German and recommends that the authorities develop further other aspects of the National Integration Plan, such as programmes to help German citizens be more receptive to the diversity of contemporary German society.

ECRI reiterates its call for the establishment of an independent investigatory mechanism which can carry out enquiries into allegations of police misconduct and, where necessary, ensure that the alleged perpetrators are brought to justice.

* The recommendations in this paragraph will be subject to a process of interim follow-up by ECRI no later than two years after the publication of this report.

FINDINGS AND RECOMMENDATIONS

I. Existence and Implementation of Legal Provisions

International legal instruments

1. In its third report, ECRI recommended that Germany ratify as soon as possible Protocol No. 12 to the European Convention on Human Rights.

2. Germany has not yet ratified Protocol No. 12 to the ECHR. The authorities have indicated that discrimination is prohibited under German law, in accordance with section 3 of the Basic Law (Constitution) and with the General Equal Treatment Act 2006, and that ratification should therefore not have direct consequences in Germany. However, the inclusion of the criterion of national origin in Protocol No. 12 may not correspond to the existing situation in Germany, and the authorities have stated that they will await rulings on this point from the European Court of Human Rights, regarding other member states, before proceeding with ratification. ECRI recalls that Protocol No. 12 is one of the most important international instruments for combating racial discrimination, and that its ratification would make it possible to combat this phenomenon more effectively at national level.

3. ECRI urges Germany to ratify Protocol No. 12 to the European Convention on Human Rights.

4. In its third report, ECRI also recommended that Germany ratify the Additional Protocol to the Convention on Cybercrime and the European Convention on Nationality. It called on Germany to sign and ratify the Revised European Social Charter, the Convention for the Participation of Foreigners in Public Life at Local Level and the International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families.

5. ECRI welcomes the ratification by Germany, on 11 May 2005, of the European Convention on Nationality, which came into force in Germany on 1 September 2005.

6. Germany signed the Revised European Social Charter on 29 June 2007; the Federal Ministry of Labour and Social Affairs has initiated the formal scrutiny procedure for ratification, and ratification is planned for a later date, following a comprehensive process of coordination on content with the relevant government agencies. Germany has also signed but not yet ratified the Additional Protocol to the Convention on Cybercrime, concerning the criminalisation of acts of a racist or xenophobic nature committed through computer systems. The authorities have indicated, however, that they consider that German law complies with its provisions and that they intend to ratify the Protocol at the same time as they implement the EU Framework Decision on combating certain forms and expressions of racism and xenophobia by means of criminal law.

7. No steps have been taken towards signing the Convention for the Participation of Foreigners in Public Life at Local Level and it does not appear from the information provided by the authorities that there is any intention to sign this Convention in the near future. Likewise, there has been no progress towards signing the International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families. ECRI stresses that these two conventions may make important contributions to the fight against racism and racial discrimination.

8. ECRI strongly encourages Germany to ratify as soon as possible both the Revised European Social Charter and the Additional Protocol to the Convention on Cybercrime, concerning the criminalisation of acts of a racist or xenophobic nature committed through computer systems.

9. It reiterates its call for the signature and ratification by Germany of the Convention for the Participation of Foreigners in Public Life at Local Level. ECRI also reiterates its recommendation that Germany sign and ratify the International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families.

Citizenship law

10. As from 1 January 2000, the principle of *jus soli* was introduced into German law in so far as children born in Germany to non-German parents as from that date have acquired German citizenship automatically at birth, provided that at least one of their parents has lived legally in Germany for at least eight years and has the right of permanent residence. In such cases, the child must, however, choose between German citizenship and the citizenship of his/her parents before reaching the age of twenty-three. Other foreigners who are unable to surrender their previous nationality, or for whom that would prove particularly difficult, no longer need to surrender their previous nationality in order to acquire German citizenship.

11. In its third report, ECRI encouraged the German authorities in their efforts to facilitate the acquisition of German citizenship by long-term residents and persons born in Germany. It recommended that the German authorities continue public debate in view of the adoption of a more flexible approach to dual nationality, and encouraged them to examine the application, in practice, of the criteria for naturalisation in order to address any possible patterns of excessively restrictive application of such criteria or of direct or indirect discrimination on grounds of race, colour, religion, nationality and national or ethnic origin.

12. Since ECRI's third report, the Nationality Act has again been amended, in particular as regards the naturalisation of long-term residents. As from the entry into force of the amendments on 28 August 2007, Germany no longer requires that nationals of the other Member States of the European Union or Swiss nationals surrender their previous nationality upon naturalisation. For these persons, it is therefore no longer necessary to first obtain permission to retain their previous nationality should they wish to keep it when acquiring German citizenship. German nationals also do not lose their German nationality if they acquire the nationality of one of these states.

13. These more relaxed conditions do not apply to individuals holding a nationality other than that of another EU member state or Swiss nationality, however. ECRI is concerned that many non-citizens who may fulfil the requirements for acquiring German citizenship through naturalisation may be discouraged from doing so due to the requirement that they relinquish their present nationality, with the flow-on effect that they are prevented from participating effectively in German political life. On the impact of the requirement that applicants for naturalisation demonstrate sufficient knowledge of the German language, see further below.[1]

14. In Germany, the practical application of naturalisation criteria is controlled by the competent ministers of the interior of the *Länder*. Following the introduction by certain *Länder* of tests that applicants were required to pass in order to obtain citizenship, the contents of which were the subject of some debate in Germany,

[1] See below, *Vulnerable/Target groups – Situation of migrants, asylum-seekers, [etc] – Integration*.

the Standing Conference of Ministers of the Interior of the *Länder* decided to introduce a uniform test, to be applied throughout Germany as from 1 September 2008. The contents and impact of the introduction of this test are examined in more depth elsewhere in this report.[2]

15. ECRI recommends that Germany facilitate the acquisition of German citizenship for all long-term residents and persons born in Germany in order to promote the integration of those residents who may wish to acquire German citizenship without relinquishing their own.

Criminal law provisions against racism

16. As described in ECRI's third report, section 130 of the German Criminal Code prohibits incitement to hatred and violence against segments of the population (§ 130.1), including through the dissemination of publications or broadcasts (§ 130.2). This section also prohibits the approval, denial or playing down of the genocide committed under the National Socialist regime (§ 130.3), including through the dissemination of publications (now covered by § 130.5). The dissemination and use of symbols of unconstitutional organisations is prohibited under section 86a of the Criminal Code, and Section 86 prohibits the dissemination of propaganda of unconstitutional organisations. Section 85 prohibits the continuation of the activities of an organisation that has been banned. Section 46 of the Criminal Code contains a list of circumstances to be taken into account in sentencing offenders, which include the motives and the aims of the offender. Racist motivations are not explicitly listed as an element to be taken into account as a specific aggravating circumstance in sentencing.

17. In its third report, ECRI recommended that the German authorities keep under close review the effectiveness of the existing criminal law provisions in the areas covered by ECRI's mandate. It encouraged the German authorities to examine the extent to which existing criminal legislation enabled the criminal justice system to bring to light the racist dimension of offences, and recommended that the German authorities explicitly provide in law that racist motivations constitute an aggravating circumstance for all offences.

18. At the time of writing, debates were occurring, at the initiative of civil society and certain *Länder*, on the possibility of introducing racist motivations as a specific aggravating circumstance to be taken into account under section 46 of the Criminal Code. The German authorities have indicated that, while they share the objective of punishing racist crimes, they remain unconvinced that such a step would be useful. They have underlined in particular that racist motivations can already be taken into account within the general formulation of section 46, and that they consider that placing the accent specifically on racist motivations might disturb the balance of elements to be taken into account by judges when sentencing offenders, and might be seen as diminishing the importance of other relevant motivations and factors. Moreover, for offences defined under section 130 of the Criminal Code, the authorities consider that motivations such as racist motivations are an integral part of the offence; taking account of them again as an aggravating circumstance under section 46 in such cases would therefore amount to counting them twice. ECRI stresses that, in line with its General Policy Recommendation No. 7,[3] the principle of taking account of racist motivations as an aggravating circumstance applies only to ordinary offences, i.e. offences, such as physical assault, in which the racist element is not already an integral part of

[2] See below, *Vulnerable/Target groups – Situation of migrants, asylum-seekers, [etc] – Integration*.

[3] See ECRI's General Policy Recommendation No. 7 on national legislation to combat racism and racial discrimination, § 21, as well as § 47 of its explanatory memorandum.

the offence. The principle is not designed to apply to provisions such as section 130 of the Criminal Code.

19. NGOs have, however, voiced considerable concern that, as the law stands, racism is understood only in its strongest forms, and in particular as a manifestation of right-wing extremism. ECRI has repeatedly heard that other, less obviously extreme manifestations of racism tend to be neglected as such in the criminal process. As a result, members of visible minorities feel that only offenders who are identifiably members or sympathisers of right-wing extremist groups are likely to be pinpointed in the criminal justice system as authors of racist acts, with the result that some racist offences are not treated as such at all.[4] ECRI is particularly concerned that the absence of a precise reference in the Criminal Code to racist motivations as an aggravating circumstance for ordinary offences may contribute to this phenomenon, as neither police nor prosecutors nor judges have any explicit legal basis on which to look beyond extremist motivations in their investigations, the charges they bring or the judgments they deliver. Moreover, a failure to take due account in practice of offenders' racist motivations may leave Germany at risk of breaching the European Convention on Human Rights. ECRI draws the German authorities' attention to the consistent case-law of the European Court of Human Rights in this field.[5]

20. Concerns have also been expressed that, although the definition of crimes contained in sections 86a and 130 of the Criminal Code may provide a basis for prosecuting crimes committed via racist propaganda on the internet, incidents of hate speech continue to occur, including racist propaganda on the internet.[6] Efforts to prevent such racially motivated offences and ensure that the relevant legislative provisions are effectively implemented continue to be needed.

21. As regards the expression of racist views at public gatherings, in March 2006, §130.4 of the Criminal Code was strengthened. It now provides that a person who publicly or in a gathering disturbs the public peace by harming the dignity of the victims of the Nazi regime or who approves, glorifies or justifies the genocide committed under the Nazi regime can be sentenced to imprisonment for up to three years. This section applies in particular to memorial places of Holocaust victims. According to the Ministry of the Interior, the number of demonstrations by neo-Nazi organisations clearly decreased in 2007 (down from 126 in 2006 to 66 in 2007), thanks to the intensified application of §130.4 of the Criminal Code. The authorities have also referred to section 129 of the Criminal Code, which prohibits forming, being a member of, recruiting members to or supporting organisations of which the aims or activity are directed towards the commission of crimes. This provision was successfully used to sentence the members of a right-wing extremist music group that sought to use their band as a political instrument and to stir up hatred.

22. ECRI strongly recommends that the German authorities make specific provision in the criminal law for racist motivations for ordinary offences to constitute an aggravating circumstance, taking account of the recommendations contained in ECRI's General Policy Recommendation No. 7 on national legislation to combat racism and racial discrimination.[7]

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[4] See also below, *Racist violence*.

[5] See notably *Šečić v. Croatia,* Application no. 4357740116/02, 31 May 2007, § 67; *Anguelova and Iliev v. Bulgaria*, Application no. 55523/00, 26 July 2007, § 115.

[6] See below, *Racism in public discourse*.

[7] See ECRI's General Policy Recommendation No. 7 on national legislation to combat racism and racial discrimination, § 21, as well as § 47 of its explanatory memorandum.

23. It also recommends that the German authorities intensify their efforts to provide training to police officers, prosecutors and judges on issues pertaining to the implementation of criminal legislation addressing racism and racial discrimination, in order to ensure that all offences with racist motivations, whether or not they fall into the category of extremist crimes, are properly identified and dealt with as racially motivated offences. It further recommends that lawyers be given the opportunity to receive training on these matters.

Civil law provisions: the General Equal Treatment Act

24. In its third report ECRI encouraged the German authorities to adopt anti-discrimination legislation in all key fields of public life, and to ensure that victims of racial discrimination would be granted the highest level of protection. A certain level of resistance to such legislation first had to be overcome within Germany, however, with some politicians regrettably considering such legislation would simply lead to increased bureaucracy or needless and expensive litigation.

25. In 2006, however, the Parliament enacted the General Equal Treatment Act (*Allgemeines Gleichbehandlungsgesetz*, AGG), which came into force on 18 August 2006. The AGG constitutes the transposition into German law of several EU equal treatment directives.[8] The purpose of the Act, as defined in section 1, is "to prevent or to stop discrimination on the grounds of race or ethnic origin, gender, religion or belief, disability, age or sexual orientation". ECRI draws the authorities' attention to the fact that two important grounds included in its General Policy Recommendation No. 7 on national legislation to combat racism and racial discrimination do not appear to be covered by this list: namely, language and nationality. As regards the scope of application of the AGG, it covers the fields of employment, vocational guidance and training, membership in workers' and employers' organisations, social protection and social benefits, education, and access to and the supply of goods and services, including housing. It sets out the manner in which victims of discrimination may enforce their rights, and establishes a Federal Anti-Discrimination Agency entrusted with dealing with individual complaints, raising public awareness, taking measures to prevent discrimination and carrying out academic research into discrimination.[9] The AGG is essentially applicable to private-law relationships; except in the field of public-law employment relationships (covered by section 24 of the AGG), persons who consider they have been discriminated against by public authorities must continue to rely on the general prohibition on discrimination laid down by Article 3 of the Constitution (Basic Law).

26. ECRI welcomes the enactment of the AGG, which constitutes a significant step forward in ensuring that victims of discrimination have justiciable rights in Germany. It notes that, as finally enacted, the AGG goes further than the EU directives in some respects, in particular in so far as it does not confine protection against discrimination on the grounds of religion or belief, disability, age or sexual orientation, to the sole field of employment, but extends protection against discrimination on the basis of all of the grounds covered to a number of other fields. While section 9 of the AGG does provide for a permissible difference of treatment on the grounds of religion or belief, where such grounds constitute a justified occupational requirement for a particular religion or belief, this provision has so far been interpreted narrowly. Thus, the Hamburg Labour Court ruled in December 2007 that a German evangelical social welfare organisation which aids

[8] Of specific relevance to ECRI's terms of reference are Council Directives 2000/43/EC, implementing the principle of equal treatment between persons irrespective of racial or ethnic origin, and 2000/78/EC, establishing a general framework for equal treatment in employment and occupation.

[9] On the role and powers of the Federal Anti-Discrimination Agency, see further below, *Anti-Discrimination Bodies and other institutions*.

immigrants had discriminated against a German citizen of Muslim faith when it refused to hire her as an integration counsellor for immigrants. The court found that the rejection of the applicant constituted a discriminatory act since in this context religious faith could not be interpreted as a genuine occupational requirement for the job.[10]

27. The text as enacted may nonetheless leave room for improvements. As regards the scope of the Act, two aspects in particular give rise to concern. First, section 19(3) of the AGG expressly allows for differential treatment in the case of rental or housing where it serves to create and maintain stable or balanced social structures or settlement structures. While the authorities have stressed that this provision is intended to ensure integration, that it only applies to landlords owning at least 50 rental units and that in practice, no complaints have so far been lodged by persons having been refused housing on the basis of the provision, ECRI shares the concerns voiced by both civil society and international actors regarding the possible negative effects of including, in the very Act intended to give effect to the prohibition of discrimination, a provision expressly allowing differential treatment on the basis of all the protected grounds, including racial or ethnic origin. ECRI observes that positive measures intended to compensate for disadvantage are already provided for under section 5 of the AGG and that the precise scope of section 19(3) is therefore all the harder to grasp.

28. A second question concerns the applicability of the AGG to the field of education. Whereas it is clear that private schools are subject to the provisions of the AGG, it appears that public (state-funded) schools are not. As it is the *Länder*, in the German federal system, that are competent in the field of education, it will be up to each *Land* to ensure that the prohibition on discrimination in this field is made effective in practice. In this context, ECRI stresses that education has a fundamental impact on children's future life choices and that – bearing in mind the current inequalities in school outcomes in Germany[11] – it is all the more urgent that discrimination be eliminated in this field.

29. Two important obstacles to the use of the AGG by victims of racial discrimination have also been identified. First, although racial discrimination remains a significant phenomenon in daily life,[12] the existence, scope and purpose of the AGG remain largely unknown, including among potential victims from this group. According to a recent study, 56% of persons surveyed considered that discrimination on the grounds of ethnic origin was widespread (compared with 23% who considered discrimination on the grounds of gender to be widespread); in the same study, 16% of persons surveyed reported having seen someone being discriminated against or harassed on the grounds of their ethnic origin, and 8% on the grounds of their religion or belief (compared with 5% reporting having witnessed someone being discriminated against or harassed on the grounds of their gender). Yet only 26% of persons surveyed stated that they knew their rights if they were victims of discrimination or harassment, and only 29% were aware of the existence of a law prohibiting discrimination on the basis of ethnic origin by employers when hiring new employees.[13] Moreover, the Federal Anti-Discrimination Agency itself reports that only 14.5% of cases it dealt with between August 2006 and December 2008 concerned discrimination on the grounds of ethnic origin, and a total of 2.88% on the grounds of belief or religion

[10] Decision of 4 December 2007, no. 20 Ca105/07. This decision was subsequently overturned by the Hamburg Regional Labour Court (decision of 29 October 2008, no. 3 Sa 15/08), on unrelated grounds, namely that the professional qualifications of the plaintiff did not meet the requirements specified in the vacancy notice.

[11] See further below, *Discrimination in Various Fields – Education*.

[12] See further below, *Discrimination in Various Fields.*

[13] Discrimination in the European Union Report (2007) – Special Eurobarometer 263.

– compared with 24.84% on the basis of gender, 26.24% on the basis of disability and 19.75% on the basis of age. As regards court proceedings, the majority of case-law to date concerns discrimination on the grounds of age or disability; at the time of writing, only two judgments were known to have been delivered in cases concerning discrimination on the grounds of ethnic origin. This discrepancy between the proportion of instances of discrimination on the grounds of ethnic origin, religion or belief observed and the proportion of cases actually reported would seem to point to a lack of awareness amongst victims or potential victims of racial discrimination of the existence and scope of the AGG. Against this background, the information that the Anti-Discrimination Agency has recently published information on the internet in Arabic, English, French, Polish, Russian, Spanish and Turkish, in addition to German, is welcome.

30. A further obstacle frequently referred to by NGOs active in the anti-discrimination field is the time-limit of 2 months for initiating a complaint laid down by sections 15(4) and 21(5) of the AGG. The authorities have indicated that in all cases, complainants then have three months in which to lodge a claim with a court. ECRI is concerned, however, that the initial two-month period may be too short. It emphasises that, as described above, many victims, in particular where discrimination on the grounds of their ethnic origin is at stake, remain unaware of the existence of the AGG, or of their rights under it. Moreover, victims may not immediately know where to turn for advice, and may initially be reluctant to raise the issue, or unable to do so because they do not uncover important information until after the deadline has expired. This issue is compounded by the limited role afforded to NGOs under the law, which, as ECRI understands it, may provide legal advice to victims but may not represent them in court. ECRI stresses in this context that in order for the AGG to be effective in practice, it must not only be widely known by the general public, but also provide effective relief to victims when discrimination does occur.

31. As noted above (§ 24), the enactment of the AGG sparked considerable debate in Germany, some of it hostile. While this did not in the end prevent the enactment of a text that in many respects corresponds to the key elements contained in ECRI's General Policy Recommendation No. 7 on national legislation to combat racism and racial discrimination, it seems that suspicion towards the AGG still exists. A striking example is one law firm's free internet service, to which employers who are the subject of a claim on the basis of the AGG can turn in order to find out whether the claimant in their case has lodged similar claims previously. Amongst the express aims of the site is that of preventing individuals from making serial claims under the Act with the sole purpose of milking employers for money. Not only may the existence of such a website deter some victims from making legitimate complaints; it also shows that even among lawyers, understanding of the need for effective legislation against discrimination is not universal. ECRI notes with interest that the Data Protection Commission of Baden-Württemberg (where the law firm is based) has intervened to put an end to this service, and that the case is currently pending.

32. ECRI observes that, in its General Policy Recommendation No. 7, it recommends that the law explicitly prohibit discrimination on the grounds not only of race, colour, religion, or national or ethnic origin but also of language or nationality. ECRI considers that, even though these latter grounds may in many cases be covered within the existing grounds, including these elements as part of the AGG would be useful, for example to counter the reportedly continuing practice of advertising jobs reserved to mother-tongue German speakers only.[14]

[14] See below, *Discrimination in Various Fields – Housing*.

33. ECRI recommends that the German authorities incorporate in the relevant anti-discrimination legislation all of the grounds referred to in ECRI's General Policy Recommendation No. 7, in order to ensure that the highest level of protection is afforded to victims of racial discrimination.

34. ECRI strongly recommends that the German authorities take a more proactive role in raising awareness of the legal framework now in force against racial discrimination, notably among groups who are especially vulnerable to this phenomenon. To this end, ECRI recommends that the authorities run an awareness-raising campaign specifically targeted at ensuring that potential victims of racial discrimination are aware of the existence and scope of the General Equal Treatment Act (AGG) and of the mechanisms for invoking their rights before the courts.

35. ECRI encourages the authorities to ensure that information in languages other than German concerning the content and scope of the legal framework for combating racial discrimination is distributed as widely as possible. It recommends that NGOs, lawyers and other interested parties such as employers and employment agencies be involved in this process.

36. ECRI further recommends that the German authorities keep under review the impact of the new legislation in preventing discrimination and in ensuring that it is effectively sanctioned when it does occur. In this respect, ECRI recommends that the authorities scrutinise particularly closely the manner in which the provisions concerning housing, education and legal representation are applied in practice, and revise them if necessary.

Anti-discrimination bodies and other institutions

- *Federal Government Commissioner for Migration, Refugees and Integration*

37. The Federal Government Commissioner for Migration, Refugees and Integration is responsible for combating discrimination against foreigners, and has competence to deal with and assist in individual cases within the framework of the AGG. The Commissioner's key tasks include dealing with racial discrimination and discrimination on account of ethnic origin and the elimination of structural forms of discrimination. The Commissioner also has lead responsibility for the coordination of the National Integration Plan.[15]

38. In 2005 the Federal Government assigned the office of the Federal Government Commissioner for Migration, Refugees and Integration to the Federal Chancellery, thereby highlighting the importance attached to integration policy. At the same time, the Commissioner was also given permanent access to the Cabinet. The Commissioner is in regular contact with the Commissioners for Integration and the Commissioners for Foreigners' Issues of the *Länder* and the local authorities, and supports them in their work.

- *Federal Anti-Discrimination Agency*

39. In its third report, ECRI encouraged the German authorities to establish a specialised body to combat racism and racial discrimination at national level and to take into account in this respect its General Policy Recommendations Nos. 2 and 7.

40. Since ECRI's third report, a Federal Anti-Discrimination Agency has been set up under the AGG. In addition to the Agency's competences to carry out awareness-raising work, take measures to prevent discrimination on any of the grounds

[15] *Vulnerable/Target groups – Situation of migrants, asylum-seekers, [etc] – Integration*.

covered in the AGG and conduct academic research into such discrimination, any person who believes they have been discriminated against on any of the grounds covered by the AGG may take their case to the Agency, which is entrusted with giving such persons independent assistance. This may include providing information, arranging for advice to be provided by another authority or endeavouring to seek an out-of-court settlement between parties. The Agency is not, however, entitled to investigate complaints itself or to bring proceedings before the courts. It is also required to co-operate with the competent Parliamentary Commissioners of the German Bundestag and Federal Government Commissioners, including the Federal Government Commissioner for Migration, Refugees and Integration, where their competencies overlap. To avoid duplication, in cases which come under the responsibility of these Commissioners, the Agency is required to forward the petitioner's complaint to them. The Agency is also required to involve in its work, in an appropriate manner, non-governmental organisations and institutions active in the field of the protection against discrimination.

41. ECRI welcomes the creation in Germany of a body specifically entrusted with combating discrimination, and hopes that both its existence and activities will help to increase the visibility and effectiveness of the fight against discrimination in Germany. It notes in this context that the Agency has recently published a detailed brochure containing explanations and examples on the AGG.[16] Other material with appeal to the broader public is also being prepared. ECRI is concerned, however, that so far, in the eyes of civil society actors working in the field of combating racial discrimination, the Agency is perceived as somewhat distant from victims and lacking an understanding of their perspective. From ECRI's perspective, one of the primary purposes of setting up a national body with special competencies in the fight against racism and racial discrimination is to bring avenues of redress closer to victims. ECRI therefore hopes that this perception will change rapidly, and that both the presentation of the Agency's first annual report to Parliament in 2009 and the publication in languages other than German of information about the new legal framework in place to fight discrimination will provide an opportunity not only to raise the Agency's public profile but also to make it more accessible to victims. It also hopes that the Agency will be able to strengthen its contacts with non-governmental associations working with victims of discrimination.

42. As regards the guarantees of effective functioning of the Agency, ECRI observes that with a staff of 23 people and an annual budget of 2.8 million EUR in 2008 and 3 million EUR in 2009, the Agency would appear to have relatively few resources to carry out its statutory tasks; this will be even more the case as public awareness of the AGG and of the Agency itself increases.

43. ECRI recommends that the German authorities examine, in line with ECRI's General Policy Recommendation No. 7, the possibility of extending the competencies of the Federal Anti-Discrimination Agency to include the power to investigate individual complaints, as well as the right to initiate, and participate in, court proceedings.

44. ECRI recommends that the German authorities ensure that sufficient necessary financial and human resources are available to the Agency to enable it to carry out its current tasks, and that these resources are expanded as necessary to ensure that the Agency can keep pace with any increases in workload as its work becomes better known.

[16] *AGG-Wegweiser: Erläuterungen und Beispiele zum Allgemeinen Gleichbehandlungsgesetz*, published November 2008.

II. Discrimination in Various Fields

Education

45. In its third report, ECRI encouraged the German authorities in their efforts to improve the position of non-citizen children[17] in schools. It considered education in German as a second language from kindergarten level upwards as one of the priority areas for action. It stressed, however, that measures aimed exclusively at non-citizen children would not suffice to ensure equality of opportunities of these children in education. In this respect, it recommended initiatives to strengthen the intercultural competence of the school communities through measures targeted at the majority population as well.

46. Both international studies and research carried out within Germany in recent years show that first- and second-generation immigrant children continue to have significantly lower chances of success in the German school system than German children – although their desire to succeed is as high as, or even higher than, that of German children.[18] In Germany's multi-track secondary school system, despite the mechanisms in place to ensure permeability between the different streams, the proportion of non-citizens in the lowest stream (*Hauptschule*) is well over twice as high as that of German children, and the proportion of non-citizens who do not even complete *Hauptschule* is considerably over twice the proportion of German citizens. At the same time, the proportion of non-citizens in the highest stream (*Gymnasium*), giving access to university education, is well under half that of German children. One study found that in Baden-Württemberg, non-citizen children were three-and-a-half times more likely to end up in a special school for children with learning disabilities than German children. Overall, only 62.6% of men and 51.3% of women with an immigrant background have completed education or training of some form, compared with 88% of men and 73.4% of women who do not have an immigrant background. ECRI emphasises that this contrast in the education received by, and the education outcomes of, non-citizen and German children with a migration background as compared with other German children is deeply worrying. It notes that studies on this situation have stressed two key factors that may help to redress the situation: first, providing support for developing linguistic skills in the language of instruction (German), and second, addressing the tendency to direct children with a migration background to schools with lower performance expectations, which are dominated by socio-economically disadvantaged student populations.

47. The German authorities have indicated that German as a second language and special remedial language courses for children whose mother-tongue is not German have become an important element in the German day-care, education and training system. Education is a competence of the *Länder*, and the latter have all developed binding education and training plans for pre-school facilities and schools, which fall within their sphere of competence. These plans are either already in place or are being implemented progressively. The key elements of these education and training plans are the promotion of language and intercultural skills. Indeed, in most *Länder*, the language skills of all children are assessed at pre-school level, and extra classes provided if required. These

[17] ECRI's third report was published in 2004. ECRI notes that since 2006/7, the term "children with a migration background" has been used, covering both citizen children with a migration background and non-citizen children.

[18] See in particular OECD 2006, *Where Immigrant Students Succeed: A Comparative Review of Performance and Engagement in PISA 2003*; see also Federal Ministry of the Interior, *Migration and Integration: Residence law and policy on migration and integration in Germany*, April 2008, from which the following figures are drawn. In the present paragraph, the terms "non-citizen" and "immigrant background" correspond to the terms used in the relevant studies.

measures are not restricted to foreign children, but focus on all children with language deficits or children whose mother-tongue is not German. In parallel, specialists in the field of education working in day-care and educational facilities are required to undergo relevant training.

48. ECRI welcomes these measures, which are no doubt a step towards providing children experiencing initial language difficulties with greater chances of achieving better outcomes in school. It welcomes in particular efforts made to promote and foster the linguistic abilities of children from the very earliest stages, as a key means of improving their school outcomes overall. While it seems that kindergarten attendance rates are in any case high, ECRI stresses that those children having missed out on kindergarten are likely to be those who subsequently perform less well in school, in particular due to language difficulties. Given the stark disadvantages faced by children with a migration background in the education system, ECRI particularly emphasises the key role in improving the education outcomes of disadvantaged children that could be played by ensuring that all children have access to free kindergarten education, at very least for the final year before school.

49. As regards teacher training, it is reported that relatively few teachers are trained in teaching German as a second language. ECRI also notes that in a system where children with a migration background are considerably less likely to succeed in school than others, the number of teachers who are themselves first- or second-generation immigrants is unlikely to increase rapidly. Efforts to increase the cultural awareness of teachers are thus all the more urgent. Not only do teachers' attitudes influence children's perceptions of their own capacities; in Germany, teachers also play a central role in directing students towards the different streams of secondary education. NGOs report that some teachers display openly discriminatory attitudes in the classroom, in particular towards Turkish and Muslim children, and some may have a tendency (for example, through the misguided belief that it will simply be easier for these students to cope in the lower levels of the system) to direct such students more often towards the lower streams of secondary education, even, in some cases, where the students have the skills to complete *Gymnasium*. In addition, parents of first- and second-generation immigrant children may be less well equipped than German parents to question such recommendations, as they may themselves experience language difficulties or be less familiar with the German school system. ECRI notes that the system of streaming in schools is currently the subject of some debate in Germany but stresses that for as long as it continues to exist, every effort must be made to ensure that it does not produce, promote or compound problems of discrimination in Germany.

50. At an Education Summit held in Dresden on 22 October 2008, involving both the German authorities and the *Länder*, some significant targets were set. These included a pledge to provide more language assistance to immigrant children, and a proposal to increase spending on education and research to 10% of GDP by 2015. However, it was reported that the summit did not provide an opportunity to examine the entire education chain from kindergarten all the way through to university and life-long education. Concrete decisions on funding and on measures to translate the important agreements of principle into practice were moreover deferred pending their preparation by a strategy group that is not due to report until after the next federal elections, in autumn 2009.

51. Against the above background, ECRI draws the attention of the German authorities to its General Policy Recommendation No. 10 on combating racism and racial discrimination in and through school education. It stresses in particular the elements of this Recommendation that concern the development of policies at national and regional level to ensure the full participation, on an equal footing, of

children from minority groups in education; combating racism and racial discrimination within schools, in particular through ensuring that the fight against such phenomena in schools, whether they emanate from pupils or educational staff, is part of a permanent policy; and training all teaching staff to work in multicultural environment.

52. ECRI strongly encourages the German authorities to continue and intensify their efforts to ensure that no children suffer disadvantage in the school system due to inequalities in their linguistic skills in German, and recommends that they draw inspiration in this regard from ECRI's General Policy Recommendation No. 10. In this context, ECRI also recommends that the German authorities ensure that all children in Germany have access to free kindergarten education, at very least in the final year before primary school.

53. ECRI strongly recommends that the German authorities step up the provision of training programmes to teachers and other school staff, in accordance with ECRI's General Policy Recommendation No. 10, in order to increase their understanding of a variety of cultures and equip them to work effectively in increasingly diverse classrooms, including increasing their capacity to teach German as a second language to children with a different mother tongue.

54. Bearing in mind that no immediate move away from the present streaming system for secondary schooling in Germany has been envisaged, ECRI recommends that the German authorities take urgent steps to implement targeted training programmes to ensure that all teachers have the capacity to assess objectively the skills of students due to enter the secondary school system, in order to ensure that students are not sent to schools in the lower academic streams unless this is strictly necessary.

Employment

55. In its third report, ECRI encouraged the German authorities to prevent and combat racial discrimination, racism and xenophobia in the labour market. It reiterated its recommendation that the German authorities ensure that the barriers encountered by non-citizens and persons of immigrant background for entry into the labour market were accurately identified, in order to target funding to initiatives in priority areas. It further recommended that the German authorities evaluate the implementation of the new competences of the Works Councils in the field of combating racial discrimination and promoting the integration of foreign workers, and that the "XENOS – Living and Working in Diversity" programme be evaluated, in order to assess its effectiveness in combating racial discrimination, racism and xenophobia in the labour market.

56. Persons with a migration background in Germany continue to suffer from serious discrimination in access to employment, particularly in the case of qualified workers. Even with equivalent qualifications, immigrants and their children have greater difficulty finding work than the rest of the population. An OECD report published in 2007 found that, for immigrants with tertiary qualifications, the employment rate was 68%, compared with 84% for persons born in Germany. At the other end of the scale, for jobs requiring few or no qualifications, a slightly higher proportion of immigrants (45%) was employed than of persons born in Germany (40%). Young immigrants are more likely than Germans to seek apprenticeships, yet even so, their percentage of the overall number of apprentices remains lower than their percentage of the population in Germany. Even taking account of the lower educational attainment of children with a

migration background,[19] the employment rate of immigrants remains significantly lower than that of native-born Germans.

57. NGOs report that in the labour market, visible differences – including a person's name – are a significant factor in discrimination in access to employment, especially where such differences are linked to a perceived Muslim or Turkish background. It is still common to include photographs on CVs in Germany and women graduates, even with high marks from highly respected German academic institutions, report that they are not invited to interviews if their photograph shows them wearing a headscarf.[20] Black persons applying for work report being turned away as soon as employers see them. Advertisements requiring "mother-tongue German" have also been reported. Precarious residency status can also act as an added barrier for non-citizens seeking access to work or apprenticeships. ECRI observes that the new anti-discrimination legislation should help to provide a remedy for some individuals who have been subject to discrimination and who are in a position to make a complaint within the required time-limits.[21] However, structural approaches to combating discrimination are also required, and increased efforts to change employers' attitudes and promote a diversity approach in the workplace appear to be urgently needed. ECRI notes with interest that a Charter of Diversity was initiated by the business community in 2006, to which several hundred businesses have subscribed.

58. Since ECRI's third report, the implementation and effects of the 2000-2006 "XENOS – Living and Working in Diversity" programme, which included around 250 multi-year and nationwide projects against xenophobia and right-wing extremism and for tolerance and diversity on the labour market have been evaluated. The results of and recommendations made in this evaluation were incorporated into the follow-up programme drawn up by the Federal Ministry for Labour and Social Affairs called "XENOS - Integration and Diversity" (2007-2013 funding period). The goal of the new programme is to boost awareness of democracy and tolerance and to eliminate xenophobia and racism. The main focus is on preventive measures against exclusion and discrimination on the labour market and in society. Activities against xenophobia, racism, right-wing extremism, antisemitism and discrimination on the labour market are to be promoted in areas such as: work, administration, training, schools and vocational training in Germany and in the European context. Six priority areas have been identified: qualification and further training at school, in training and at work; cross-border and transnational measures; in-company measures and educational work in companies and public administrations; measures to integrate immigrants; teaching facts about and awareness-raising against right-wing extremism; and promoting moral courage and strengthening civil-society structures in local communities and rural regions.

59. ECRI encourages the German authorities to pursue their efforts to create a workplace free of racism, racial discrimination, xenophobia and other related forms of intolerance, including through measures such as the programme "XENOS – Integration and Diversity".

60. ECRI strongly recommends that, as part of their ongoing efforts towards creating a workplace free of racism, the German authorities launch an awareness-raising campaign aimed specifically at changing employers' attitudes towards persons with an immigrant background. This campaign should focus not only on

[19] See above, *Discrimination in Various Fields – Education*.

[20] See further below, *Vulnerable/Target groups – Muslim community*.

[21] See above, *Existence and Implementation of Legal Provisions – Civil law provisions: General Equal Treatment Act*.

employers' obligations and liabilities under the new General Equal Treatment Act (AGG) but also on the positive aspects of diversity in the workplace. It could form part of a regular series of such campaigns.

Housing

61. In its third report, ECRI recommended that research be carried out into discriminatory practices and barriers or exclusionary mechanisms in public and private sector housing, in order to inform targeted policy responses to any problems found.

62. Various studies carried out in the past have shown that on average, migrants living in Germany pay higher rent than German citizens but live in smaller houses or apartments. In some cities migrants also live mostly in specific districts, a fact that is readily used by conservative commentators to criticise migrants, and especially Muslims, for creating and living in "parallel societies". In public debates on how to reduce the concentration of migrants in some neighbourhoods, the focus has at times tended to be on finding ways to make migrants relocate to new neighbourhoods or to prevent them from moving in to districts which already have a high proportion of migrants, rather than on, say, incentives that could be offered to German citizens to move into such neighbourhoods, or measures (such as improving schools or living conditions) to make such districts more attractive. NGOs report that a key role is played, however, by discriminatory practices of landlords and property managers, based for example on a person's name or on their fluency in German. Cases in which rooms are advertised as available for mother-tongue German speakers only are also reported.

63. The authorities have pointed out that housing is one of the fields covered by the General Equal Treatment Act (AGG) 2006. However, as noted above (§ 27), the inclusion in the Act of a provision expressly permitting differential treatment on the basis of racial or ethnic origin gives rise to doubts as to whether the AGG will be of assistance in turning this situation around.

64. ECRI strongly recommends that the German authorities carry out research into discriminatory practices and barriers or exclusionary mechanisms in public and private sector housing, in order to inform targeted policy responses to any problems found. It recalls in this context its recommendation made earlier in this report that the authorities keep under review the impact of the new legislation in preventing discrimination and in ensuring that it is effectively sanctioned when it does occur, in particular as regards the provisions concerning housing

III. Racism in Public Discourse

Political discourse

65. In its third report, ECRI encouraged the German authorities in their efforts to ban political parties and other organisations which resort to racist, xenophobic and antisemitic actions and propaganda. It recommended that the authorities consider enacting legislation to withdraw public financing from organisations that promote racism, xenophobia and antisemitism.

66. Since ECRI's third report, some worrying developments have occurred in the political arena in Germany. The success in Mecklenburg-Western Pomerania in 2006 of the National Democratic Party (NPD) – which has flags and symbols similar to Nazi paraphernalia and which was labelled as "racist, antisemitic and revisionist" in the 2006 *Verfassungsschutzbericht* – is a particular case in point. The leader and two senior members of the NPD were indicted in early 2008 on charges of racial incitement. Support for the party, which receives state funding, quadrupled in local elections in Saxony in June 2008, and it is now represented

in all 10 regional councils of Saxony. Supporters of this party have distributed xenophobic and antisemitic tracts in schools in several *Länder* and chanted antisemitic slogans during protest marches. Attempts to ban the party in 2003 failed, as some evidence against it had been improperly gathered by undercover informants; however, suggestions that efforts should be made to have the party banned resurfaced in 2008. Meantime, the far-right German People's Union (DVU) won a number of seats in the Brandenburg legislature. As mentioned elsewhere in this report, a single-issue anti-mosque movement created in Cologne won 5% of votes (as well as 5 seats) in recent local elections there.

67. While most mainstream parties have for the most part avoided racist comments or overtones, some discourse aimed at Muslims has tended to focus essentially on security issues, or on a supposed integration deficit of Muslims in German society. This approach is also of concern to ECRI.[22]

68. ECRI again encourages the German authorities in their efforts to ban political parties and other organisations which resort to racist, xenophobic and antisemitic actions and propaganda. It recommends that the authorities consider, in line with ECRI's General Policy Recommendation No. 7,[23] enacting legislation to withdraw public financing from organisations that promote racism, xenophobia and antisemitism.

69. ECRI recommends that the authorities encourage politicians to take the utmost care to avoid perpetuating hostility or negative stereotypes about non-citizens and members of minority groups; instead, they should take the lead in denouncing racism and discrimination and in ensuring that non-citizens and members of minority groups are perceived as equal and valuable members of society.

Neo-Nazi propaganda

70. In its third report, ECRI recommended that special efforts be deployed to counter the right-wing extremist hate music scene. ECRI notes that music from the extreme right-wing scene continues to act as a vector for spreading racist, antisemitic and xenophobic ideas, and is also often used as a tool for recruiting youths as new members of right-wing extremist groups. These groups reportedly seek to recruit young people directly in schoolyards, for example by giving away free CDs to students, and use music and magazines to create links between extremist groups and young people. The authorities estimate that there are presently around 4 400 Neo-Nazis and 10 000 sub-culture-oriented and other right-wing extremists having a tendency to violence in Germany, numbers which have not decreased in recent years.

71. The authorities have been active in investigating and prosecuting members of neo-Nazi groups.[24] In October 2008, the German authorities carried out nationwide raids on the offices and homes of individuals affiliated with a youth group having links to the NPD, and suspected of indoctrinating teenagers and children with neo-Nazi ideas during summer camps. In April 2007, the Interior Ministry of Saxony prohibited a neo-Nazi group that had committed several acts of racist violence. In March 2007, three men were sentenced for burning the diary of Anne Frank. In March 2006, major raids were carried out on the homes of over 100 persons suspected of having links to the banned Blood and Honour skinhead

[22] See below, *Vulnerable/Target Groups – Muslims,– Situation of migrants, asylum-seekers, [etc] – Integration.*

[23] See § 16 of the General Policy Recommendation and § 36 of the accompanying explanatory memorandum.

[24] Acts of violence by neo-Nazis are dealt with below, under *Racist violence*.

group. ECRI welcomes these efforts as an essential part of the fight against racism, xenophobia and antisemitism.

72. ECRI strongly encourages the German authorities to pursue their efforts to ban neo-Nazi organisations and groups, and refers to its further recommendations made below concerning the fight against racist violence, including the need to take a comprehensive approach in order to identify and combat the causes of such violence.

Internet

73. In its third report, ECRI recommended that the German authorities intensify their efforts to counter racist, xenophobic and antisemitic activities on the Internet, and encouraged the authorities to promote initiatives which had proved successful in countering racist, xenophobic and antisemitic activities on the Internet. ECRI notes that since its third report, the prevalence of racist expression on the internet does not appear to have decreased. A high proportion of racist expression via the internet appears to be authored by persons belonging to neo-Nazi groups; their targets are most often Roma/Sinti or members of the Jewish community. The authorities report that it is not always easy to bring prosecutions in such cases or to close down offending sites, as they frequently hosted on overseas servers. However, successes have been achieved through international co-operation, including at the initiative of NGOs.

74. ECRI reiterates its recommendation that the German authorities intensify their efforts to counter racist, xenophobic and antisemitic activities on the Internet, and again draws the authorities' attention to its General Policy Recommendation No. 6. ECRI again encourages the German authorities to promote the use of initiatives which have proved successful in countering racist, xenophobic and antisemitic activities on the Internet.

Media

75. In its third report, ECRI referred to the need to ensure that reporting did not perpetuate racist prejudice and stereotypes, and to the adoption and implementation of codes of self-regulation as useful tools to these ends. It also noted the need for the media to equip itself better to reflect a diverse society, both through training journalists from the majority population and through a stronger representation of persons with an immigrant background in the media professions.

76. ECRI notes that certain measures related to the media, such as efforts to promote innovative and integrational television programmes, are included in the National Integration Plan.[25] The Federal Agency for Civic Education also runs activities aimed at strengthening the role of local journalists in contributing to the cohesion of communities in their district, city or region. ECRI is therefore concerned to learn that the only multicultural radio programme currently being broadcast, radiomultikulti in Berlin, is to be shut down in 2009 by local radio station RBB. Generally speaking, minorities continue to report that they are underrepresented in the media, and where they are represented, it is usually with stereotypes. This phenomenon affects not only the Black community and Sinti and Roma, as noted elsewhere in this report,[26] but also Muslims. The latter point out that they have tended to be associated, as a group, with the offences of a few. They also point to intense media coverage of an incident where the

[25] See below, *Vulnerable/Target groups – Situation of migrants, asylum-seekers, [etc]* – Integration and naturalisation.

[26] See below, *Vulnerable/Target Groups – Black Community, – Sinti and Roma*.

headmaster of a school attended mostly by students with an immigrant background, in Berlin's Neukölln district, asked for help as he considered the situation there had gone beyond his control; at the same time, similar incidents in schools mostly attended by German pupils passed unreported. ECRI emphasises the importance of equipping media professionals with special training on reporting in a diverse society. It also stresses that a stronger representation of persons of immigrant background in the media profession could positively affect the image of persons of immigrant background reflected by the press.

77. ECRI encourages the German authorities to raise awareness amongst the media, without encroaching on their editorial independence, the need to ensure that reporting does not perpetuate racist prejudice and stereotypes and also the need to play a proactive role in countering such prejudice and stereotypes. ECRI recommends that the German authorities engage in a debate with the media and members of other relevant civil society groups on how these ends could best be achieved.

78. ECRI encourages the authorities and all relevant actors to implement all measures of the National Integration Plan aimed at ensuring the media are better equipped to deal with the diversity of present-day German society.

IV. Racist Violence

79. As mentioned in previous reports, ECRI considers racist, xenophobic and antisemitic violence to be one of the most dangerous expressions of racism, and a priority area for action in Germany. Asylum-seekers, members of Jewish communities, Roma and Sinti continue to be targeted by such attacks. Visible minorities, especially in the eastern parts of the country, where the highest numbers of crimes occur in per capita terms, are reported to be particularly exposed to racist violence.[27] Unfortunately, the number of violent crimes with extremist, xenophobic or antisemitic motivations has continued to rise in recent years.

80. Many of these attacks are committed against single victims by several young men or teenagers acting together and belonging to or sympathising with more or less organised Neo-Nazi, skinhead or other right-wing extremist groups. In its third report, ECRI noted that the problem of racist, xenophobic and antisemitic violence was not only linked to conditions specific to the youth who are perpetrators of these crimes, however, but was also favoured by other, more general conditions prevailing in German society as a whole. It encouraged the authorities in their efforts to take a more comprehensive approach to the phenomenon of racist, xenophobic and antisemitic violence, not focusing exclusively on the activities of right-wing extremists but seeking to address other causes underlying this violence which may be found in society as a whole, such as perceptions about non-citizens and their place within German society; the incidence of racial discrimination in everyday life; and the latent racism, xenophobia and antisemitism existing more generally in other segments of the population of Germany. In this context, ECRI notes with interest that long-term academic research is being carried out into the phenomenon of group-focused enmity in Germany, its causes and the conditions in which it is likely to find expression. It welcomes the interest displayed by the authorities in the results of this work, which may help in designing increasingly effective strategies to prevent and combat racist violence in Germany.

81. A number of initiatives supported by the authorities may also be noted. One such initiative is the Alliance for Democracy and Tolerance, which has been in place

[27] See also below, *Vulnerable/Target Groups – Black Community*.

since 2000 and of which the mission is to promote positive messages around democracy and tolerance through preventive and practical measures. The measures aim to increase acceptance of immigrants in German society, promote the efforts of immigrants to integrate and increase their participation, and find concrete solutions when integration problems arise. Following on from an earlier programme, the Federal Ministry for Family Affairs, Senior Citizens, Women and Youth also initiated two German-wide programmes against right-wing extremism, xenophobia and anti-Semitism in 2007. The first, "Diversity feels good. Youth for diversity, tolerance and democracy", aims to raise awareness amongst children and young people with a view to getting them involved in the fight against right-wing extremism, xenophobia and antisemitism. The programme currently supports 90 model projects and 90 local action plans throughout Germany. The second, "Competent for democracy – Counselling network against right-wing extremism" provides professional counselling on issues related to racism, xenophobia or anti-Semitism, in particular to help respond to crisis situations, and aims to enhance the co-operation between the federal government and the *Länder*. Almost all the *Länder* have now set up counselling networks in the framework of this programme. The police are also taking an increasingly active role in working to prevent racist, xenophobic and antisemitic crime. This work primarily targets young people, for example through the distribution to schools of the "Wolves in Sheep's Clothing" media kit, including a film targeted at 13-year-olds and supplementary material for teachers on how to use the material in classes; as well as a follow-up DVD including award-winning television spots against right-wing extremism made by schoolchildren. It has also led to the publication of a leaflet designed to help parents identify signs (for example, brands of clothing or other insignia) that their children may be becoming involved in the activities of extreme right-wing, and particularly neo-Nazi groups. As part of its broad mandate to promote civic education, the Federal Agency for Civic Education set up a specific extremism unit in 2007. The Forum against Racism set up by the Federal Ministry of the Interior in 1998 also continues to serve its members (30 governmental organisations and 60 non-governmental organisations) as a platform for dialogue on the fight against racism and xenophobia. Other initiatives at grassroots levels include support programmes for victims, as well as programmes to assist offenders to leave right-wing groups. Non-governmental organisations report, however, that even though it is clear that sustained efforts are needed to combat the prevalence of racist, xenophobic and antisemitic violence in Germany, local programmes continue to be funded on only a very short-term basis, which hampers their capacity to be effective.

82. ECRI welcomes the above initiatives and notes that considerable resources have been invested in combating the gravest forms of racism and xenophobia through a variety of means. It also welcomes the fact that action is being taken at several different levels, including supporting victims, fighting crime when it occurs, assisting perpetrators to break out of extremist groups and seeking to prevent young people from going down the path of extremist activity. Bearing in mind the high levels of racist violence that currently prevail in some parts of German society, ECRI emphasises that programmes such as these are likely to be needed for a considerable time to come.

83. As regards the situation of victims of racist violence, ECRI is not aware of any new research carried out in recent years. In terms of compensation, as noted in ECRI's third report, the authorities may now pay compensation on a voluntary basis to victims of racist violence under the Victims Compensation Act of 2001. While these provisions are overall welcome, ECRI understands that the criteria on the basis of which the level of compensation is determined do not depend on the type and severity of the offence suffered by the victim so much as on their country of origin and the length and basis of their residence in Germany. ECRI stresses that, no matter what the citizenship or residency status of the victim,

racist violence constitutes the worst form of expression of racism; it considers that compensation awarded to victims should reflect this.

84. ECRI strongly encourages the German authorities to pursue and consolidate their efforts to take a more comprehensive approach to the phenomenon of racist, xenophobic and antisemitic violence, not focusing exclusively on the activities of right-wing extremists but also addressing other causes underlying this violence which may be found in society as a whole.

85. ECRI reiterates its recommendation that the German authorities continue and intensify their support to local initiatives aimed at strengthening democratic civil society and at equipping local communities against right-wing extremism and, more generally, against racism, xenophobia and anti-Semitism. It also recommends that they improve access to funding, in particular long-term funding, for grass-roots organisations working in this field.

86. ECRI recommends that the German authorities continue and intensify their efforts in order to address the position of victims of racist, xenophobic and antisemitic violence, taking account of the fact that compensation in this respect should reflect the harm suffered by the victim. It recommends that these efforts also include concrete initiatives to rehabilitate victims as well as academic research in this field.

87. In its third report, ECRI encouraged the German authorities in their efforts to search for means to improve the implementation of existing criminal legislation to combat right-wing extremism and, more generally, to combat racist, xenophobic and antisemitic violence. It also highlighted the continuing need for training of law enforcement officials on such legislation, and strongly encouraged the German authorities in their efforts to monitor racist, xenophobic and antisemitic crimes and, within these, violent crimes.

88. Although the concept of "hate crimes" is not expressly recognised as such in the German Criminal Code,[28] since 2001 the police have gathered statistics on "politically motivated offences" (divided into four categories: "left-wing", "right-wing", politically motivated activities by foreigners and other types of politically motivated crimes). These statistics cover, inter alia, offences directed against individuals due to their political beliefs, nationality, ethnic origin, race, colour, religion, ideology, origin, sexual orientation, disability, appearance or social status. Offences are considered to be "extremist" if they are aimed at overthrowing the state. Xenophobic crimes (committed due to the victim's real or perceived nationality, ethnicity, race, skin-colour, religion or origin) and antisemitic crimes (committed because of an anti-Jewish sentiment) are registered as sub-groups of these offences. The vast majority of antisemitic and xenophobic crimes recorded as politically motivated offences are registered in the right-wing category. Overall, 24.4% of right-wing politically motivated crimes recorded in 2007 were considered to be hate crimes.

89. In 2007, the Federal Criminal Police Office registered 17 176 politically motivated offences, of which 980 were acts of violence. In 2006, 17 597 such offences were recorded, 1 047 of which were acts of violence. 16% of registered right-wing extremist offences registered in 2007 were recorded as having a xenophobic background. NGOs working with victims of such crimes note, however, that the parallel statistics they keep of racist incidents reported to them are consistently higher than the official statistics for the relevant politically motivated offences.

[28] See above, *Criminal law provisions against racism*.

One reason cited for this is a lack of confidence amongst victims of racist offences that police officers will deal appropriately with them.[29]

90. Representatives of victims of racist violence also emphasise that one of the key barriers to successful prosecutions of offenders in this field is the narrow understanding of racism that currently prevails in Germany. As mentioned above (§ 84), there is no definition of racism in German law but it is understood (including in official documents[30]) as a view held essentially by right-wing extremists, and based on considerations as to the supposed biological superiority of certain "races" over others. NGOs point out that this understanding is widespread throughout German society, including in the criminal justice system, i.e. amongst police, prosecutors and judges. Thus, unless the perpetrators of crimes are clearly identifiable as members of right-wing extremist groups or sympathisers of such groups, crimes based on racist motivations may not be investigated or prosecuted as such. Even if they are, judges' understanding of racism, combined with the absence of a specific reference in the Criminal Code to racist motivations as an aggravating circumstance for ordinary offences,[31] may again make it difficult to get an appropriate conviction.

91. ECRI is concerned that because of this, persons having committed racist offences may be escaping due prosecution and punishment for their acts. It draws the authorities' attention to the definition of racism contained in its General Policy Recommendation No. 7 on national legislation to combat racism and racial discrimination, which states that, for the purposes of the Recommendation, "'racism' shall mean the belief that a ground such as race[32], colour, language, religion, nationality or national or ethnic origin justifies contempt for a person or a group of persons, or the notion of superiority of a person or a group of persons," and stresses that the mere fact that the perpetrator of a violent crime has no manifest links with the extreme right-wing scene does not mean that they had no racist motivations for their act. ECRI stresses, as has been repeatedly highlighted by the European Court of Human Rights, that racist violence is particularly destructive of fundamental rights, and that it is essential that it be identified and punished accordingly.

92. ECRI recommends that the German authorities seek means to improve the implementation of existing criminal legislation to combat right-wing extremism and, more generally, to combat racist, xenophobic and antisemitic violence. It recommends that the authorities intensify their efforts to train law enforcement officials, including police, prosecutors and judges, on such legislation, in order to ensure that no incidents of racist, xenophobic or antisemitic violence pass unnoticed due to an unnecessarily narrow interpretation of the existing law. It recommends that lawyers also be given the opportunity to receive training on these matters.

V. Vulnerable/Target Groups

Jewish communities

93. See below, Antisemitism.

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[29] See below, *Conduct of law enforcement officers*.

[30] See, for example, the explanation of racism given in the glossary of the Ministry of the Interior: http://www.bmi.bund.de/cln_145/DE/Service/Glossar/Functions/glossar.html?nn=105094&lv2=296448&lv3=152418

[31] See above, *Criminal law provisions against racism*.

[32] Since all human beings belong to the same species, ECRI rejects theories based on the existence of different "races". However, in this definition ECRI uses this term in order to ensure that those persons who are generally and erroneously perceived as belonging to "another race" are not excluded from protection.

Muslims

94. In its third report, ECRI recommended that the German authorities take steps to combat and prevent racism and discrimination vis-à-vis Muslims in Germany effectively. It drew the authorities' attention in particular to its General Policy Recommendation No. 5, which proposes a range of legislative and policy measures governments can take to this end.

95. The German authorities estimate that approximately 3.4 million Muslims live in Germany. The great majority are not German citizens. As with other groups, Muslims who do not have German citizenship are referred to and perceived as foreigners, regardless of how long they or their family have lived in Germany, and, unless they are nationals of another EU member state, they do not have the right to vote in elections at any level. Given the increasing diversity of the backgrounds and beliefs of Muslims living in Germany, they reportedly do not have a strong collective identity. Few Muslims hold high-profile positions in German political parties and very few have been elected to the Federal Parliament (*Bundestag*).

96. Muslims frequently experience discrimination in daily life, facing difficulties in access to employment as well as so-called "ghettoisation" in the housing sector.[33] In the field of education, Muslim children are not only strongly affected by the phenomenon of lower school outcomes that affects children with a migration background in general, but also report cases of discrimination against them by some teachers.[34] Nearly two-thirds of Muslims reported experiencing some form of discrimination in the past twelve months. As regards attitudes of society in general towards Muslims, when questioned about their experiences in the past year, many Muslims reported having been treated as simple or odd, treated rudely because they were perceived as foreigners, subjected to pejorative comments such as being told to "go home", intentionally insulted or subjected to name-calling; one-fifth reported have been discriminated against by the police or other authorities, nearly one in ten reported having had property deliberately damaged or destroyed and 3% reported having been physically assaulted.[35]

97. ECRI notes with concern a new law on registration of personal data, which will come into force in January 2009. Under this law, Muslims, in contrast with persons affiliated to religions that are registered as corporate bodies under public law, are prohibited from registering their faith. ECRI is concerned that this may be a violation of the principle of equal treatment.

98. As regards practising and learning about the Muslim faith, it may be noted that religious education in schools is permitted in Germany, but Muslim religious education in schools is at present a relative rarity. In March 2008, the third official Islam Conference agreed to add Islam to the school curriculum in public schools. However, this initiative has been hampered by a lack of qualified Muslim teachers with sufficient knowledge of German to teach the Muslim faith in schools. With respect to practising the Muslim faith, the construction of mosques has often been surrounded by controversy, and in some cases used by extreme right-wing parties to push their own anti-Islam agendas. In response to plans to build one of Europe's largest mosques in Cologne, a single-issue anti-mosque movement was created and won 5% of votes (as well as 5 seats) in recent local elections. The movement invited nationalist groups from around Europe to join a rally and congress in Cologne in mid-September 2008 to fight what it called the "Islamisation and immigration invasion" of Germany and Europe; however, the

[33] See above, *Discrimination in Various Fields –Employment, Housing.*

[34] See above, *Discrimination in Various Fields – Education.*

[35] *Muslime in Deutschland*, p105.

demonstration was stopped by several thousand anti-right demonstrators who blocked access to the square where it was planned. Not all such projects have been controversial, however: in a number of instances political leaders and the majority of the population have given their support to the building of a mosque. In Duisburg, Germany's largest mosque – combined, in an unprecedented move in Germany, with a local community meeting centre open to all members of the community – opened in October 2008 with general support.

99. A major point of difficulty for Muslim women is the impact, in particular on their chances of finding employment, of the choice to wear a headscarf. Following a decision by the *Land* of Baden-Württemberg in 2000, prohibiting a female Muslim teacher from wearing a headscarf, in 2003 the Federal Constitutional Court – finding in favour of the teacher in that case – ruled that it was up to the *Länder* to legislate to define which religious symbols could be worn in which circumstances. Since then eight *Länder* – Baden-Württemberg, Bavaria, Berlin, Bremen, Hesse, Lower Saxony, North-Rhine-Westphalia and Saarland – have passed laws that explicitly prohibit the wearing of headscarves in schools. In Hesse, all civil servants are banned from wearing headscarves. The public discussion about headscarves is reported to have had even more detrimental effects than the laws themselves for Muslim women, who were portrayed in public discourse as oppressed and dependent. Muslim women moreover report that it has also become increasingly difficult to find employment in the private sector since these laws were passed, as they have sent the message that it is reasonable to reject an applicant solely because she wears a headscarf.

100. Civil society actors continue to report that since the events of 11 September 2001, media coverage of Muslims in Germany has tended to be one-sided. One study found, for example, that police announcements concerning raids on mosques were invariably published as front-page news, yet the fact that virtually all such raids produced no results was not mentioned. Some commentators blame Muslims themselves for the discrimination they experience, suggesting that it is their fault because they do not want to integrate – for example, because they watch satellite television in the language of their country of origin. Likewise, political discourse has also frequently been negative.[36] Muslims have increasingly been identified, both by the press and by the authorities, with crimes, and more specifically with terrorism. Political discourse concerning Muslims frequently revolves around "internal security issues", and the strong focus of the authorities, in particular the German Intelligence Agency (*Verfassungsschutz*), on identifying radical Islamist groups, may result in even moderate groups being denied access to public funding and excluded from policy-making. While it recognises the legitimacy and importance of ensuring internal security, ECRI is concerned that an approach in which the non-violent individuals who form the vast majority of the Muslim community are simply equated with the few who may be prepared to resort to violence may stigmatise all Muslims in the eyes of the general public, and in the long run, alienate more than it reassures. ECRI emphasises that messages sent by the authorities and by the media are of central importance in building confidence and strengthening dialogue in order to foster a society based on trust rather than mutual suspicion or fear.

101. Against this background, ECRI welcomes the creation by the Ministry of the Interior of the German Islam Conference (*DIK*), intended to create a permanent space for dialogue between the authorities at all levels and Muslims in Germany. Such a space had previously been lacking, in part due to the authorities' insistence on seeking a single partner for dialogue, to represent the full breadth and diversity of the country's more than 3 million Muslims from Europe, Northern

[36] See above, *Racism in Public Discourse.*

and sub-Saharan Africa, the Middle East and Asia. The Conference is thus an important symbol of change for the authorities. The authorities have indicated that the goal of the Conference is to promote inclusive and constructive forms of community, and to ensure better integration of Muslims in Germany. It is intended to show by example that Muslims have become a part of German society, to counteract segregation of Muslims in Germany, and to prevent Islamism and extremism. ECRI observes that the exercise at stake is a delicate one: as much as the new dialogue between Muslims and the authorities may send a positive message to society as a whole, this message risks being obscured by the focus on security issues. The risk is that the latter focus may create the false impression that extremism is a generalised phenomenon amongst Muslims, and a problem solely of Muslims. How this issue is managed will therefore have a strong influence on whether the Conference is able to achieve its goals.

102. ECRI strongly recommends that the German authorities intensify their efforts to combat and prevent racism and discrimination vis-à-vis Muslims in Germany effectively. It draws the authorities' attention once again to its General Policy Recommendation No. 5 on fighting intolerance and discrimination against Muslims, which proposes a range of legislative and policy measures governments can take to this end.

103. ECRI recommends that the German authorities take all necessary steps, in the field of registration of personal data, to ensure that persons practising the Muslim faith are treated on an equal footing with persons practising religions that are registered as corporate bodies under public law.

104. ECRI strongly recommends that the German authorities make every effort to differentiate, in their own work and in the messages sent to society as a whole, between the small number of Muslims who may, as in any group, hold radical views, and the vast majority. It draws the authorities' attention to its General Policy Recommendation No. 8, which proposes a range of legislative and policy measures governments can take to fight effectively against terrorism while at the same time effectively combating racism.

Turkish community

105. The Turkish community in Germany comprises around 2.7 million people and is the largest single group of residents of non-German origin. Around 1.7 million of these persons do not have German citizenship, although the great majority have been living in Germany for more than 7 years.[37] Frequently considered simply as a subset of the Muslim community, the Turkish community includes immigrants from a variety of backgrounds. Nonetheless, their experience of discrimination is similar to that of many Muslims: as children with a migration background, many children of Turkish origin experience below average education outcomes; members of the Turkish community also experience discrimination in access to employment and housing, for example on the basis of their name or their non-native German.[38] As the largest group of non-citizens in Germany, Turks are also particulary affected by the introduction of the new national integration policy, with the positive and negative effects described elsewhere in this report.[39] They are moreover not immune from violent racist attacks. The many members of the Turkish community who are not German citizens or citizens of other EU countries are also not entitled to vote or stand in elections at any level.

[37] On the acquisition of German citizenship, see above, *Citizenship law*.

[38] See above, *Discrimination in Various Fields – Education, Employment, Housing*.

[39] See below, *Vulnerable/Target groups – Situation of migrants, asylum-seekers, (etc) – Integration*.

106. Against this background, a survey conducted in March 2008 found that, while most persons of Turkish origin did not regret their decision to come to Germany, more than half felt unwelcome and inadequately represented. The election in November 2008, for the first time, of a German of Turkish origin as one of the leaders of a German political party was understandably hailed as a landmark event in German politics.

107. ECRI draws the authorities' attention to the recommendations made elsewhere in this report, in particular those concerning access to citizenship, discrimination in the fields of education, employment and housing, and integration, and underlines in this context the importance of creating an environment in which members of the Turkish community as well as immigrants from all backgrounds feel welcome.

Black community

108. Members of the Black community continue to be especially vulnerable to racist violence. A number of particularly violent and brutal attacks against Black persons have occurred since ECRI's third report. Black persons report that there are still "no-go areas" in some *Länder* to which they avoid going alone, or avoid going altogether if possible, and to which they would not take their children at all, for fear of being targeted by racist attackers. Black victims of racist violence also report being treated as "second-class" victims when they turn to the police for help, for example being treated as suspected drug-dealers, or at best as time-wasters, when they wish to report a racist attack, or benefiting from active police intervention to put a stop to a violent attack, only to discover later that a failure by the police officers present at the scene to arrest or even to check the identities of the attackers has compromised the chances of successful prosecution.

109. Frequently referred to as visible minorities in relation to racist violence, members of the Black community (which is estimated to include 200 000 to 300 000 persons) complain that they are otherwise virtually invisible as active members of society. Subject to discrimination in access to employment,[40] Black people find few professional role models, whether working as teachers, bank clerks or public servants. They also suffer from the streaming system in place in the field of education.[41] Moreover, there is a relative lack of diversity in the media[42] and where Black actors appear, the characters they play often merely respond to prevailing stereotypes. In the field of advertising, NGOs report that some advertisements depict Black persons as commodities rather than human beings. ECRI further notes that there appears to have been little research carried out into the situation of the Black community in Germany that would make the issues they face more visible to the authorities and to the public at large, and by the same token easier to tackle.

110. ECRI draws the German authorities' attention to the recommendations made elsewhere in this report, aimed in particular at overcoming racist violence and racial discrimination in various fields of daily life and at increasing diversity in the media, and stresses their importance to overcoming the forms of racism most frequently experienced by members of the Black community; it furthermore recommends that research be carried out into the specific situation of members of the Black community in Germany, in order to identify any fields where action is most urgently needed to redress the disadvantages they face.

[40] See above, *Discrimination in Various Fields – Employment*.

[41] See above, *Discrimination in Various Fields – Education*.

[42] See above, *Racism in Public Discourse – Media*.

Roma/Sinti communities

111. German Sinti and Roma are one of the four national minorities recognised in Germany and as such, receive support from the federal state in order to defend and promote their interests as a minority. The state has also taken welcome steps to recognise officially the suffering experienced by these communities during the Holocaust. In daily life, however, members of the Roma and Sinti communities report that they continue to face discrimination, in particular in access to housing and in the field of education, where teachers frequently have little knowledge of the history of Sinti and Roma, and perpetuate negative stereotypes. Representatives of the Roma and Sinti communities also draw attention to a generally unfavourable climate of opinion towards them, both amongst the media – which continue mentioning accuseds' Roma or Sinti origin unnecessarily in their reports – as well as amongst the police.[43] They also express deep concern about increasingly widespread and virulent expressions of anti-Roma sentiment on the internet. Similar stigmatisation is also experienced by Roma having recently arrived in Germany; moreover, their situation with respect to access to social rights is often more precarious, as many are refugees or asylum-seekers, or remain in Germany only with tolerated status.

112. ECRI recommends that further steps be taken to improve the situation of Roma and Sinti in Germany, in consultation with representatives of these communities, in order to combat and prevent racism and racial discrimination against them. It again draws attention to its General Policy Recommendation No. 3 on combating racism and intolerance against Roma/Gypsies, which proposes a range of legislative and policy measures governments can take to this end.

Situation of migrants, asylum-seekers, refugees, other beneficiaries of international protection and persons with tolerated status

- *Refugees and asylum-seekers*

113. In its third report, ECRI encouraged the German authorities in their efforts to ensure that persecution from non-state agents and gender persecution were recognised in Germany for the purposes of granting refugee status under the Geneva Convention, and recommended that the authorities intensify their efforts to provide specific training on asylum and refugee questions to judges involved in the asylum process. It further recommended that the German authorities ensure that no person was forcibly returned to his or her country of origin contrary to the principle of *non-refoulement* and Article 3 of the ECHR. ECRI also made a number of recommendations concerning the application of the airport procedure and the situation of unaccompanied children.

114. Since the entry into force of the new Immigration Act on 1 January 2005, Convention refugees and refugees recognised under the terms of the Consitution have benefited from the same status in German law. Gender persecution and persecution by non-state actors have been expressly included as criteria for the recognition of a person as a refugee in Germany. ECRI welcomes this development and notes that since then, recognition rates for refugees have increased. While this may be due to a variety of factors, including variations in countries of origin of asylum-seekers, it seems that at least part of the increase may be ascribed to better implementation of the relevant criteria. However, some concerns remain as to whether the criteria are as yet consistently and effectively applied in practice, meaning that some genuine cases may still be missed.

[43] See below, *Conduct of law enforcement officers*.

115. With regard to airport procedures, that is expedited procedures applied to asylum applications lodged on arrival by air and prior to the applicants' entry into German territory, asylum-seekers continue to be entitled to legal counselling in these circumstances. However, ECRI notes that, amongst other concerns with respect to this expedited procedure, higher proportions of asylum-seekers subject to airport procedures (rather than in-country procedures) are found to have manifestly unfounded claims, meaning they are denied entry to German territory. Vulnerable groups such as unaccompanied minors may also still be subject to this procedure, although the number of unaccompanied minors subjected to airport procedures was reported to have decreased in 2007.

116. ECRI is also concerned at the low threshold applied by the courts for revoking asylum or refugee status under section 73 of the Asylum Procedures Act. This means that some persons with refugee status may see this status prematurely terminated, leading them to be induced or in some cases forced to return to their country of origin although the conditions there are not yet conducive to return.

117. ECRI recommends that the German authorities pursue and intensify their efforts to provide specific training on asylum and refugee questions to judges and all other officials involved in the asylum process, in particular to ensure that the new criteria for recognition included in the Immigration Act of 2004 are effectively applied in practice.

118. ECRI recommends that the German authorities keep the airport procedure under review and modify it if necessary to ensure that genuine asylum-seekers are not deprived of protection. ECRI reiterates its recommendation that unaccompanied minors be excluded from the application of this provision.

119. ECRI recommends that the German authorities exercise the utmost caution before revoking refugee status, particularly where this may lead to a loss of residence rights for the person.

120. In its third report, ECRI reiterated its recommendation that the German authorities ensure that asylum seekers were not left in a state of destitution, including by allowing them adequate access to work. ECRI also recommended that the German authorities ensure that asylum seekers' freedom of movement was respected, and that full family reunification rights were guaranteed to all recognised refugees.

121. Following a decision of the Federal Administrative Court on 15 January 2008, recognised refugees are now allowed to choose where they reside. Beneficiaries of subsidiary protection who are dependent on social welfare are still assigned to residence areas, however. Asylum-seekers are subject to even more stringent requirements, as they must reside and remain in their district of assigned residence, and are not allowed to travel outside their assigned district without permission. ECRI notes that an application to the European Court of Human Rights under Article 2 of Protocol No. 4 to the European Convention on Human Rights, contesting the application of this rule, was declared inadmissible.[44] Independently of any question of compatibility with the European Convention on Human Rights, however, ECRI is concerned that these restrictions on freedom of movement of asylum-seekers – which aim to distribute amongst the *Länder* the costs of looking after asylum-seekers – may place the latter in situations of undue hardship. It draws the authorities' attention to the fact that asylum-seekers, who are already vulnerable and who by definition may have been exposed to persecution in their countries of origin, are in some cases required to live in parts of Germany where racist violence is known to be high, even though in many

[44] *Omwenyeke v. Germany*, application no. 44294/04, 20 November 2007, Fifth Section.

cases they belong to the groups most likely to be targeted by perpetrators of racist violence. They are thus placed in a situation where they are particularly exposed to racism and xenophobia, without the option of moving to areas where they would be less exposed. Moreover, ECRI understands that while permission to travel is regularly granted to allow an individual to seek legal advice from a lawyer or an NGO, it may not necessarily be granted to visit family members, a result that is likely to compound the isolation and anguish asylum-seekers already experience simply by virtue of their status.

122. The authorities have indicated that asylum-seekers are provided with benefits to cover their basic needs. Benefits are usually given in kind, with some sums given in money to cover additional needs, and are overall around 20% lower than social benefits given to other categories of people. Although asylum-seekers receive a work permit one year after their arrival, this entitlement is only subordinate, meaning they can only be offered a job if there is no other suitable applicant with an ordinary work permit. Asylum-seekers are not entitled to an ordinary work permit until their application has been determined, or up to a maximum of three years after their arrival. They are housed in initial reception centres for a maximum of three months, then dispatched to live in collective centres across Germany. In some *Länder*, children have access to school from the outset; in others, access to school is not granted as long as the family is in the initial reception centre.

123. ECRI notes that some of these collective centres, where asylum-seekers may in some cases live for several years, are still located in isolated areas, where counselling on legal and social issues is less readily available. More generally, ECRI is concerned that accommodating asylum-seekers together in collective housing, even beyond the maximum three-month period in which they may be required to stay in initial reception centres, may be detrimental to their long-term chances of integration, as it not only delays their contact with German society and but may also serve to stigmatise them in the eyes of the majority population. ECRI is also worried that asylum-seeking children assigned to *Länder* where they are not obliged to attend school may in practice not have access to education, and strongly hopes that efforts currently under way to address this issue will come to fruition. ECRI has also received reports that asylum-seekers are required to pay fees when they apply for permission to travel outside of their assigned residence areas. Bearing in mind the low social benefits granted to asylum-seekers, especially in cash form, and their preclusion from access to work, ECRI is concerned that this may leave them with little opportunity to travel in practice, including to consult a lawyer or NGO with respect to their case.

124. As regards family reunification of refugees, ECRI notes that refugees are eligible once their status has become final and they have obtained a residence permit, and that they may, and in some cases must, be exempted from the usual requirement to show that they are not dependent on social welfare and can provide sufficient living space for their family. However, those eligible are generally limited, except in cases of exceptional hardship, to the refugee's spouse and minor children. Moreover, the application process may take many months to process, a situation that is especially difficult for minors seeking to join their parents.

125. ECRI recommends that the German authorities review the restrictions imposed on freedom of residence of beneficiaries of subsidiary protection and freedom of residence and movement of asylum-seekers, in order to ensure that these measures do not have a disproportionate human cost on asylum-seekers.

126. ECRI recommends that the German authorities consider the possibility of extending the access to work of asylum-seekers, to ensure that they have

adequate means to live, and reiterates its recommendation that full family reunification rights be guaranteed to all recognised refugees.

- *Persons with tolerated status*

127. Persons with tolerated status (*Duldung*) in Germany are in principle obliged to leave the country; their presence is tolerated because they cannot be deported (for example, because, even though they have not been recognised as refugees, the situation in their country of origin makes it impossible to deport them). These persons usually have only short-term permits to remain in Germany (for example, for three months, although this period may be renewed repeatedly), making it difficult for them to find work. They are not entitled to take up work at all until they have been in Germany for 1 year, and are also not entitled to benefit from integration measures.

128. In its third report, ECRI encouraged the German authorities in their plans to grant temporary residence permits to persons entitled to temporary protection, at the same time recommending that the authorities work towards a humane solution, respectful of human rights, for those persons who had been living in Germany with tolerated status for a long time and had developed close ties with Germany. ECRI welcomes the fact that, since then, provisions have been enacted that have made it possible for persons who have been living in Germany with tolerated status for some years – 6 years if they have children, 8 if they do not – to be granted a trial residence permit, provided they have accommodation and do not have a criminal record; they can then be granted a residence permit if they are able to demonstrate that they have found work before the end of 2009. This deadline is fixed, however, so persons with tolerated status having arrived in Germany more recently will not benefit from the present provisions. The authorities indicate that to date, around 50 000 people have gained legal status under the present provisions and a previous version.

129. ECRI encourages the German authorities to work towards a solution which is humane and respectful of human rights for all persons, including those who will not benefit from the present provisions, who have been living in Germany with tolerated status for a long time and have developed close ties with Germany.

- *Family reunification*

130. In its third report, ECRI recommended that the German authorities ensure that the right to private and family life and the rights of the child were fully respected for all persons residing in Germany, including non-citizens. It called for measures to facilitate reunification of children with their families and to facilitate visits from family members living abroad. It considered that the maximum age of children falling under the scope of family reunification, which was then 16 years, should not be lowered but should instead be raised to 18 years for all children.

131. The German authorities have stated that as Council Directive 2003/86/EC on the right to family reunification has been transposed into German law, the age limit for the immigration of children for the purposes of family reunification will not be reduced to below 16 years. In accordance with applicable legislation, the age limit of 18 years applies where the children are considered to have a "positive integration prognosis", in the case of children of those entitled to asylum and recognised Convention refugees, or when children transfer their main ordinary residence to the Federal Republic of Germany together with their parents.

132. Since ECRI's third report, new measures have been introduced concerning family reunification for spouses. As from 2007, persons arriving in Germany to join their spouse have been obliged to demonstrate proficiency in German to at least A1 level on the Common European Framework of Reference before leaving their

country of origin. In order to prove that they possess the required level of proficiency, spouses must supply a certificate of the Goethe Institute stating that they have passed the "Start Deutsch 1" test; in countries where this test is as yet unavailable, embassies or consulates general make the relevant determination during the visa application procedure. Examination dates, fees and application procedures depend on where the examination is taken. The authorities indicate that to acquire the necessary level of German, persons can attend language courses provided by the Goethe Institute or other organisations; free beginner and more advanced German courses are also available in almost 30 languages on the Deutsche Welle website. In addition, certain groups of persons are exempt from the language proficiency requirement, namely: EU citizens; persons with a physical or mental illness or disability that prevents them from demonstrating basic knowledge of the German language; persons holding a university degree or equivalent qualification; persons not wishing to reside permanently in Germany; persons whose spouse holds a residence permit as a highly skilled worker, researcher, company founder, person entitled to asylum or recognised refugee, or holds a permanent right of residence granted by another EU state; and citizens of Australia, Israel, Japan, Canada, the Republic of Korea, New Zealand or the United States of America.

133. The authorities have indicated that this measure serves to promote new immigrants' ability to integrate. The logic is that basic language proficiency makes it easier to find one's feet on arrival in Germany and forms the basis for further, state-funded integration courses in which new immigrants have had a right to take part since 2005.[45] ECRI observes, however, that language classes are not always readily available outside major cities; they are rarely provided free of charge when they are available; and for those living outside major cities, internet services are not accessible everywhere, for example, in rural areas in some countries from which candidates for family reunification may wish to apply. Yet the language could be learned upon arrival in Germany, and progress may occur considerably faster upon immersion in a German-speaking environment. Moreover, obliging spouses to remain apart until the spouse who has remained in the country of origin has attained A1 level in German does nothing to further the integration of a spouse already living in Germany – indeed, this separation may rather contribute to a negative, even alienating experience of Germany, without the emotional and psychological support that the presence of family members can provide. There is also no exceptional clause allowing hardship cases to be taken into account. Overall, then – and whereas from the point of view of the majority population, the new requirements may at first glance appear reassuring, as they should mean fewer immigrants arrive in Germany with no knowledge of German – in fact, they may do little to promote the integration of migrants and may even serve to hinder it. Moreover, they may also be discriminatory, as they may result in the *de facto* exclusion of candidates from some countries for family reunification.

134. ECRI reiterates its recommendation that the maximum age of children falling under the scope of family reunification be raised to 18 years for all children.

135. ECRI recommends that the German authorities keep under review the new language requirements for family reunification, in order to ensure that they do not have a discriminatory or counter-productive effect in practice and to allow corrective measures to be taken if necessary, including to allow hardship cases to be taken into account.

[45] On integration courses, see below, *Vulnerable/Target Groups – Situation of migrants, asylum-seekers (etc) – Integration and naturalisation*.

- *Integration and naturalisation*

136. Many immigrants arrived in Germany between 1955 and 1973 as "guestworkers" (*Gastarbeiter*); the intention at the time was that they would stay only for limited periods in Germany and then to return to their home countries, to be replaced by new foreign workers. In line with this thinking, taking measures to assist these workers to integrate into German society was not considered a priority. A second wave of immigration occurred from 1988 to the late 1990s, with the arrival of around 3 million ethnic German repatriates and refugees. The authorities have recently recognised that the earlier understanding that immigrants would only remain for short periods in Germany has proved wrong, and that Germany is a country of immigration; however, today the reality is striking. Nearly two-thirds of non-citizens presently living in Germany have been resident for more than ten years, and more than 20% have been resident for over thirty years. Official figures show that in total, around 9% of the population of Germany, or more than 7 million people, are non-citizens. Moreover, it is estimated that overall, nearly one in five persons living in Germany, whether citizens or non-citizens, have a migration background.

137. In keeping with this understanding of Germany as a country of immigration, the federal authorities have over the past decade begun to develop a strong new focus on integration. Following a first national integration summit in 2006, a National Integration Plan was presented in July 2007. All levels of government – federal, the *Länder* and local authorities – as well as representatives of civil society and migrants were involved in developing the National Integration Plan, which includes 400 voluntary measures that may be taken by the various authorities, encompassing a broad range of fields. They include, for example, measures to improve immigrant children's education outcomes (such as providing targeted funding either to schools with a high percentage of children having an immigrant background or for the training of teachers at those schools, or providing increased support to language learning in schools or kindergartens), measures to improve the access of young immigrants to the labour market, programmes to promote integration through sports, as well as measures to promote the participation of parents in their children's education or to improve access to health care, to promote a more diverse approach in the media or to address the specific situation of women and girls. The overall estimated expenditure by the federal authorities in the field of integration is 750 million EUR.

138. ECRI welcomes the recognition by the German authorities that Germany is today a country of immigration, and that immigrants should be encouraged to participate fully in society and helped to master the basic tool for such participation: the German language. The National Integration Plan represents a significant investment by the authorities in assisting the process of integration, and ECRI salutes the authorities' willingness to devote considerable resources to this process.

139. The cornerstone of the National Integration Plan is the provision of "integration courses" for adult migrants, primarily focused on language learning. These have been in existence since they were introduced by the Immigration Act in 2005 but were revised following an evaluation in 2006. Today, the standard language course is 600 hours. However, other options are offered to take account of individual needs: these range from an intensive course (400 hours) to a course specifically designed for women (900 hours) to a literacy course (1200 hours). Participants in the first three courses who have not achieved the target level of proficiency within the given time – that is, B1 level, or the first level corresponding to an "independent user" of the language in the Common European Framework of Reference for Languages – may follow a further 300 hours of classes. Proficiency is now assessed via standardised tests throughout Germany. In

addition, 45 hours of instruction on Germany's history, culture and legal system are provided in orientation classes. Support measures to increase participation have been introduced since the 2006 evaluation, such as the reimbursement of travel expenses, the provision of childcare facilities and the reimbursement of 50% of the costs of the course if successfully completed. In principle, and based on the logic that participants will be more committed to the process if they have paid for it, integration courses are not free of charge. Participants' fees are set at 1 EUR per hour. However, the courses are provided free of charge to ethnic German repatriates (*Spätaussiedler*) and recipients of welfare benefits; persons not receiving welfare benefits but with a similarly low income may also be exempted from the fees. The courses are primarily targeted at non-citizens, but German citizens may attend them if they so choose.

140. All newcomers to Germany who are considered as having a perspective of permanent residency are entitled to participate in integration courses, and (with some exceptions) they are obliged to do so if their level of German on arrival is less than A1 on the Common European Framework of Reference. Persons arriving in Germany through family reunification – who are now obliged to demonstrate proficiency in German to at least A1 level before leaving their country of origin – are also required to follow integration courses if their proficiency in German is less than B1 level and unless they fall into an exempted group of people (for example, EU citizens).[46] Other non-citizens for whom these courses are mandatory are certain recipients of welfare benefits, and foreigners "in need of integration", i.e. legal guardians of children who do not speak German themselves. There is no obligation to succeed (that is, to pass a test demonstrating that the individual has reached the target proficiency level of B1 in German), but there is an attendance obligation for persons for whom the courses are mandatory, which is understood as an obligation to attend regularly enough not to endanger the possibility of successful completion of the course. Sanctions may be imposed on persons considered to have committed a "gross breach of duty": that is, in cases where the individual concerned fails to attend the integration course in accordance with the applicable provisions. Thus, recipients of social welfare benefits under the Second Volume of the Social Code (SGB II) who participate in the courses on the basis of an integration agreement may see their benefits cut by up to 30 % and, if they repeatedly fail to attend, their benefits may be cut altogether. Newcomers for whom mandatory attendance was a factor in the attribution of a residence permit may not be granted an extension of that permit.

141. ECRI is concerned that the obligation imposed on some persons to attend integration courses may be counterproductive, as it may tend to give the impression that, in the absence of such an obligation, it would be impossible to integrate those persons subject to it in German society. Moreover, the fact that the obligation to demonstrate a basic knowledge of German (A1 level) prior to arriving in Germany is only imposed on immigrants from some countries and not on immigrants from others may create the false impression that the capacity to integrate in German society is a direct function of a person's country of origin.

142. ECRI is concerned at the possibility of imposing sanctions on persons subject to an obligation to attend integration courses if they fail to attend sufficiently regularly. It notes that such sanctions may have a stigmatising effect. At the same time, they may be damaging to individuals' rights, as they may lead to a refusal to extend a residence permit or to a reduction in welfare payments. ECRI notes that at the very least, exceptions should be possible in some circumstances.

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[46] See above, *Vulnerable/Target Groups – Situation of migrants, asylum-seekers (etc) – Family reunification*.

143. As concerns naturalisation, ECRI notes that benefits for successful participants in integration courses are directly linked to naturalisation, as applicants for naturalisation are now required by German law to demonstrate sufficient knowledge of the German language[47] and successful completion of an integration course serves as proof of having attained the requisite level in this context. Persons who succeed in the integration course are also eligible to apply for naturalisation after seven years of legal residence, rather than the usual eight. Immigrants demonstrating evidence of integration achieved, in particular a higher level of proficiency in German than the required B1 level, may be eligible for naturalisation after six years of legal residence.

144. As mentioned elsewhere in this report, the practical application of naturalisation criteria is controlled by the competent ministers of the interior of the *Länder*. In recent years, and independently of any language requirements, certain *Länder* have introduced controversial tests that some or all applicants were required to pass in order to obtain citizenship. In Baden-Württemberg, a 30-question test covering applicants' personal and political views, for example with respect to sexual orientation, was introduced in 2005, to be applied if anti-constitutional tendencies were suspected. However, the Ministry of the Interior in Stuttgart was reported as holding the view that "in general", it was to be doubted that Muslims who verbally committed to German constitutional principles were "really internally" committed to them. Citizens of the 57 member States of the Organisation of the Islamic Conference (OIC) and anyone else appearing to be Muslim were thus to be subjected to the test. Following considerable criticism of the test and of the discriminatory attitudes it revealed towards Muslims, a new test was distributed from June 2007 onwards, to be applied to all applicants for naturalisation. Another test introduced in Hesse contained 100 questions, many quite complex.

145. Following discussions within the Standing Conference of Ministers of the Interior of the *Länder*, it was decided to introduce a uniform naturalisation test, replacing the various tests then existing at the level of the *Länder*, to be applied throughout Germany as from 1 September 2008. The relevant legal provisions have been enacted at federal level but will be implemented by the *Länder*. Applicants for naturalisation will be required to pass the test in order to obtain citizenship. The stated aim of the test is nonetheless to open the door to citizenship, rather than to make it harder to obtain. The questions for this test have been made available on the internet in order to allow applicants to prepare for the test. There is no limit on the number of times applicants may sit the test.

146. ECRI welcomes the fact that earlier, *Land*-specific tests have been abolished, in particular the test introduced in Baden-Württemberg in 2005. It considers that the application of a single, national, transparent test is a clear improvement on the previous situation. ECRI notes the authorities' intention that the new tests should "open the door" to citizenship, rather than make it harder to obtain. At the same time, it notes that the introduction of nationwide naturalisation tests is an additional process applicable to those who wish to obtain German citizenship, in addition to existing residency, language and income requirements. While the process of learning for the test may indirectly serve to help integration, by teaching migrants some additional facts about Germany, the underlying message sent to German society is seen by some NGOs as one of exclusion rather inclusion. ECRI notes that it was reported in late November 2008 that since the tests were introduced, 98% of candidates have passed it.

147. ECRI stresses that integration is a two-way process that implies mutual recognition between the majority population and minority groups. Integration

[47] See above, *Existence and Implementation of Legal Provisions – Citizenship law.*

should allow minority groups to participate fully in society, but not be felt by them as a unilateral obligation to become indistinguishable from the mass. ECRI observes that the question of integration is at a particularly delicate stage in Germany at present: while the authorities have begun to move towards an important new understanding of the diversity of German society today and of measures that may be needed to ensure that all members of today's society are able to participate fully, it seems that this understanding – which itself is still evolving – has not yet filtered through to German society as a whole. The protests that frequently accompany proposals to build new mosques are a striking example of the gap between the majority society's view of present-day Germany and the reality of the latter's diversity. In this context, the experience of immigrants is that the onus to integrate is placed very much on them: while the investment of resources in the National Integration Plan is noteworthy, the sense at grassroots level is that it is only migrants who are being asked to make individual efforts to adapt to the environment they live in. At their worst, the debates surrounding integration, including discussions on "parallel societies", may have contributed to creating an impression amongst migrants that understanding and respecting the German constitutional order is not enough: some migrants are left with the impression that they will only be welcome in German society if they dress, look and think like the majority population.

148. ECRI strongly encourages the German authorities in their efforts to assist migrants to learn German. In this context, it recommends that everything be done to ensure that measures taken to achieve this result do not have a counter-productive effect on integration, by stigmatising those whose mother tongue is not German or endangering their individual rights.

149. ECRI strongly encourages the authorities to develop further other aspects of the National Integration Plan, aiming to support immigrants through measures in such fields as education, employment, health, sports and the media. It recommends that the authorities pay particular attention to developing programmes to help German citizens be more receptive to the diversity of contemporary German society.

150. ECRI recommends that the German authorities keep under review the new, national, naturalisation test, and in particular its impact on applications for naturalisation, both made and granted, in order to ensure that it does not have a counter-productive effect and to allow corrective measures to be taken if necessary.

VI. Antisemitism

151. In its third report, ECRI recommended that the German authorities continue and intensify their efforts to address all manifestations of antisemitism in Germany. As described above,[48] the German authorities have adopted a broad range of measures aimed at fighting right-wing extremist crimes, including antisemitic crimes.

152. Nonetheless, from 2005 to 2007, the number of right-wing politically motivated offences with an extremist and antisemitic background registered by the Federal Criminal Police Office (BKA) hovered at around 1600 each year, i.e. an average of more than 30 such crimes each week. While the numbers declined slightly each year during this period, preliminary figures for the first three quarters of

[48] See above, *Racist violence*.

2008 showed an increase of 10% on the same period in 2007.[49] The most frequently reported offences involved the desecration of Jewish cemeteries or other monuments. In some cases gravestones were knocked over; in others, graffiti was sprayed, including the use of swastikas and other Nazi symbols. As regards violent antisemitic crimes, 49 such crimes were registered in 2005, 43 in 2006 and 59 in 2007. Alongside these crimes involving violence against persons or property, antisemitic and neo-Nazi hate speech also continue to be of deep concern.[50]

153. The German authorities regularly condemn such crimes. They also pursue perpetrators and bring them to justice where possible. Numerous charges with respect to Holocaust denial or the use of Nazi symbols have thus been brought since ECRI's third report.[51] At same time, a wide range of measures are taken to atone for the past and ensure remembrance of the victims of the Holocaust. These include the ethnic German repatriation programme, thanks in part to which there are now estimated to be around 110 000 Jews or people of Jewish origin living in Germany; memorial ceremonies organised to mark anniversaries of significant events during or leading up to the Holocaust; and the reopening of synagogues. In the week prior to the seventieth anniversary of the Night of Broken Glass riots of 9 November 1938, the lower house of the federal parliament also adopted a resolution renewing its commitment to counter every form of anti-Jewish hatred and antisemitism and urging the government to continue supporting and protecting Jewish life in Germany, expand teaching in schools on Jewish life in Israel, and set up a group of experts to issue a regular report on antisemitism in Germany.

154. ECRI salutes the authorities' commitment to denouncing and combating all forms of antisemitism and to supporting Jewish culture in Germany. It stresses nevertheless the need to make constant efforts to ensure that these words are translated into concrete actions. With antisemitic crimes apparently on the rise at present in Germany, even more intensive efforts may be needed to reverse such a trend.

155. ECRI recommends that the German authorities continue and intensify their efforts to combat all manifestations of antisemitism in Germany. It stresses the role to be played by the various opinion leaders in society, be they politicians, religious groups, the media or civil society, in consistently speaking out against any manifestations of antisemitism.

VII. Conduct of Law Enforcement Officials

156. In its third report, ECRI made a number of recommendations relating to the conduct of law enforcement officials, calling for the establishment of an independent body entrusted with the investigation of allegations of ill-treatment by police officers, recommending that training in intercultural competence and to raise the awareness of law enforcement officials of the issues of racism and direct and indirect racial discrimination be provided to police throughout the territory of Germany, and calling for measures to ensure adequate representation of members of minority groups in the police.

157. Since ECRI's third report, several persons belonging to visible minorities have died either at the hands of police officers or while in police custody. ECRI notes

[49] By definition, the preliminary figures are subject to change. The German authorities have pointed out that differences in reporting patterns between the *Länder* make it difficult to predict how far the final figure will vary from the preliminary reports.

[50] See above, *Racism in public discourse*.

[51] See above, *Racism in public discourse*.

that such events could reveal particularly serious breaches of fundamental rights and stresses that an effective investigation into such deaths, including into any allegations that a racist motivation may have played a part in events, is a key part of the rights protected under Articles 2 and 14 of the European Convention on Human Rights.[52] It also underlines that the authorities' capacity to respond rapidly and effectively to suspected cases of ill treatment by law enforcement officers is crucial in maintaining the confidence of society as a whole in the law enforcement system.

158. Elsewhere in this report, ECRI has drawn attention to the treatment of Black victims of racist violence as "second-class" victims when they turn to the police for help.[53] It notes, moreover, that NGOs consistently report higher numbers of incidents of racist violence than police, a fact that suggests that some victims may lack confidence in the police to deal effectively with their case.

159. ECRI is also concerned at the publication in 2005, in a journal distributed to over 20 000 police officers, of a letter to the editor that was subsequently found by the UN Committee for the Elimination of Racial Discrimination to have included comments of a "discriminatory, insulting and defamatory nature" towards Roma, which were "of particular weight…if made by a police officer whose duty is to serve and protect individuals."[54] The failure of the relevant police association since to distance itself from this letter is disturbing. ECRI is concerned that this situation may reveal deeper or more widespread prejudices within the police force towards certain groups, prejudices which should be combated as a matter of urgency. ECRI welcomes in this context the recognition by the higher echelons of the police of the importance of awareness-raising and other measures to increase the intercultural competence of police officers at all levels.

160. ECRI stresses the importance of setting up an independent investigatory mechanism which can carry out enquiries into allegations of police misconduct and, where necessary, ensure that the alleged perpetrators are brought to justice, and reiterates its call for the establishment of such a body in Germany.

161. ECRI also reiterates its recommendation that the German authorities ensure that training in intercultural competence and training to raise the awareness of law enforcement officials of the issues of racism and direct and indirect racial discrimination is provided to police throughout the territory of Germany. It further recommends that the German authorities take steps to introduce a network of trained officers responsible for serving as a point of contact between the public, and especially members of minority groups, and the police, and for helping to increase the two groups' understanding of each other.

VIII. Monitoring Racism and Racial Discrimination

162. In its third report, ECRI emphasised that, if done in accordance with European laws, regulations and recommendations on data protection and the protection of privacy, and the principle of freedom of declaration, the collection of data disaggregated by ethnic origin could help the authorities to better assess the situation of the various minority groups living in Germany in different fields of life, such as employment, housing and education.

163. The German authorities have indicated that data are collected in Germany by reference to people's religion, citizenship, gender and age, but not on the basis of

[52] See in particular *Nachova and Others v. Bulgaria*, Applications nos. 43577/98 and 43579/98, Judgment of 6 July 2005 (GC), and subsequent case-law.

[53] See above, *Vulnerable/Target Groups – Black Community*.

[54] CERD/C/72/D/38/2006

ethnic origin. Some minority groups do not wish the last criterion to serve as a basis for data collection; others, however, believe it is important. The authorities have indicated that there are other means to estimate the number of members of specific groups, that may be preferable. In the light of repeated recommendations by international bodies, they have, however, commissioned a study to examine whether it is desirable, permissible by law and necessary to collect such data.

164. ECRI reiterates its recommendation that the German authorities improve their monitoring systems by collecting relevant information broken down according to categories such as religion, language, nationality and national or ethnic origin. It emphasises that this should in all cases be done with due respect to the principles of confidentiality, informed consent and the voluntary self-identification of persons as belonging to a particular group. These systems should also take into consideration the possible existence of double or multiple discrimination.

INTERIM FOLLOW-UP RECOMMENDATIONS

The three specific recommendations for which ECRI requests priority implementation from the German authorities are the following:

- ECRI strongly recommends that the German authorities take a more proactive role in raising awareness of the legal framework now in force against racial discrimination, notably among groups who are especially vulnerable to this phenomenon. To this end, ECRI recommends that the authorities run an awareness-raising campaign specifically targeted at ensuring that potential victims of racial discrimination are aware of the existence and scope of the General Equal Treatment Act (AGG) and of the mechanisms for invoking their rights before the courts.

- Bearing in mind that no immediate move away from the present streaming system for secondary schooling in Germany has been envisaged, ECRI recommends that the German authorities take urgent steps to implement targeted training programmes to ensure that all teachers have the capacity to assess objectively the skills of students due to enter the secondary school system, in order to ensure that students are not sent to schools in the lower academic streams unless this is strictly necessary.

- ECRI strongly recommends that, as part of their ongoing efforts towards creating a workplace free of racism, the German authorities launch an awareness-raising campaign aimed specifically at changing employers' attitudes towards persons with an immigrant background. This campaign should focus not only on employers' obligations and liabilities under the new General Equal Treatment Act (AGG) but also on the positive aspects of diversity in the workplace. It could form part of a regular series of such campaigns.

A process of interim follow-up for these three recommendations will be conducted by ECRI no later than two years following the publication of this report.

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Greece

Law 927/1979 (mod. 1419/1984 et 2910/2001) "on punishing acts or activities aiming at racial discrimination" criminalizes:

Section 1.1

a) to wilfully and publicly, either orally or by the press or by written texts or through pictures or any other means, incite to acts or activities which may result in discrimination, hatred or violence against individuals or groups of individuals on the sole grounds of the latter's racial or national origin or [by virtue of article 24 of Law 1419/1984] religion;

(…)

b) to express publicly, either orally or by the press or by written texts or through pictures or any other means offensive ideas against any individual or group of individuals on the grounds of the latter's racial or national origin or religion.

Section 1.2 Constitution or
membership of an organisation whose aim is to organise propaganda or activities of any nature involving racial discrimination.

Section 2 Covers the expression in speech, via the press, in writings, by pictures or by any other means of any ideas offensive to an individual or a group of individuals by virtue of their racial or ethnic origin or their religious affiliations.

Regulation n° 1 of the National Radio and Television Council (CNR) on journalistic ethics for radio and television (Code of Journalistic Ethics for Radio and Television) of 20 June
1991 (Official Gazette 421/B/21.6.91), Article 5 states:
"It is not permissible to depict persons in a way liable, in practice, to encourage the degradation, social isolation or unfavourable discrimination against a section of the public for reasons relating, in particular, to sex, race, nationality, language, religion, ideology, age, sickness or infirmity, genetic orientation or occupation".

Case Law

Greece

A number of persons have been successfully prosecuted in the last couple of years for antisemitic or anti-Roma publications under, inter alia, Law 927/1979 which prohibits incitement to racial hatred. On 19 September 2008, the Court of Appeals of Athens sentenced the publisher of the newspaper "*Eleftheros Kosmos*" and one of its former columnists to a five-month suspended sentence under this law for an article in the newspaper's 12 March 2006 issue which contained antisemitic statements. The same persons were also convicted, with a third defendant for an article published in the same paper on 18 June 2006 with language inciting hatred against Roma. On 13 December 2007, a person well known for his extreme right-wing opinions was also sentenced, by the Athens Court of Appeal under Law 927/1979, for a patently antisemitic book to a 14 month suspended sentence and 3 years probation. The defendant was acquitted on 27 March 2009. At the time of writing, reports indicated that civil society actors would seek all possible remedies against the acquittal.
[ECRI, Fourth report on Greece, adopted on 2 April 2009, CRI(2009)31, § 16]

Un certain nombre de personnes ont été condamnées ces dernières années pour la publication d'articles antisémites ou hostiles aux Roms, en application notamment de la loi 927/1979 qui interdit l'incitation à la haine raciale (et aussi, notamment, la violence à motivation raciste). Le 19 septembre 2008, la Cour d'appel d'Athènes a condamné l'éditeur du journal « *Eleftheros Kosmos* » et l'un de ses anciens éditorialistes à une peine de cinq mois de prison avec sursis pour des propos antisémites contenus dans un article paru le 12 mars 2006. Les mêmes personnes ont également été condamnées, ainsi qu'une tierce partie pour un article paru le 18 juin 2006 dont le libellé incitait à la haine envers les Roms. Le 13 décembre 2007, M. K. Plevris a également été condamné par la Cour d'appel d'Athènes à une peine principale de 14 mois assortie d'un sursis probatoire de 3 ans en application de la loi 927/1979 pour avoir publié un livre manifestement antisémite. Le défendeur a été acquitté le 27 mars 2009. Lors de la rédaction du présent rapport, des informations indiquaient que des acteurs de la société civile intenteraient tout recours possible contre cet acquittement.
[ECRI, Quatrième rapport sur la Grèce adopté le 2 avril 2009, CRI(2009)31, § 16]

Greece / Plevris' trial

Inventory No.	CASE 163 1
Deciding body	Athens Court of Appeal
Date	Decision date: 13.12.07
Deciding Body	National court / tribunal
Grounds of discrimination	Discrimination on ground of racial or ethnic origin
Form of Discrimination	Instruction to discriminate / incitement to discrimination
Keywords	Greece, Racial hatred, legal finding, court decision, Anti-Semitism, Promotion of racial discrimination and hatred
Abstract	Key facts of the case: Lawyer C. P. was handed a 14-month suspended sentence for inciting racial hatred through his book 'Jews: The Whole Truth,' which denies that Holocaust took place. Main reasoning/argumentation: The court found that the accused 'incited deeds and actions that could provoke discrimination, hatred and violence against persons and groups of persons, solely because of their racial and ethnic origins, and expressed offensive ideas against a group of persons because of their racial and ethnic origin. 'Key issues (concepts, interpretations) clarified by the case: The court found that the accused 'incited deeds and actions that could provoke discrimination, hatred and violence against persons and groups of persons, solely because of their racial and ethnic origins, and expressed offensive ideas against a group of persons because of their racial and ethnic origin. 'Results (sanctions) and key consequences or implications of the case: The Athens Court of Appeal condemned the accused to a 14-month suspended sentence.

[FRA Database]

Article :	CCPR-OP-2 / CCPR-20-2 / CCPR-26
Subject :	prohibition of advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence / equal protection of the law / equal before the law
Keywords :	incitement to discrimination / discrimination / race / equal before the law
Communication :	1570/2007
Parties :	Maria Vassilari et al. v. Greece
Reference :	views of 19 March 2009

Facts :

1.1 The authors of the communication are Ms. Maria Vassilari, born in 1961, Ms. Eleftheria Georgopoulou, born in 1964, Mr. Panayote Dimitras, born in 1953, and Ms. Nafiska Papanikolatos, born in 1955, all Greek citizens. They claim to be victims of violations of article 20, paragraph 2, taken together with article 2, paragraphs 1 and 3(a); article 26; article 14, paragraph 1; and article 18, paragraph 1, read alone and in conjunction with article 2, paragraphs 1 and 3(a), by Greece. The authors are represented by counsel, Mr. Panayote Dimitras from the Greek Helsinki Monitor.

1.2 On 24 September 2007, the Committee, acting through its Special Rapporteur on New Communications and Interim Measures, decided to examine the admissibility of the communication together with the merits.

AUTHOR'S SUBMISSIONS:

2.1 On 17 November 2001, a letter to the Rector and the Rector's Council of the University of Patras entitled, "Objection against the Gypsies: Residents gathered signature for their removal", was published in the newspaper "Peloponnisos". The letter was sent by the representatives of local associations of four districts of Patras, and contained 1200 signatures of non-Roma residents who lived in the vicinity of a Roma settlement situated in the area of Riganokampos. The settlement was built on land owned by the Rector and the Rector's Council of the University of Patras. The signatories of the letter collectively accused the Roma of specific crimes, including physical assault, battery, and an arson attack on a car, and demanded that they be "evicted" from the settlement and failing eviction threatened with "militant action".

2.2 On 29 March 2002, the first and second authors, who reside in the settlement, filed a criminal complaint against the local associations under the Anti-Racism Law, and joined the criminal proceedings to be initiated by the Public Prosecutor as civil claimants. They claimed violation of article 2 of the Anti-Racism Law 927/1979, because of the public expression of offensive ideas against the residents of the settlement on account of their racial origin. They also claimed a violation of article 1 of the same law, by the incitement, by means of public written expression, of discrimination, hatred or violence against the residents of the settlement on account of their racial origin.

2.3 A preliminary judicial investigation was opened, and those who had written the letter were charged. On 17 March 2003, the signatories of the letter and the owner and editor of the newspaper were indicted for the public expression of offensive ideas, in violation of article 2 of the Anti-Racism Law but the charge under article 1 of that law was dropped. On 25 June 2003, the trial took place at the Misdemeanors Court of Patras (the Patras Court). The criminal offences of which the Roma community had been accused of by the signatories of the letter were found to be unsubstantiated by the competent police authority. According to the authors, this fact was ignored by the Patras Court.

2.4 During the proceedings, the presiding judge allegedly made comments which compromised her impartiality and indicated a prejudicial attitude against the Roma. In reply to a comment made by defence counsel that Roma commit many crimes, the authors allege that she stated "it is true" and that there were, "many cases pending against Roma in the court of Patras". When the first author indicated that the letter had offended her, the judge responded "you have to admit, you Roma do steal though".

2.5 During the trial, the third and fourth authors were examined as witnesses. In the context of taking the oath, they had to declare that they were not Orthodox Christians but atheists, and that they could not take the Christian oath under article 218 of the Code of Criminal Procedure (CCP), which reads "I swear to God that I will tell in full conscience the whole truth and only the truth, without adding or hiding anything". Instead, they made use of article 220 (2) of the CCP, which provides that "(..) if the investigating judge or the court are convinced after a related statement that the witness does not believe in any religion, the oath taken would be the following: I

declare on my honour and conscience that I will tell the whole truth and only the truth, without adding or hiding anything". According to the authors, to make this affirmation under article 220 (2) of the CCP, the witness must declare his/her religion or non-belief in any religion. However in the present case, it was mistakenly recorded in the minutes of the trial that the witnesses had taken the Christian oath rather than the civil oath.

2.6 On 25 June 2003, the defendants were acquitted and the court concluded that there was no violation of article 2 of the Anti-Racism Law, on the basis that "doubts remained regarding the ... *intention* [emphasis added] to offend the complainants by using expressions referred to in the indictment." The Court found that the impugned letter merely intended to draw the authorities' attention to the plight of the Roma in general. The Court did not examine whether such remarks were indeed offensive and did not provide any reasoning as to why the defendants could not be said to have intended to offend the complainants.

2.7 To support their complaint, the authors provide copies of reports from various NGOs and INGOs, which they claim attest to the forced eviction of Roma by the State party.

THE COMPLAINT:
3.1 The first and second authors claim to be the victims of a violation of article 20, paragraph 2, read in conjunction with article 2, paragraphs 1 and 3 (a), of the Covenant, because the Patras Court failed to appreciate the racist nature of the impugned letter and to effectively implement the Anti-Racism Law 927/1979 aimed at prohibiting dissemination of racist speech. The present case allegedly discloses a violation of the State party's obligation to ensure prohibition of the advocacy of racial hatred that constitutes incitement to discrimination, hatred or violence. In the authors' view, the requirement of the law in question to prove intent is an impossible burden on the civil claimants, as the burden of proof in such criminal cases to prove such intent, "beyond reasonable doubt", is almost impossible to prove. This point they argue is reflected in the fact that there has been no convictions to date under this Act. In this regard, the authors state that it is for this reason that national courts of other States, as well as other international human rights bodies, hold that racist remarks can be made even by negligence, in other words, where there is an absence of intent.

3.2 The four authors claim a violation of article 26, read alone and in conjunction with article 2, paragraphs 1 and 3, because the writers of the letter accused an entire group on the basis of their racial origin for the alleged actions of a few individuals of the same racial group. The claim that the law itself is inadequate, as argued above, is also said to violate article 26, as the failure to punish perpetrators deprives potential victims from protection from such attacks. In addition, the failure of the State party's authorities, in particular the Patras court, to prosecute the signatories of the letter in question, thereby implementing the Anti-Racism Law, is said to constitute a violation of article 26.

(...)

STATE PARTY'S OBSERVATIONS:
(...)

4.3 On 4 December 2007, the State party provided its comments on the merits of the case. It submits that the authors exaggerate and provide inaccurate statements, including the inaccurate translation of words from the letter under consideration, and produce evidence that has nothing to do with their case. For the State party the claims are manifestly ill-founded. The words "eviction" and "militant action" do not appear in the original letter. According to the State party, the correct translation of the former would be "removal" and of the latter "dynamic mobilizations" which implies protests or demonstrations.

4.4 As to the letter itself half of it, as described by the third author in his Court testimony, refers to the poor living conditions of the Roma in the settlement and focuses on the lack of proper hygiene and prevalence of diseases. The authors of the letter then refer to incidents they claim had occurred, including the theft of fruit, swearing, beating etc and conclude that the Rector should "remove" the Roma from the settlement (not to evict them), otherwise any delay would lead to "dynamic action". In its evaluation, the court did not consider that the letter "was not insulting" to the authors, but merely found that the legal condition, namely the offence of a "public, via the press, expression of offensive ideas against a group of people, by virtue of their origin", is intentionally committed, was not met beyond reasonable doubt. It so concluded, after hearing all witnesses and evaluating all of the available evidence. While one may agree or disagree with the Court's evaluation of the evidence, there is no reason to regard its finding as arbitrary. In this regard, the State party refers to the Committee's jurisprudence that it is not for the Committee to evaluate the facts and evidence and interpretation of law in a case, unless it can be shown that the decision was manifestly arbitrary or amounted to a denial of

justice.

(...)

4.6 The State party affirms that the claim under article 26 is manifestly ill-founded. The authors have not substantiated their claim and have not demonstrated that persons in a similar situation have been treated differently. As to the claim of a violation of article 2, the State party invokes to the Committee's jurisprudence that this right does not constitute a substantive right guaranteed under the Covenant.

(...)

4.8 As to the NGO and INGO reports produced by the authors, the State party submits that these reports do not directly refer to the current case and, in its view, are only provided as a substitute to the lack of evidence provided by the authors.

AUTHOR'S SUBMISSIONS:
(...)

5.3 On the merits, the authors defend their definition of the two terms questioned by the State party, namely "eviction" and "militant". The former, they claim, is not so different from the term "evacuation", which is the translation in the Oxford Greek-English dictionary. The latter refers to the militant action threatened by the signatories of the letter, which could include the use of force. The authors take issue with the State party's assessment of the importance of the NGO and INGO reports provided by them, and with its contention that these reports were only submitted to effectively slander Greece. The authors dispute that the purpose of the impugned letter was to draw the attention of the authorities to the poor living conditions of the Roma, but rather to force the authorities to take action and relocate the Roma, to another place. According to the authors, extensive reference was made to the alleged increase in the crimes committed by Roma, without producing any evidence but by merely holding them collectively responsible for certain offences, that some of them undoubtedly committed, as well as serious offences. They should not have collectively accused the Roma of committing crimes without, at the very least, producing evidence of a relatively higher crime rate among Roma as compared with non-Roma, to make their claims look bona fide rather than racist. In the authors' view, the signatories of the letter used this issue of criminality in an attempt to have the Roma evicted. The Court should have paid more attention to the nuanced anti-Roma speech and should have refrain from making, let alone silently endorsing, anti-Roma statements.

5.4 The authors argue that although "intention" is required in violation of article 1 of the Anti-Racism Law 927/79, it is not for violations of article 2 and that an incorrect notion of intent was applied by the court. As the authors had already made this argument in their initial submission which, they submit, remains answered by the State, they claim that the State party implicitly admits that the arguments are correct.

5.5 As to the possibility of filing a complaint concerning the impartiality of the judge, the authors acknowledge that an application for the disqualification of a judge may be made under article 17.2 of the Code of Criminal Procedure. However, such an application must be made early on in the proceedings and as the grounds for such disqualification only arose during the proceedings, such a request would have been rejected as inadmissible. The authors wrote to the Minister who could have asked the Appeals Prosecutor to file an appeal leading to a second trial where an impartial panel of judges would have evaluated the case anew. This was the only quasi-judicial means open to them to seek redress for the violation of their rights. On article 26, the authors submit that they have provided sufficient evidence to demonstrate prejudice specifically in this case and submit that the burden of proof is now reversed and rests on the State party. They maintain that it is mandatory in criminal proceedings to declare that one does not adhere to the Christian faith to be allowed to take the civil oath, despite the State party's argument that one has a free choice of oath. The assumption that one will take the Christian oath unless otherwise expressly stated is reflected in the continued use of pre-printed forms, with the oath set out therein.

Decision on admissibility :

6.1 Before considering any claim contained in a communication, the Human Rights Committee must, in accordance with rule 93 of its Rules of Procedure, decide whether or not it is admissible under the Optional Protocol.

6.2. The Committee has ascertained, as required under article 5, paragraph 2 (a), of the Optional Protocol, that

the same matter is not being examined under another procedure of international investigation or settlement.

(...)

6.5 Without determining whether article 20 may be invoked under the Optional Protocol, the Committee considers that the authors have insufficiently substantiated the facts for the purposes of admissibility. Thus, this part of the communication is inadmissible under article 2 of the Optional Protocol.

6.6 As to the claim of a violation of article 26 in conjunction with article 2, the Committee considers that the authors have provided sufficient substantiation to consider these claims on the merits.

Views :

7.1 The Committee notes that the authors claim violations of article 26 in conjunction with article 2 of the Covenant, insofar as the Anti-Racism Law 927/79 is said to be inadequate for the purpose of protecting individuals against discrimination and because in this case the courts application of the law failed to protect the first and second authors from discrimination based on racial origin. The Committee notes that article 26 requires that all persons are entitled, without discrimination, to equality before the law and to receive equal protection of the law.

7.2 The Committee notes that the Anti-Racism Law provides for sanctions in the event of a violation. It observes that the signatories of the impugned letter were tried under article 2 of this Law but were subsequently acquitted. An acquittal in itself does not amount to a violation of article 26 and in this regard the Committee recalls that there is no right under the Covenant to see another person prosecuted. [Footnote 2: Communication No. 578/94, *De Groot v. the Netherlands*, Decision adopted on 14 July 1995, Communication No. 396/90, *M. S v. the Netherlands*, Decision adopted on 22 July 1992.] The authors challenge the failure of the Court to convict the defendants on the basis of the Court's interpretation of the domestic law, in particular, whether the requirement of "intent" is a necessary prerequisite for the finding of a violation of article 2 of the Anti-Racism Law. Both the authors and State party provide conflicting views in this regard. They also present conflicting opinions on the English translation of certain parts of the impugned letter. The Committee is not in a position to reconcile these disputed issues of fact and law. Upon a thorough review of the information before it, and bearing in mind the conflicting views of the authors and State party, the Committee finds that the authors have failed to demonstrate that either the terms of the Anti-Racism Law 927/79 or the application of the law by the courts discriminated against them within the terms of article 26.

8. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights, is of the view that the facts before it do not disclose a violation of any of the articles of the International Covenant on Civil and Political Rights.

Remedy proposed :

Individual Opinion :

Individual opinion of Committee member Mr. Abdelfattah Amor (dissenting)

"Without determining whether article 20 may be invoked under the Optional Protocol, the Committee considers that the authors have insufficiently substantiated the facts for the purposes of admissibility. Thus, this part of the communication is inadmissible under article 2 of the Optional Protocol." This is the conclusion reached by the Committee in paragraph 6.5 of its Views in the Vassilari case.

I cannot agree with this conclusion, which prompts me to make the following remarks:

(1) The Committee has not ventured an opinion on the applicability of article 20, paragraph 2, to individual cases. While it may, of course, decide to do so in the future, the reasons for evading the question are puzzling. There is no logical or objective reason to do this. In stating that "any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law", article 20, paragraph 2, provides protection for individuals and groups against this type of discrimination. Article 20 is not an invitation to add another law to the legal arsenal merely for form's sake. Even if this was the purpose, which

is not the case in Greece, such a law would be ineffective without procedures for complaints and penalties. In fact, the invocation of article 20, paragraph 2, by individuals who feel they have been wronged follows the logic of protection that underlies the entire Covenant and consequently affords protection to individuals and groups. It would be neither logical nor legally sound to consider excluding its applicability under the Optional Protocol. By declining to give an opinion on this aspect of the communication, the Committee allows uncertainty to persist on the scope of article 20, paragraph 2, particularly as, given the points raised, discussion was needed at the very least with regard to the question of admissibility. In my opinion, this approach is, frankly, questionable, especially given that:

(2) The State party did not object to the admissibility of the communication either on the grounds of the applicability of article 20, paragraph 2, or any other grounds. The Committee's settled jurisprudence holds that, when the State party raises no objection to admissibility, the Committee declares the communication admissible unless the allegations are manifestly groundless or not serious or do not meet the other requirements set out in the Protocol.

(3) The Greek courts concerned ruled directly on the merits, without raising questions of admissibility or the individual nature of the complaint of racism.

(4) To say that, in the case in point, the authors have insufficiently substantiated the facts for the purposes of admissibility relies on an assessment that cannot be confirmed or justified by the contents of the file. While the facts may be discussed on the merits, they are sufficiently serious not to present an obstacle to admissibility under article 2 of the Optional Protocol. The case in point concerns a letter signed by 1,200 non-Roma individuals, entitled "Objection against the Gypsies: Residents gathered signatures for their removal". The letter accuses the Roma, as a group, of physical assault, battery and arson. The signatories demand that the Roma be "evicted" - "removed" according to the State party - from their settlement and threatened to take "militant action". Individual Roma, as individual victims, initiated judicial proceedings for the public expression of offensive ideas expressing discrimination, hatred and violence on account of their racial origin, under the Greek Anti-Racism Law. The court hearing the case found no violation of that law, as "doubts remained regarding the ... intention to offend the complainants by using expressions referred to in the indictment". The authors took their case to the Committee, claiming to be the victims of a violation by the State party of article 20, paragraph 2, read in conjunction with article 2, paragraph 1, of the Covenant, because the court "failed to appreciate the racist nature of the impugned letter and to effectively implement the Anti-Racism Law 927/1979 aimed at prohibiting dissemination of racist speech". This allegedly "discloses a violation of the State party's obligation to ensure prohibition of the advocacy of racial hatred that constitutes incitement to discrimination, hatred or violence". Was it advocacy of racial hatred or just words? Was a racist offence committed or not? Was there the intention to offend, and who must prove this? These are questions that should be discussed, analysed and assessed on the merits. To say, subsequently, that *the facts have been insufficiently substantiated for the purposes of admissibility is indefensible both legally and factually*. Sometimes there are reasons which the legal mind knows nothing of!

(*Signed*): Mr. Abdelfattah Amor

Individual opinion of Committee members Mr. Ahmad Amin Fathalla and Mr. Bouzid Lazhari

We associate ourselves with the opinion of Mr. Abdelfattah Amor's in this case.

(*Signed*): Mr. Ahmad Amin Fathalla

(*Signed*): Mr. Bouzid Lazhari

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PERMANENT MISSION OF GREECE
TO THE UNITED NATIONS' OFFICE
IN GENEVA

URGENT

Ref. No AS 1861

NOTE VERBALE

The Permanent Mission of Greece to the United Nations Office and other International Organizations in Geneva presents its compliments to the Office of the High Commissioner for Human Rights and, with reference to the latter's Verbal Note GVA 0471, dated April 4th, 2007, has the honour to provide attached herewith ***the information of the Greek Government*** regarding the implementation of the United Nations' General Assembly resolution 61/164 (A/RES/61/164), dated December 19, 2006, entitled «Combating Defamation of Religions »,

The Permanent Mission of Greece to the United Nations Office and other International Organizations in Geneva avails itself of the opportunity to renew to the Office of High Commissioner for Human Rights the assurances of its highest consideration.

REPUBLIQUE HELLENIQUE MISSION PERMANENTE DE LA GRECE - GENEVE -

Geneva, August 21st, 2007

To: the Anti Discrimination Unit of the
Office of the High Commissioner for Human Rights
Attn Ms Marie-Dominique Perret
Palais Wilson
Rue des Paquis 52
CH-1211 Geneva 10

OHCHR REGISTRY
23 AOUT 2007
Recipients : ADU

4, rue du Léman, C.P. 56, 1211 Genève 21
Tel : +41 22 9098940, Facs: +41 22 7322150, Email : mission.greece@ties.itu.int

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Information of the Greek Government regarding the Implementation of the General Assembly Resolution 61/164, dated December 19th 2006, on Combating defamation of religions"

1. In Greece, **freedom of religious conscience** and worship of any known religion, which does not offend the public order or principles is **protected by the Constitution** (article 13). A "*known religion*" is defined as one which, on the one hand, has open beliefs that are taught in public, and on the other hand, whose worship is also open. Moreover, it is immaterial if such a religion is a sect, in relation to the religion prevailing in Greece, as well as if believers of this religion do not have cleric authorities, or if its religious officials have not been ordained in the sense of the term used by the Orthodox Church (plenary session of the State Council 2105/75, 2106/75 Plen., 2484/80, 4260/85).

2. The International Treaty of Rome of 4th November 1950 "*On the protection of human rights and fundamental freedoms*" was initially ratified by law 2329/1953 and again by decree 53/1974 and has, therefore, in compliance with article 28 paragraph 1 of the Constitution, an enhanced procedural force. Article 9 of this treaty establishes the individual right to religious freedom.

3. The **Criminal Code** includes some provisions which aim to **safeguard religious peace of citizens**. Moreover, in compliance with case-law, any offence against religious peace is considered an offence against the public interest (see First Instance Judgment No. 1/2000). In principle, article

198 prohibits public and intentional profanity against God and public blasphemy or absence of respect of religion, whereas article 199 of the Criminal Code prohibits public and intentional profanity against the Eastern Orthodox Church of Christ and of any other religion acceptable in Greece. In addition, article 200 of the Criminal Code prohibits the obstruction and disruption of religious meetings or ceremonies which are accepted by the law of the state, as well as insulting or indecent actions in places that are used for such religious meetings.

4. The specific law 927/1979 "*On punishment of actions or activities aimed at racial discrimination*", as amended by article 24 of law 1419/1984, expressly prohibits the encouragement of actions or activities that may lead to discrimination, hatred or violence against people or groups of people because of their racial or national origin or their religion. Such encouragement is illegal and is prosecuted, whether it is verbal or written and includes illustrations or any other means whatsoever. In addition, any ideological offence against persons or groups of persons due to racial or national origin or religion expressed through the press, written texts or illustrations or any other means whatsoever is prohibited and punished.

Violation of such provisions entails imprisonment and/or fines. In the same way establishment of and participation in organizations aiming at organized propaganda or actions of any kind leading to racial or religious discrimination is also prohibited. Moreover, by virtue of article 39 of law 2910/2001, all above-mentioned actions and activities are prosecuted ex officio.

In addition, article 3 of law 927/1979, which formerly established the offence of denial to supply goods or provide services due to racial or national

origin or due to religion was abrogated by article 16 paragraph 2 of law 3304/2005. Now paragraph 1 of article 16 of the latter law provides that: "*Anyone violating the prohibition of discrimination due to reasons of national or racial origin or religion or other beliefs, disability, age or sexual orientation, in the field of commercial distribution of goods or provision of services to the public shall be punished with imprisonment of six (6) months and a fine of one thousand (1000) to five thousand (5000) euros*". The **new criminal regime** provides **a more effective protection** in comparison to the former one in article 3 law 927/1979 in cases of violation of the principle of equal treatment regarding distribution of goods and provision of services, because it is of a wider content, since it also includes cases of "*other beliefs, disability, age or sexual orientation*" and the penalties foreseen are stricter.

5. Law 3304/2005 establishes the general regulatory context for the **combat and elimination of discrimination due to racial or national origin as well as religious or other beliefs**, disability, age or sexual orientation in the field of employment and labour, according to Council Directives 2000/43/EC of 29th June 2000 and 2000/78/EC of 27th November 2000, which are based on articles 6 paragraphs 1 and 13 of the Treaty of the European Union, so as to ensure implementation of equal treatment. The provisions of such law cover particular and specific aspects of the issue, introduce legal means of protection and provide for effective sanctions so as to discourage any discrimination. At the same time, a complete institutional framework for the promotion of the principle of equal treatment is in place.

According to article 19 of law 3304/2005, the **Greek Ombudsman**, the **Equal Treatment Commission** and the **Labor Inspectorate** are the entities which promote the principle of equal treatment. These three bodies are

independent of each other and each one acts within the framework of its competences provided for by the law.

In particular:

A. The competent body for the promotion of the principle of equal treatment, in case of violation by public services, is the Greek Ombudsman. Public services mean the services referred to in the first subparagraph of article 3, law 3094/2003. In particular these services might be (a): the state, (b) first- and second-level local government organizations, (c) other public law legal entities, (d) governmental private law legal entities, public enterprises and enterprises of local government organizations as well as enterprises whose administration is directly or indirectly appointed by the state by means of an administrative act or in its capacity as a shareholder thereof.

B. With the exclusion of the sector of employment and labor, the competent body for the promotion of the principle of equal treatment, in the case of violation by natural or legal entities apart from those mentioned above, shall be the Equal Treatment Commission.

C. In the sector of employment and labor, the competent body for the promotion of the principle of equal treatment, in the case of violation by natural persons or legal entities apart from those mentioned above (case A), is the Labor Inspectorate.

The Equal Treatment Commission was established by the Ministry of Justice through article 21 of law no. 98623/10-10-2005, was formed by the Minister of Justice (OGG B'1489/27-10-2005), and has been operating under the chairmanship of the Secretary General of the same Ministry. Furthermore,

with article 23 of the same law, the Equal Treatment Service was established within the Central Service of the Ministry of Justice, and operates at division level, being competent, inter alia, for the examination of complaints concerning violation of the principle of equal treatment, the conduct of reconciliation efforts, the drafting and filing of a concluding report to the Equal Treatment Commission in case of failure of such reconciliation action, and the secretarial and scientific support of the Commission. Citizens can use the four-digit contact number of this service which is 1529.

The Ministry of Justice follows international developments against racism, xenophobia and racial discrimination and actively participates in the related international activities. Indicatively, it should be mentioned that **within the framework of the European Union the adoption of a Framework-Decision for the combat of racism and xenophobia is in its final stage**.

Finally, within the framework of the Council of Europe, Greece has signed, but has not yet ratified, the European Convention on cyber crime and its supplementary protocol, concerning penalization of actions of a racist or xenophobic nature conducted through computer systems. The processing of a draft bill for the ratification and incorporation of the said Convention and its Protocol in Greek law has been already assigned to a special legislative committee by the Ministry of Justice, so that the bill may be presented to Parliament for adoption and be promulgated.

Specifically concerning the Hebrew religion, the Greek Parliament in 2004 unanimously designated 27th January as "*Greek Jews Holocaust Martyrs and Heroes Remembrance Day*". The designation of this day dedicated to Greek Jews who perished in the Holocaust is the fulfillment of a moral obligation of the Greek state to the innocent victims of Nazi racism and

intolerance. It is also an admonition to all citizens always to be vigilant in protecting and defending human rights and ideals.

Since October 2005 **Greece has been officially included in the list of countries which designate 27th January as Jews Holocaust Martyrs and Heroes Remembrance Day**. In November 2005 Greece was unanimously accepted as a full member of the International Organization for Holocaust Cooperation, Education, Remembrance and Research, established in 1998 on the initiative of Sweden.

In this framework measures have been taken to teach the history of the Holocaust in schools, aiming to make students conscious of the need to defend democracy, freedom and respect for diversity.

In addition to the above and **in line with implementing resolution 61/164** of the United Nations' General Assembly, the Greek government pays particular attention to ensuring that **young people and especially those in school learn from an early age to accept and respect religions** followed by other people or groups.

Specifically by circular no. 61723/G2/13 of June 2002 which is based on article 13 of the constitution, **students of creeds and religions other than the Orthodox religion are lawfully exempt**, at primary and secondary educational levels, at the request of their parents or guardians, **from attending classes in which religion is taught.** This exemption is extended to all other obligations of the students directly or indirectly relating to religion (morning prayer, attending mass, etc.).

In order to avoid potential discrimination against different religions, only printed material that has been authorized by the Ministry of Education can be circulated in schools, so as to avoid negative presentation of religions.

Concerning **religious minorities**, the Greek state, in accordance with its obligations stemming from international law, has for decades provided by law for the operation of minority schools for the Muslims in Thrace (which is also in line with reciprocal provisions for persons of the Orthodox religion in Istanbul). In the islands of the Cyclades the teaching of religion to Roman Catholic students is undertaken by Roman Catholic theologians, in agreement with the local religious communities. In both cases, this policy is justified by the presence of groups of persons who follow their religious faiths in these areas.

The legislation permits also any other **religious or linguistic communities** to operate their own schools if they so wish.

It is also to be noted that in Greek schools students do not face any restrictions on the clothing they may wear, provided that their dress meets common standards of decency and social acceptance. Any problems that may arise in this area are handled by the board of teachers in collaboration with student communities and parents and guardians associations.

Hungary

Constitution

Article 70/A: (1) The Republic of Hungary shall ensure the human rights and civil rights for all persons on its territory without any kind of discrimination, such as on the basis of race, color, gender, language, religion, political or other opinion, national or social origins, financial situation, birth or on any other grounds whatsoever. (2) Any kind of discrimination described in paragraph (1) shall be strictly penalized by the statute. (3) The Republic of Hungary shall promote the equality of rights for everyone through measures aimed at eliminating the inequality in opportunity.

Criminal Code

Section 155: (1) The person whowith the aim of the total or partial extermination of a national, ethnic, racial or religious group - a) kills the members of the group, b) causes serious bodily or mental injury to the members of the group because they belong to the group, c) constrains the group into such conditions of life which menace the group or certain members thereof with death, d) takes such a measure which is aimed at the impediment of births within the group, e) displaces the children belonging to the

group into another group commits a felony and shall be punishable with imprisonment from ten to fifteen years or life imprisonment. (2) The person who commits preparation for genocide, shall be punishable for a felony with imprisonment from two years to eight years.

Section 157: (1) The person who - with the aim of the obtention and maintenance of domination by one racial group of people over another racial group of people and/or with the aim of the regular oppression of the other racial group - a) kills the members of a racial group or groups, b) constrains a racial group or groups to such conditions of life by which it strives for the total or partial physical annihilation of the groups commits a felony and shall be punishable with imprisonment from ten to fifteen years or life imprisonment. (2) The person who commits another crime of apartheid, shall be punishable for a felony from five to ten years. (3) The punishment shall be imprisonment from ten to fifteen years or life imprisonment, if the criminal act of apartheid described in subsection (2) has given rise to serious consequences. (4) For the purposes of subsections (2) and (3), the crime of apartheid shall mean the crime of apartheid defined in paragraphs a)/(ii), a)/(iii), c), d), e), and f) of Article II of the International Treaty on the Combat and Punishment of Crimes of Apartheid, adopted on 30 November 1973 by the General Assembly of the the United Nations Organisation in New York promulgated by Law- Decree No. 27 of 1976.

Criminal Code §174/A

« Whoever a) restricts another person by violence or by threats in his freedom of conscience b) prevents another person from freely exercising his religion by violence or threats, commits a crime, and is punishable by imprisonment extending to three years »

Criminal Code §174/B

punishes violence against a member of a national, ethnic, racial or religious group (and presumption of membership of such a group) with imprisonment

1) The person who assaults somebody else because he belongs or is believed to belong to a national, ethnic, racial or religious group, or coerces him with violence or menace into doing or not doing or into enduring something, commits a felony and shall be punishable with imprisonment up to five years.

2) lists aggravating factors such as use of arms.

Criminal Code §269:

incitement against a community: A person who incites to hatred before the general public against (a) the Hungarian nation; (b) any national, ethnic, racial group or certain groups of the population, shall be punishable for a felony offence with imprisonment up to three years. Proposed amendment to §269 to ensure punishment of racial expression – adopted by Hungarian Parliament, but judged unconstitutional by Constitutional Court in May 2004 - unamended article still valid.

Criminal Code §269B:
detailed list of symbols which are connected to ideas and events relating to the forceful seizure and dictatorial keeping of power, and therefore represent violence, hate against certain national, ethnic, or religious groups

NB. "In early 2008, on the initiative of six of its members, Parliament enacted a new amendment to the Criminal Code, taking a new approach based on abuse, and which would allow the prosecutor to initiate an investigation on broader grounds, including non-verbal abuse (such as the use of Nazi salutes). In October 2007, at the government's initiative, Parliament had also already amended the Civil Code. Previously, only identifiable individuals who were personally targeted by insulting or defamatory statements could seek civil law remedies such as damages; under the 2007 amendments, this right would be extended to individuals or associations belonging to a group of people generally targeted by broadly defined insults based on national, ethnic or racial identity.
However, neither of these sets of provisions has come into force, as they were each referred to the Constitutional Court for review prior to their promulgation. The Court was asked to examine the provisions from a number of angles, including possibly disproportionate limits on freedom of expression, questions as to whether the provisions were sufficiently clear to ensure legal certainty, possible discrimination against persons who are not members of minority groups protected by the provisions, and possible infringements of the right to selfdetermination of members of civil society organisations who did not feel insulted by a given statement but whose association decided to initiate legal proceedings. On 30 June 2008, the Constitutional Court found the 2008 amendments to the Criminal Code unconstitutional. At the time of writing, the result of the review of the Civil Code was not yet known. "
(Source: ECRI Report on Hungary, 2009, available at:
http://www.coe.int/t/dghl/monitoring/ecri/country-by-country/hungary/HUN-CbC-IV-2009-003-ENG.pdf)

Case Law

COURT DECISION IN THE FIRST INSTANCE IN THE CASE OF LÓRÁNT HEGEDÛS JR.

Summarized communication

Municipal Court of Budapest
Case No.: 13.B.423/2002/7.

IN THE NAME OF THE REPUBLIC OF HUNGARY!

The Municipal Court of Budapest delivered the following

sentence

passed on the basis of the reconvened sessions of the public hearings held on 4th and 6th December 2002:

GYÖRGY METES as primary accused

found guilty: as an accomplice acting in the crime of incitement against the community

On the above grounds the Municipal Court of Budapest sentenced Metes György as primary accused to the pecuniary penalty of payment of an amount equal to 350 (in words: three hundred and fifty) days' fine.

The amount of the fine charged for one day has been assessed by the court to be HUF 1,500 (in words: one thousand and five hundred Hungarian forints) to be paid by the primary accused György Metes.

In case of non-payment of the pecuniary penalty by the primary accused György Metes thus determined by the court in the sum of altogether HUF 525,000 (in words: five hundred and twenty-five thousand Hungarian forints), the pecuniary penalty shall be changed into the sentence of imprisonment in minimum security prison for a period of days equal to the number of daily items of the fine non-paid.

LÓRÁNT HEGEDÛS Jr., as accused of the second degree

found guilty: as an accomplice acting in the crime of incitement against the community in cumulative offence

On the above grounds the Municipal Court of Budapest sentenced Lóránt Hegedûs Jr., to imprisonment to be carried out in prison for the period of 1 (one) year and 6 (six) months.

The execution of the sentence of imprisonment in the case of Lóránt Hegedûs Jr., as accused of the second degree has been suspended by the court for a probation term of 3 (three) years.

The civil claims filed in this criminal action have been ordered by the court to be adjudged by other statutory proceedings of the civil lawsuit.

The accused are ordered by the court to the payment of the costs of the criminal proceedings incurred up to this date or that may incur in this connection at any time in the future.

Justification

György Metes, as primary accused
(personal data)

Lóránt Hegedûs Jr., as the accused of the second degree
(personal data)

György Metes, primary accused, president of the MIÉP (Party for Hungarian Truth and Life) Organization of District XVI (of Budapest), and the editor-in-chief of the journal Ébresztô published by the same organization of MIÉP. Lóránt Hegedûs Jr., as the accused of the second degree, is the vice-president of MIÉP, and ex-member of the Parliament.

In August 2001, upon the request of György Metes, primary accused, Lóránt Hegedûs, Jr, wrote an article titled "The Christian Hungarian State" to com-

memorate the 20th August; this article was published in the journal entitled Ébresztô issued by the MIÉP organization of District XVI in 12000 copies.

The article read as follows:

"Christian Hungarian State,
This is how we can address our thousand year old country relying on the gold deposit of countless incidents of martyrdom suffered in the course of ten centuries. With the words of "the young and free Sándor Petôfi appearing in the light of undying glory on the plain of Transylvania" we can "look down into the ocean of the past/Beholding cliffs that rise to storm the skies/My hero land, your deeds of courage vast/We had our word to say on Europe's stage/And ours was not a minor actor's part/As dreaded by the world our drawn sword's rage/ As children dread the lightning in the dark."

And let me refer to the words of László Németh, who wrote about the mission of the Hungarian nation extending to the whole of Central-Eastern Europe, organizing these peoples into a unit of quality, and in the absence of such mission the life of the Hungarian people would gradually fall into decay.

Christian Hungarian State! What a powerful organizing force appeared in you and had been exerted by you within the wreath of the Carpathian Mountains and far beyond them, radiating the resounding triumph of the Christian ethics whereby small groups of people and large communities, societies, people and nations are arranged in "beautiful and brilliant order".

However, Jesus Christ says: "My kingdom is not of this world." This is where we can understand the real underlying cause and reason of all Hungarian suffering. "Our fight is fought with the Hungarian inferno" – wrote Endre Ady. Where the light of the Soul of God, conquering and invigorating the world, appears, the negative soul, the devil will become intolerably hysterical, then it would turn into something cold-bloodedly deliberate and meanly vulgar.

This was how the Tatars, Turks and last, but not least the Russians turned up as the representation of the devastating, hysterical animosity: to destroy the wonders experienced by the spiritual constitution in the space and time of Christ, which is above the Asian space and time.

And similarly, this was how the Habsburg-house made its presence here to display its cold-blooded disposition to meanness, as the most untalented and most obtuse dynasty in Europe, what is more, all over the world.

The Christian Hungarian State could have withstood even that, if, as a result of the self-renunciation of the Compromise of 1867, the hordes of the vagabonds of Galicia had not invaded it; who, as if they were the old self of man without salvation, in an ancient onslaught fretted and are still scrunching this homeland, which, despite all this, is capable of resurrection from its ruins, on the heaps of the bones of our heroes. With their Sion of the Old Testament lost because of their sins and rebellions against God, let the most promising eminence of the moral order of the New Testament, the Hungarian Sion be irretrievably perished.

Also, Ady stated about the Hungarian Sion: "Never ever so much chaos, passion, violence, and Jewishness raved in a nation ..." And because it is not possible to burn out every single Palestinian from the banks of river Jordan with Fascist methods very often surpassing even those of the Nazis, they come to the banks of the Danube, sometimes as internationalists, sometimes as nationalists, and sometimes as cosmopolitans, to kick into the Hungarians once again, because they feel like it.

They become hysterical even from the salutation: CHRISTIAN HUNGARIAN STATE.

They say: it is exclusion. Every 20th August this false proposition is squawked by them cheating Hungarians out: the Hungarian state founded by King Saint Stephen I of Hungary was a receptive one. Of which László Németh said that we would like to have today such a clear situation as it had been in the multilingual state of Saint Stephen, where, under the mask of patriotism, the minority could not lie themselves into majority.

Now let you Hungarians listen to the one single message of survival over the thousandth year of the Christian Hungarian state, which has been based on the ancestral inheritance and continuity of right: EXCLUDE THEM! FOR IF YOU DO NOT EXCLUDE THEM, THEY WILL EXCLUDE YOU!

Of this message we are warned by the misery of thousand years, by the inheritance nevertheless existing "high above" of our country that has been robbed and looted a thousand times, and last but not least by the stone-throwing sons of Ramallah."

Lóránt Hegedûs Jr., accused of the second degree, read out the above text in Pannon Rádió; which was recorded, and at 6.55 and 7.55 a.m. on 4th September 2001 it was broadcast in the programme entitled "Religious norms and spiritual call" of the same radio channel.

The immunity of Lóránt Hegedûs Jr., ex-member of the Parliament was suspended by the Parliament of the Republic of Hungary in its decision no. 89/2001. (XII.20.) dated 18 December 2001.

The Central Investigation Office of the Public Prosecution presented a bill of indictment No. Nyom. 174/2001. against György Metes as primary accused and Lóránt Hegedûs Jr., as accused of the second degree, including excerpts of the text of the article quoted above to substantiate the accusation of one count of the crime of incitement against the community, in violation of the statutory provisions stated in Article 169 b) of the Hungarian Criminal Code, which was committed by the accomplices acting in the crime and which was committed by Lóránt Hegedûs Jr., as accused of the second degree, in cumulative offence. The prosecutor present at the trial clarified the factum of the crime, and, by maintaining the legal classification of the act, added to the charges the entire article written by Lóránt Hegedûs Jr.

György Metes, as primary accused and Lóránt Hegedûs, Junior, as accused of the second degree, made a detailed confession admitting the facts but not pleading guilty.

In his confession György Metes, as primary accused, confirmed that it was upon his request that Lóránt Hegedûs, Junior compiled the article presented as a crime in the indictment. He also stated that he had read the article prior to the publication and found no grounds to refuse its publication, therefore he published it unchanged, in its original version. He also acknowledged that in his opinion the article could be interpreted in various ways, even in the way presented in the bill of indictment.

In his confession Lóránt Hegedûs Jr. as accused of the second degree, stated that he had only drawn the conclusion from the words of Sándor Petôfi, Endre Ady and László Németh. It had not been his intention to incite hatred, as it would have been inconsistent with both his education and profession. He stated that he had only exercised his right of expression of opinion granted by the constitution when he had written that article. He had only responded to the article entitled "The methodology of Exclusion" written by István Hell, in accordance with the decision of the MIÉP group in the Parliament and MIÉP President István Csurka. Lóránt Hegedûs Jr. also told the court that the term "exclusion" in its original Latin meaning, as "excommunication" meant exclusively intellectual and spiritual dissociation, therefore it could not be qualified as exhortation to commit any criminal act.

...

Due to the nature and type of the case, the court inevitably had to address the issue of anti-Semitism, anti-Jewish feelings as well as the topic of incitement to hatred.

It can be established that no definition is available for anti-Semitism up to this date. Its peculiar feature is that raising the issue itself generates tensions or induces people to take a point of view. This concept can be assigned to a wide range of opinions from the simple dislike of the Jews quite up to the physical persecution of the Jewish people.

All that can be stated in connection with this concept is that it is a social and political trend directed against the Jews, which can be traced down almost in every society from the ancient times up to the present days, sometimes in weaker forms, sometimes in stronger manifestations, depending on the current tensions prevailing in the given society.

Every democratic and civilized society tries to suppress the views of exclusion and discrimination, including anti-Semitism. Among the set of the tools available for this purpose, criminal law may be the ultimate means only and can be employed exclusively under the predetermined conditions set by Hungarian and international legislation.

In summary, the court is bound to address anti-Semitism only to the extent the right of the expression of opinion granted in the constitution is concerned, having regard to the fact that anti-Semitism is ordered to be punished by the Hungarian Criminal Code in force exclusively if it is manifested as an incitement to hatred. Even then, the court examines not anti-Semitism but the incitement against the community.

The right of the expression of opinion is granted by Act XX of 1949 as amended, on the Constitution of the Republic of Hungary, in Article 61. /1/, as a fundamental constitutional right, which is, however, determined as a liberty that may be subject to restriction in the provisions of the International Covenant on Civil and Political Rights. Neither of them makes any distinction as to the positive or negative quality of the opinion expressed or whether it may cause injury to anyone or not.

According to the position of the court, opinions in this extraordinarily wide scale may be expressed freely as long as they do not turn into incitement to hatred. Conclusively, the statutory provision in Article 269 of the Criminal Code may not be supposed to offer a specific protection by criminal law against the expression of opinions that are insulting, offensive or perhaps humiliating.

Accordingly, the only thing the court had to decide upon was whether the article or lecture is to incite hatred or not. Upon looking into this matter, extraordinary importance must be attached to the fact that incitement has no specific interpretation in criminal law. This must be all the more emphasized because the question what is capable of incitement and what is not cannot be approached subjectively. In this case both indictment and adjudication would be subject to individual judgement, political sensitivity or tolerance. Consequently, in delivering the judgement the court had to proceed in a manner to eliminate subjective elements as much as possible, and to base its judgement exclusively on the facts and on the legal regulations which are strictly applicable to the case.

Article 19 of the International Covenant on Civil and Political Rights passed by Session XXI of the General Assembly of the United Nations on 6 December, 1966, which was promulgated by Law Decree No. 8 of 1976 states that "everybody has the right to free expression of opinion and this right includes the freedom of dissemination of all kinds of data and thoughts ..."). At the same time,

Article 20 /2/ specifies that "any propagation of national, racial or religious hatred which incites to discrimination, hostility or violence, shall be prohibited".

Pursuant to Article 4 of the agreement promulgated by Law Decree No. 1 of 1969, which may impose legal sanctions on the Hungarian State, the participating states shall:
"a) declare that any propagation of ideas based on racial superiority or racial hatred, any incitement to racial discrimination, all aggressive acts or incitement directed against groups of persons of any race, colour or ethnic origin, furthermore any support, including the financial support, of racist activities shall qualify as acts of crime subject to punishment by penal law."

Article 10 point 1 of the European Convention of Human Rights contains a further provision, which states that "Everybody has the right of the free expression of opinion. This right includes the freedom to form opinions and the freedom to know and transfer information and ideas, irrespective of borders and without the right of intervention therein by the authorities."

Based on all the aforementioned it can be established that here two types of obligations have to be faced. On the one hand, the obligation to ensure the free expression of opinion, and, on the other hand, the obligation of subjection to criminal sanctions of all incitement to national, racial or religious hatred.

...

The court has come to the conclusion that it is a fact that the provision of certain liberties and at the same time the restriction thereof for the protection of the rights of others are in contradiction with each other and may unavoidably lead to clashes of interests.

In certain cases, especially where political, religious or racial issues are concerned, the exercise of a right, which manifests itself in a negative expression of opinion, may cause actual infringement of the law in the area concerned.

In such a case both parties have sufficient grounds to apply for the enforcement or protection of their specific rights, whereupon any decision taken may cause injury to the other party.

Now the task is passed onto the legislator to define the constitutional boundaries of the expression of opinion so that it should not cause a disproportionate injury to the lawful interests of others while it could be enforced in the widest possible range.

...

In colloquial usage, the word 'hatred' means a vehement, hostile emotion. Incitement is a statement or series of statements which are aimed at inducing a malicious and hostile behaviour which is not based primarily on reasoned, rational and consciously considered views, but on rage and base instincts.

According to the grammatical interpretation of the law, therefore, the one who incites to hatred, intends to excite vehement, hostile feelings arising out of rage or base instincts.

In these definitions, according to the viewpoint of the court, it is emphasized that the encouraging, provoking or instigating act shall be aimed at inducing some behaviour or activity which is hostile or causes damage.

This is also pointed out in Article 20 /2/ of the International Covenant on Civil and Political Rights, stating that the act subject to punishment is "hostility or incitement to violence", whereas pursuant to Article 4 of the agreement promulgated by Law Decree No. 1. of 1969 it is any "violent act or incitement thereto."

In summary, according to the viewpoint of the court, the objective adjudication, which is free of emotions and subjective elements, of the acts made subject to the indictment can be ensured only by the construction of the concept 'incitement' in line with the aforementioned and also in accordance with the definitions of the various international conventions. Any departure therefrom would bring about particularly harmful consequences. The broad construction would lead to unjustified restrictions of the constitutional liberties, while the narrow construction would cause uncontrolled outbursts of rage.

...

In Resolution No. 30/1992. (V.26.) Ab the Constitutional Court stated a stare decisis opinion concerning the issue, namely, that while maintaining the free-

dom of expression of opinion, it is necessary and justified – albeit only in a narrow range and as an ultimate solution – to intervene by the means of criminal law, where the protection of the violated legal matter cannot be ensured in any other way.

In view of the aforementioned, the court had to form an opinion not on the validity of the content of what had been published or communicated, but the suitability thereof to incitement to hatred.

According to the viewpoint of the court, the examination and evaluation of the content of the statements subject to indictment would require a political and historical fact-finding and assessment which can be neither the aim nor the task of the present criminal proceeding as it lies beyond the adjudication of the criminal procedure.

...

The court did not accept the presentation of the defense on behalf of the accused.

Lóránt Hegedûs Jr., accused of the second degree, intended to communicate to the reader or the listener his own point of view using the ideas of well-known personalities who are highly esteemed by the entire Hungarian society. In his article, when quoting excerpts from Sándor Petôfi, Endre Ady or László Németh, after each passage a kind of partial postulate is formulated based on the content of the excerpt, as if it were an explanation of the aforementioned passage. At the end of his article, in accordance with the final conclusions representing his own viewpoint he claimed the following: "EXCLUDE THEM! FOR IF YOU DO NOT EXCLUDE THEM, THEY WILL EXCLUDE YOU! ".

It is the position of the court that Lóránt Hegedûs Jr., in order to support his own ideas, quoted such well-known works of such well-known persons of which each is suitable in itself to influence people. The mentality of the whole article corresponds to Lóránt Hegedûs's own final conclusions.

The court refuses to agree with such conclusions and viewpoints, no matter in what form they are presented, and denounces such ideas on moral grounds and firmly dissociates itself from them.

The concept of 'exclusion' composed in the article has no specific construction in criminal law. Also in this case, for the purposes of interpretation, the court considered the definition worded in the Hungarian Concise Dictionary of Definitions. According to the Hungarian Concise Dictionary of Definitions, the word 'exclusion' means that he who makes exclusion, hampers somebody in the enforcement of his rights or prevents him from getting his share of, or partaking in something.

Obviously, exclusion may have lawful and also illegal means. The article made subject to the indictment does not contain any data which would call for the use of any illegal means.

It must be established, however, that calling upon to conduct exclusion is deemed to constitute a criminal act by itself, in view of the fact that exclusion may lead to some kind of physical segregation, or serve as a basis for that. No matter to what extent it may be "legitimate", exclusion by all means would preclude the possibility of the enforcement of some kind of right for particular members of the Hungarian society. Such orders for a so-called "legitimate exclusion" corresponding to the call by the accused were stated in Act No. IV of 1939 on the limitation of the social and economic expansion of the Jews as well as in Act No. VIII of 1942 on the regulation of the legal status of the Israelite denomination. The objective of these provisions also was to prevent certain members of the society from exercising their rights via "legal regulations".

According to the viewpoint of the court, Lóránt Hegedûs Jr., accused of the second degree, was aware that the statements expressed in his article were suitable to incite and add fuel to hatred. This fact was acknowledged also by György Metes, the primary accused of the indictment, when he stated in his confession that, from this aspect, the article may be interpreted this way.

The call to the exclusion of a certain part of the society and their stigmatization thereby, in other words, the arousing of hatred in itself may be suitable to disturb the social order, peace and public tranquillity.

In summary the court establishes therefore that Lóránt Hegedûs Jr., accused of the second degree made statements directed against the Jews which are suitable to incite hatred as described in the Hungarian Criminal Code. The final aim of

this article was, and the accused was aware of it, that the aroused hatred might as well erupt from the enclosed world of emotions and manifest itself for others. This conduct constitutes and qualifies as incitement against the community as stated in the statutory provision in Article 269. b) of the Hungarian Criminal Code.

...

The accused committed their act in great publicity as the periodical paper entitled Ébresztô had a circulation of 12000 copies, while the article communicated in the programme of Pannon Rádió was broadcast to an audience of a precisely not definable, however, large number of listeners.

Based on the aforementioned, the court concluded that by their conduct carried out in great publicity, György Metes, primary accused and Lóránt Hegedûs Jr., accused of the second degree, incited hatred against a national, ethnic, racial and religious group, namely against the Jews. This conduct was performed by Lóránt Hegedûs Jr. in cumulative offence.

Accordingly, the court pronounced György Metes, primary accused, guilty of incitement against the community which constitutes a criminal act violating Article 269 b) of the Hungarian Criminal Code and is to be qualified in accordance with that Article, which he committed as an accomplice; and Lóránt Hegedûs Jr., accused of the second degree, guilty of incitement against the community which constitutes a criminal act violating Article 269 b) of the Hungarian Criminal Code and is to be qualified in accordance with that Article, which he committed as an accomplice in cumulative offence.

...

The extraordinary danger to society, exerted by their act, was assessed by the court as an aggravating circumstance at the disadvantage of both accused. In respect of Lóránt Hegedûs Jr., accused of the second degree, the fact that he committed his act as a member of the Parliament and as a vice president of a political party, was assessed by the court as a further aggravating circumstance.

In view of the extenuating circumstances in respect of Lóránt Hegedûs Jr., accused of the second degree, the sentence of imprisonment was suspended by the court for a probation period pursuant to Article 89 /1/, /2/ and /3/ of the Hungarian Criminal Code.

...

Budapest, 6 December, 2002

Edina Kaszay	Dr. László Szebeni	János Kocsis
associate judge	presiding judge	associate judge

[SZESZLÉR T. (eds), Anti-Semitic Discourse in Hungary in 2002-2003, Report and Documentation, pp. 321-333]

COURT DECISION IN THE SECOND INSTANCE IN THE CASE OF LÓRÁNT HEGEDÛS JR.

Summarized Communication

Municipal High Court of Appeal of Budapest
Case Reg. No.: 3.Bf.111/2003/10

IN THE NAME OF THE REPUBLIC OF HUNGARY!

The Municipal High Court of Appeal of Budapest delivered the following

S e n t e n c e

at the public hearing held on 6 November 2003:

Judgement No. 13.B.423/2002/7. delivered and pronounced by the Municipal Court of Budapest on 6 November 2002 in the criminal proceeding launched against György Metes and his accomplice, charged for the commitment of the criminal act of incitement against community, has been

r e v e r s e d.

Whereby
accused in the first order, charged with the criminal act of incitement against the community,

accused of the second degree, charged with the criminal act of incitement against the community, committed in cumulative offence, are hereby

a c q u i t t e d

from the indictment.

The eventual costs incurred in the criminal procedure shall be borne by the state.

JUSTIFICATION:

György Metes, primary accused and Lóránt Hegedûs Jr., accused in the second degree, were pronounced guilty of the criminal act of incitement against the community, which was committed by them as accomplices, and by Lóránt Hegedûs, Junior, accused in the second degree, in cumulative offence. The Municipal Court of Budapest sentenced György Metes as primary accused to the pecuniary penalty an amount equal to 350 days' fine, where HUF 1500 is charged for each day item, totalling HUF 525000; and Lóránt Hegedûs Jr., accused in the second degree, to imprisonment of 1 year and 6 months, suspended for a probation term of 3 years.

The civil claims filed in this criminal action were ordered by the court to be adjudged by other statutory proceedings of the civil lawsuit.

The accused were ordered by the court to the payment of the costs of the criminal proceedings that may incur at any time in the future.

...

The sentence of the trial court has been appealed by György Metes, primary accused and Lóránt Hegedûs, Jr, accused of the second degree for acquittal; the duly authorized defense attorney of the primary accused lodged an appeal for acquittal of his client on the grounds of absence of any criminal offence committed by him; the duly authorized defense attorney of the accused of the second degree lodged an appeal for dismissal of the criminal procedure and also for the acquittal of his client on the grounds of absence of any criminal offence committed by him.

The prosecutor acknowledged the sentence of the first instance at the hearing in respect of both accused.

In warrant No. Bf.98/2003. the Public Prosecutor's Office presented the motion to add the distribution of the newspaper article to the facts of crime, otherwise to uphold the judgement.

The representative of the Municipal Appellate Chief Prosecutor's Office who was present at the public hearing (BF.139/2003.) by maintaining the written

warrant of the Public Prosecutor's Office, moved for the uphold of the sentence of the first instance.

At the public hearing the accused and their defense attorneys maintained their appeal unchanged.

...

The statement of facts established by the court of the first instance, – which has not been opposed to by appeals – is substantiated as it presents the newspaper article made subject of the indictment, the background to its composition, furthermore, the fact that it had been read out by the accused of the second degree in a Pannon Rádió programme.

...

The evidences bearing significance in terms of the adjudication of the case was revealed and considered by the court of the first instance. The indictment filed by the prosecutor which formed the basis of the criminal procedure was exhausted, and it was detailed why it was deemed that the culpability of the accused could be established. The legal justification, however, contains certain statements which are irrelevant in respect of the present case. Weighing of these circumstances is outside the duties of the court as judicature.

The irrelevant circumstances to be omitted from the justification of the judgement are as follows:

- In the decision of the court of the first instance (the last two passages on page 4 and the first three passages on page 5) it is elaborated what qualifies as anti-Semitism in the view of the court. The definition of the anti-Semitism and the analysis of its nature is not the task of the criminal court of trial of the given case.

- The decision of the court (last passage on page 5, first passage and third passage on page 6) gives an overview of what kind of duties the legislature has in connection with the international legal regulations; furthermore, it explains (last passage on page 6 and first passage on

page 7) what tasks legislature has to face. This detailed description is contrary to the otherwise correct statement of the court of the first instance that in the course of the criminal proceedings of the case it is confined to the charges stated in the indictment. It also implies that the indictment shall be fully exhausted, however, it may not be transgressed (passage the last but three on page 4 of the judgement).

– Furthermore, the wording "denounces such ideas on moral grounds" in the fifth passage on page 9 is also to be omitted as it is in contrast to the requirement of an objective procedure which is otherwise correctly stated by the court of the first instance. The particular conviction professed by the individual judge cannot bear any relevance to the decision concerning the indictment. Also, the historical overview in the last passage on page 9 about the anti-Jewish laws was also irrelevant for similar reasons because in the present case the performance of the crime of apartheid pursuant to Article 157. /2/ of the Hungarian Criminal Code was not even stated. This criminal act is performed by someone who takes any legislative or other kind of measures in order to intentionally prevent some racial group from participating in the political, social, economic and cultural life of a country. The subject of the indictment was not a legislative or some other kind of measure, but a newspaper article.

In spite of the circumstances bearing no significance in the delivery of the judgement as detailed in the aforementioned, in its decision the court of the first instance voiced a number of principles with which the court of the second instance agreed.

One important principle was that from the point of view of the adjudication of the act made subject to indictment it bears no relevance whether any proceedings were launched against which of the persons, as the court may decide on the criminal liability only of that person against whom an indictment has been filed. Significance shall be assigned not to the words, expressions or parts of the sentences, but to those sentences in their original context from which it can be established undoubtedly whether the accused committed a criminal act, and if they have, what kind of criminal act they performed.

In summary, the court is obliged to address anti-Semitism only to the extent the right of the expression of opinion granted in the constitution is concerned, having regard to the fact that anti-Semitism is ordered to be punished by the Hungarian Criminal Code in force exclusively if it is manifested as an incitement to hatred. Even then, the court examines not anti-Semitism but the incitement against the community. Even then not anti-Semitism, but the incitement against community shall be subjected to the scrutiny of the court. Another well-founded argument is that in Article 61. /1/ of the Constitution of the Republic of Hungary, as well as in the International Covenant on Civil and Political Rights the right of expression of opinion is stated as a fundamental constitutional right.

None of the aforementioned distinguishes as to the positive or negative content of the opinion expressed, and whether or not it may cause any injury to a person or persons.

Opinions may be freely expressed as long as they do not turn into incitement to hatred. Conclusively, the statutory provision in Article 269 of the Criminal Code does not constitute any specific protection offered by criminal law against the expression of offensive, insulting or possibly humiliating opinions. Accordingly, the only thing the court has to decide is whether the incriminated article or communication incites hatred or not.

The fact what makes incitement and what not, cannot be approached subjectively. In such a case both the indictment and adjudication would then be subject to individual judgement, political sensitivity or tolerance.

Accordingly, in passing the judgement the court shall proceed in order to eliminate subjective elements as much as possible, and to base its judgement exclusively on the facts and on the legal regulations which are strictly applicable to the case.

...

There is no democratic society without pluralism and tolerance; the freedom of expression of opinions is one of the corner-stones of the democratic society, one of the prerequisites of its development. This freedom shall be granted also to thoughts, information, ideas and principles which are offensive, astonishing or alarming.

However, in spite of the fact that in its judgement the aforementioned principles and resolutions were addressed in detail in respect of the issue of the performance of the criminal act of incitement to hatred in the given case which violated Article 269 of the Criminal Code, the court of the first instance arrived at a false legal conclusion. At the same time its legal viewpoint contradicts its statement presented in the last but one passage on page 9 of the judgement, which confirmed that "the article made subject to indictment does not contain any data which called for the use of unlawful means".

...

The appeal launched by the accused and the defense attorneys for acquittal is substantiated.

On the basis of the statement of the facts established by the Municipal Court of Budapest, a false conclusion has been drawn concerning the culpability of the accused where the speech with its previously conceived content, carefully designed construction, which was presented in written form, as well as in the form of a voice recording and a radio broadcast, and which, undoubtedly, contained statements offending and humiliating the part of the Hungarian Jews originating from Galicia, was assessed as one exceeding the boundaries of the right of the expression of opinion and freedom of speech, which constitutes a criminal act.

The criminal conduct of the incitement against the community as defined in Article 269. b./ of the Criminal Code is incitement to hatred. Incitement to hatred is a serious abuse of the freedom of the expression of opinion, and it is an emotional preparation to violence. In the justification of the resolutions passed by the Constitutional Court and in the case decisions No. BH.1997/165. and BH. 1998/521. of the Supreme Court a definitive guideline is provided as to how the incitement to hatred shall be construed.

To summarize the aforementioned: the person who

- calls to violent acts,
- calls to the performance of such an action or conduct, where
- the danger is not only assumed but there are actual rights endangered and there is a direct threat of a violent act,

is deemed not as someone who exercises the right to the freedom of expression of opinion, but one who commits the incitement to hatred.

In the colloquial meaning of the word, a perceivable moral disapproval is assigned to incitement.

The content of incitement to hatred, – as a concept used in criminal law – has been formulated by the practice of judicature. The person who in large public incites to hatred against particular groups of people, shares not only his antipathy, unfavourable or offending views and ideas arousing concern with other people, by setting the mood of the public, but also he displays a rebellious conduct generating tension, which is suitable to arouse the rage of the people and to violate the social order and peace.

The heated hatred may turn into extreme activity, ultimately into the eruption of violent acts. The incitement against the community is basically not a political but a legal crime, and as such, has been listed among the crimes against public tranquillity.

The person who provokes active, efficient hatred in others, performs incitement to hatred.

The opinion expressed in the article/voice recording published by György Metes, primary accused and written then read out to voice recording and communicated via radio broadcast by Lóránt Hegedûs Jr., accused of the second degree, may be offensive, astonishing and also alarming.

However, the criminal act of incitement against the community as determined in Article 269. b./ of the Criminal Code is not constituted thereby. The newspaper article does not call upon the performance of any activity or conduct or some violent act. It is not even suitable to stimulate the active effective hatred in the reader or in the listener which is required for the facts as described in the statutory provision.

It follows from the (immaterial) endangering nature of the criminal act that the assumed existence of the danger (abstract endangerment) is not sufficient for its performance.

Danger means the realistic possibility of the occurrence of the injury, that is, the prevalence of a situation where the possibility of the development of the process in the direction of the occurrence of the injury has to be reckoned with.

The conclusion of the Municipal Court of Budapest that it is sufficient that the offender has the foresight that the aroused hatred might as well emerge from the enclosed world of emotions and manifest itself in a manner perceivable also for outsiders is not substantiated; it must satisfy also the triple requirements detailed above.

Nor was the reasoning shared by us in respect of the statement that the invitation for exclusion by itself constitutes a criminal act, as no such provision is contained in the Criminal Code currently in force, or was contained in the Criminal Code in force at the time of the performance of the act. On the other hand, in its judgement the Municipal Court of Budapest failed to address the extent of the danger, the tangibility thereof, as well as the degree of violence.

From the call "Exclude them! For if you do not exclude them, they will exclude you" it does not follow and cannot be assumed that it was the intention of the accused to encourage its readers / listeners to conduct violent acts. From the part of the sentence "they will exclude you" it cannot be concluded that the author of the article fears violence on the part of the Jews originating from Galicia, and desires to prevent it.

Evidently, in the absence of any threatening violent conduct by the Jewish people the necessity of the prevention of any violent conduct may not even occur, and thus, such preventive violent exclusion is not encouraged by the accused of the second degree, not even indirectly.

The constitutional principle described in the judgement and the case decisions brought by the Supreme Court were left out of consideration by the Municipal Court of Budapest when it failed to confront the criteria of incitement to hatred with the newspaper article and the radio programme featuring in the given case.

This comparison was subsequently performed by the Court of Appeal according to the aforementioned, and in its review it was concluded that the conduct of the accused was not factual. The incitement to hatred as an element of the factum of

crime as determined in the statutory provision is absent, therefore the accused are acquitted from the indictment for the criminal act of incitement against the community, violating Article 269. b./ of the Criminal Code, on the grounds of absence of any criminal conduct (pursuant to Article 331 /1/ of the Criminal Procedure).

...

In view of the fact that the court of the second degree did not establish the performance of criminal acts at the disadvantage of either of the accused, the civil claim launched by N.N. was refused without the examination of the legitimacy of suit (BH.1998/217.).

Pursuant to Article 339. /1/ of the Criminal Procedure, the costs of the criminal proceedings eventually incurred up to this date shall be borne by the state for reasons of acquittal of the accused.

Dated: Budapest, 6 November 2003

...

Dr. Péter Nehrer	Dr Katalin Csere	Dr Éva Lányi
presiding judge	presenting judge	judge

The decision No. 3.Bf.111/2003/10. of the Municipal High Court of Appeal in respect of György Metes, primary accused and Lóránt Hegedûs Jr., accused in the second degree shall become legally binding as of 6 November, 2003.

Dated: Budapest, 6 November 2003

Dr. Péter Nehrer
presiding judge

[SZESZLÉR T. (eds), Anti-Semitic Discourse in Hungary in 2002-2003, Report and Documentation, pp. 335-343]

Hungary (legislation hate speech)

Első / előző / következő / utolsó dokumentum Becsuk

30/1992. (V. 26.) AB határozat
Közzétéve a Magyar Közlöny 1992. évi 53. számában
AB közlöny: I. évf. 5. szám

1358/B/1991

A MAGYAR KÖZTÁRSASÁG NEVÉBEN!

Az Alkotmánybíróság jogszabály alkotmányellenességének utólagos vizsgálatára irányuló indítványok tárgyában meghozta a következő

határozatot:

Az Alkotmánybíróság a Büntető Törvénykönyvről szóló 1978. évi IV. törvény /Btk/ 269. § (1) bekezdése alkotmányellenességének megállapítására és megsemmisítésére irányuló kérelmeket elutasítja.

Az Alkotmánybíróság megállapítja, hogy a Btk 269. § (2) bekezdése alkotmányellenes, ezért azt a határozat közzétételének napjával megsemmisíti.

Az Alkotmánybíróság elrendeli, hogy a Btk 269. § (2) bekezdése alapján lefolytatott és jogerős határozattal lezárt büntetőeljárásokat vizsgálják felül, amennyiben az elítélt még nem mentesült a hátrányos következmények alól.

Az Alkotmánybíróság e határozatát a Magyar Közlönyben közzéteszi.

Indokolás

I.

1. Indítványozók a Büntető Törvénykönyvről szóló 1978. évi IV. törvénynek /Btk/ az 1989. évi XXV. törvény 15. §-ával

megállapított 269. §-a alkotmányellenességének megállapítása és e bűncselekményi tényállás megsemmisítése iránt nyújtottak be indítványt. Álláspontjuk szerint a Btk 269. §-a azért alkotmányellenes, mert büntetni rendel olyan magatartásokat, amelyek az Alkotmány 61. §-ában biztosított véleménynyilvánítási és sajtószabadság, továbbá egyik indítványozó szerint a 60. §-ban biztosított gondolatszabadság és a 65. §-ában biztosított menedékhez való jog gyakorlásának körébe esnek.

2. A Pesti Központi Kerületi Bíróság az előtte folyamatban lévő ügyben 6.B.X. 20. 192/1991/28. számú végzésével az eljárást az Alkotmánybíróságról szóló 1989. évi XXXII. törvény /AB tv/ 38. § (1) bekezdésére hivatkozva felfüggesztette. A végzés szerint a Btk "ellentmondani látszik" az Alkotmány 8. § (1)-(2) és (4) bekezdésének, figyelemmel az Alkotmány 61. § (1) és (2) bekezdésében foglaltakra.

3. Az Alkotmánybíróság ülésén felszólalt a Legfelsőbb Bíróság elnöke és a legfőbb ügyész. Álláspontjuk szerint a Btk 269. §-a nem alkotmányellenes.

II.

1. A közösség elleni izgatás tényállását, a Btk jelenlegi 269. §-át a Büntető Törvénykönyv módosításáról szóló 1989. évi XXV. törvény 15. §-a állapította meg a következőképp:

" (1) Aki nagy nyilvánosság előtt
a) a magyar nemzet vagy valamely nemzetiség,
b) valamely nép, felekezet vagy faj, továbbá a lakosság egyes csoportjai ellen gyűlöletre uszít, bűntettet követ el, és három évig terjedő szabadságvesztéssel büntetendő.

(2) Aki nagy nyilvánosság előtt a magyar nemzetet, valamely nemzetiséget, népet, felekezetet vagy fajt sértő vagy lealacsonyító kifejezést használ, vagy más ilyen cselekményt követ el, vétség miatt egy évig terjedő szabadságvesztéssel, javító-nevelő munkával vagy pénzbüntetéssel büntetendő."

2. A vizsgált büntető rendelkezések szabályozásának története során mind a védett jogi tárgyak köre, mind az elkövetési magatartások módosultak. Változatlan maradt a büntetendővé nyilvánítás célja: annak a határnak törvényi megvonása, ahol a véleménynyilvánítás és ezen belül a szólás szabadsága véget ér, és ahol a büntetőjogilag tilalmazott magatartások kezdődnek.

A magyar büntetőtörvénykönyvről szóló 1878. évi V. törvénycikknek / Csemegi Kódex / az Alkotmánybíróság által vizsgált tényállás szempontjából releváns rendelkezése szerint büntetendő az, aki valamely gyülekezeten nyilvánosan, szóval, vagy aki nyomtatvány, irat, képes ábrázolat terjesztése vagy közszemlére kiállítása által valamely osztályt, nemzetiséget vagy hitfelekezetet gyűlöletre a másik ellen izgat. / 172. § (2) bek./

Az állami és társadalmi rend hatályosabb védelméről szóló 1921. évi III. törvénycikk vétség miatt büntetni rendelte azt, aki a magyar állam vagy a magyar nemzet ellen meggyalázó kifejezést használ vagy ily cselekményt követ el. /8. §/

A demokratikus államrend és a köztársaság büntetőjogi védelméről szóló 1946. évi VII. törvénycikk, a Csemegi Kódex rendelkezése helyébe a demokratikus államrend és demokratikus köztársaság, az állampolgári szabadság és jogegyenlőség elleni lázítás és izgatás tényállásait iktatta. A büntetőtörvények egyes fogyatékosságainak megszüntetéséről és pótlásáról szóló 1948. évi XLVIII. törvénycikk a demokratikus államrend és demokratikus köztársaság elleni rágalmazást kiegészítette a nemzeti, nemzetiségi és felekezeti érzület büntetőjogi védelmével.

A "Hatályos anyagi büntetőjogi szabályok hivatalos összeállítása" /BHÖ/ 1952-ben az 1946. évi VII. és az 1948. évi XLVIII. törvénycikkben megfogalmazott tényállásokat az állam belső biztonsága elleni bűncselekmények között lényegében változatlan szöveggel tartalmazta.

A Büntető Törvénykönyvről szóló 1961. évi V. törvény több ponton módosította az állam elleni bűntettek között elhelyezett izgatás szabályozását. Új bűncselekményként jelent meg a közbiztonság és közrend elleni cselekmények között a "közösség megsértése". Ez az izgatás tényállásában meghatározott magatartások enyhébb büntetését helyezte kilátásba arra az esetre, ha a cselekmény az eset összes körülményeire, különösen a bűntett indítékára, az elkövetés módjára, az elkövető személyi körülményeire tekintettel kisebb súlyú.

Az izgatás és a közösség megsértése közötti elhatárolás a jogalkalmazói gyakorlatra hárult. Tekintettel arra, hogy az elhatárolás nem csupán a büntetési mérték szempontjából volt fontos, hanem a magatartás állam elleni vagy köztörvényes bűncselekménykénti megkülönböztetése szempontjából is, az új Btk előkészítésekor igyekeztek határozottabb elhatárolási ismérvet kialakítani.

Ennek eredménye lett, hogy az 1978. évi IV. tv, a Btk eredeti 148. §-ában szabályozott "izgatás" célzatos bűncselekménnyé vált, azaz a bűnösség megállapításához többé már nem volt elegendő, hogy az elkövető csupán tudatában legyen: cselekménye alkalmas a tényállásban szereplő jogi tárgyak elleni gyűlölet felkeltésére, hanem szükséges volt, hogy szándéka kifejezetten erre irányuljon, ezt kívánja, ennek érdekében cselekedjék.

Akinek esetében a gyűlölet keltésére irányuló célzat nem volt megállapítható, az ugyanazon magatartásért a köznyugalom elleni bűncselekmények között elhelyezett közösség megsértése /eredeti 269. § (1) bek./ miatt volt büntetendő. A közösség megsértését valósította meg továbbá az, aki mások előtt a magyar nemzetet, továbbá - nemzetiségük, felekezetük, fajuk vagy szocialista meggyőződésük miatt - csoportokat vagy személyeket sértő vagy lealacsonyító kifejezést használt, avagy egyéb ilyen cselekményt követett el /eredeti 269. § (2) bek./.

A jogállami garanciák megteremtése érdekében 1989-ben a politikai jellegű bűncselekmények a sürgősen módosítandó rendelkezések között kaptak helyet. Az 1989. évi XXV. törvény az állam elleni bűncselekemények közül kiemelte az izgatást, és a köznyugalom elleni bűncselekmények között, - a büntetőjogi felelősséget lényegesen korlátozva - a "közösség elleni izgatás" új tényállását fogalmazta meg. A büntetőjogi felelősség korlátozását egyrészt a védendő jogi tárgyak körének szűkítése, másrészt a nagy nyilvánosság alaptényállási elemmé tétele eredményezte.

3. Valamennyi kontinentális jogrendszerű európai demokratikus ország, továbbá az angolszász jogterületen Anglia és Wales, Kanada, valamint Új-Zéland büntető törvényben tiltja meg a "faji" izgatást. Az izgatás, a gyűlöletkeltés és a véleménynyilvánítás szabadsága között a megfelelő határ megvonása azonban nemzetközileg is jelentős viták forrása.

III.

Az indítványok a Btk 269. § (1) bekezdésében meghatározott bűncselekményi tényállás tekintetében nem megalapozottak. A Btk 269. § (2) bekezdése azonban - figyelemmel az Alkotmány 8. § (1) és (2) bekezdésében foglaltakra - az Alkotmány 61. § (1) és (2) bekezdésében biztosított véleménynyilvánítási és sajtószabadságot szükségtelenül és aránytalanul korlátozza, ezért alkotmányellenes.

1. A Btk 269. §-át egybevetve az Alkotmány 60. § (1)

bekezdésével nyilvánvaló, hogy a gondolat szabadsága és a közösség elleni izgatás semmilyen ponton nem érintkezik. Így a büntető rendelkezés ezen alapjogot nem korlátozza, nem sérti, mert az a vélemény kinyilvánítására vonatkozik. A vitatott tényállás meghatározott magatartás megbüntetését írja elő. A büntetőjog axiómái közé tartozik, hogy pusztán a gondolat nem lehet büntetőjogi felelősségre vonás alapja.

Ugyancsak nem fedezhető fel tartalmi összefüggés a Btk 269. §-a és az Alkotmány 65. §-ának azon rendelkezése között, amely szerint a Magyar Köztársaság - a törvényben meghatározott feltételek szerint - biztosítja a menedékjogot azoknak a külföldi állampolgároknak, akiket hazájukban, illetőleg azoknak a hontalanoknak, akiket tartózkodási helyükön faji, vallási, nemzeti, nyelvi vagy politikai okokból üldöznek. Az Alkotmánybíróság állás- pontja szerint a menedékjog megszerzésének feltétele az egyénnek faji, vallási okok, nemzeti hovatartozása, illetve meghatározott társadalmi csoporthoz való tartozása, avagy politikai nézetei miatti üldözéstől való megalapozott félelme, nem pedig az elhagyott ország népe elleni gyűlöletre uszítás, illetve azt sértő, lealacsonyító kifejezések használata. A menedékjog, mint alkotmányos alapjog és a Btk 269. §-a között releváns öszefüggés nincs, így ellentétük sem mutatható ki.

2. 1. A Btk 269. §-a az Alkotmány 61. § (1) bekezdésében meghatározott véleménynyilvánítási szabadság és a (2) bekezdésben megjelölt sajtószabadság tényleges korlátozását, határainak a felelősségi rendszer legsúlyosabb eszközével, a büntetőjogi szankcióval való kijelölését jelenti.

Valamennyi alkotmányos alapjog tekintetében fontos kérdés, hogy azokat lehet-e és milyen feltételekkel megszorítani, korlátozni, kollíziójuk esetén milyen szempontok alapján kell a prioritást meghatározni. A véleménynyilvánítás, illetve az ebbe beletartozó sajtószabadság esetén ez a kérdés kiemelt jelentőséget kap, mivel ezen szabadságok a plurális, demokratikus társadalom alapvető értékei közé tartoznak.

Éppen ezért a véleménynyilvánítás szabadságának kitüntetett szerepe van az alkotmányos alapjogok között, tulajdonképpen "anyajoga" többféle szabadságjognak, az un. "kommunikációs" alapjogoknak. Ebből eredő külön nevesített jogok a szólás - és a sajtószabadság, amely utóbbi felöleli valamennyi médium szabadságát, továbbá az informáltsághoz való jogot, az információk megszerzésének szabadságát. Tágabb értelemben a véleménynyilvánítási szabadsághoz tartozik a művészi, irodalmi alkotás szabadsága és a művészeti alkotás terjesztésének szabadsága, a tudományos alkotás szabadsága és a tudományos ismeretek tanításának szabadsága. Ez utóbbiak tiszteletben tartásáról és védelméről az Alkotmány

70/G. §-ában külön is rendelkezik. A véleménynyilvánítási szabadsághoz kapcsolódik a lelkiismereti és vallásszabadság /60. §/, valamint a gyülekezési jog is /62. §/.

Ez a jogegyüttes teszi lehetővé az egyén megalapozott részvételét a társadalmi és politikai folyamatokban. Történelmi tapasztalat, hogy mindannyiszor, amikor a véleménynyilvánítás szabadságát korlátozták, sérelmet szenvedett a társadalmi igazságosság, az emberi kreativitás, csökkent az emberben rejlő képességek kibontakozásának lehetősége. A káros következmények nem csupán az individuum, hanem a társadalom életében is megmutatkoztak és az emberiség fejlődésének sok szenvedéssel járó zsákutcájához vezettek. Az eszmék, nézetek szabad kifejtése, a mégoly népszerűtlen vagy sajátos elképzelések szabad megnyilvánulása a fejlődni- képes és valóban eleven társadalom létezésének alapfeltétele.

2. 2. Az Alkotmány 8. §-ában rögzíti, hogy a Magyar Köztársaság elismeri az ember sérthetetlen és elidegeníthetetlen alapvető jogait, ezek tiszteletben tartása és védelme az állam elsőrendű kötelessége. Az alapvető jogokra és kötelességekre vonatkozó szabályokat törvény állapítja meg, alapvető jog lényeges tartalmát azonban nem korlátozhatja.

Az állam akkor nyúlhat az alapjog korlátozásának eszközéhez, ha másik alapvető jog és szabadság védelme vagy érvényesülése, illetve egyéb alkotmányos érték védelme más módon nem érhető el. Az alapjog korlátozásának alkotmányosságához tehát önmagában nem elegendő, hogy az másik alapjog vagy szabadság védelme vagy egyéb alkotmányos cél érdekében történik, hanem szükséges, hogy megfeleljen az arányosság követelményeinek: az elérni kívánt cél fontossága és az ennek érdekében okozott alapjogsérelem súlya megfelelő arányban legyen egymással. A törvényhozó a korlátozás során köteles az adott cél elérésére alkalmas legenyhébb eszközt alkalmazni. Alkotmányellenes a jog tartalmának korlátozása, ha az kényszerítő ok nélkül, önkényesen történik vagy ha a korlátozás súlya az elérni kívánt célhoz képest aránytalan.

Az Alkotmánybíróság a terhességmegszakítás alkotmányossági kérdéseivel foglalkozó határozatában kifejtette azt is, hogy az állam kötelessége az alapvető jogok "tiszteletben tartására és védelmére" az egyéni alapjogokkal kapcsolatban nem merül ki abban, hogy tartózkodnia kell megsértésüktől, hanem magában foglalja azt is, hogy gondoskodnia kell az érvényesülésükhöz szükséges feltételekről. Az emberek egyéni szabadságuk és személyes igényeik szempontjából gyakorolják alapjogaikat. Az államnak viszont arra van szüksége garanciális feladata ellátásához, hogy az egyes alanyi jogok biztosítása mellett az azokkal kapcsolatos értékeket és élethelyzeteket önmagukban is, azaz ne csupán egyes egyedi

igényekhez kapcsolódóan védje, s a többi alapjoggal összefüggésben kezelje. Az állam számára az alapjogok védelme csupán része az egész alkotmányos rend fenntartásának és működtetésének /64/1991. (XII. 17.)AB hat./.

Az egyéni véleménynyilvánítási szabadság szubjektív joga mellett tehát az Alkotmány 61. §-ából következik a demokratikus közvélemény kialakulása feltételeinek és működése fenntartásának biztosítására irányuló állami kötelezettség. A szabad véleménynyilvánításhoz való jog objektív, intézményes oldala nemcsak a sajtószabadságra, oktatási szabadságra, stb. vonatkozik, hanem az intézményrendszernek arra az oldalára is, amely a véleménynyilvánítási szabadságot általánosságban a többi védett érték közé illeszti. Ezért a véleménynyilvánítási szabadság alkotmányos határait úgy kell meghatároznia, hogy azok a véleményt nyilvánító személy alanyi joga mellett a közvélemény kialakulásának, illetve szabad alakításának a demokrácia szempontjából nélkülözhetetlen érdekét is figyelembe vegyék.

Tekintettel arra, hogy a vizsgálat tárgya a véleménynyilvánítási szabadságnak a büntetőjog eszközeivel történő korlátozása, az alkotmányosság megítélésénél érvényesülnie kell a büntetőjog egész rendszerére vonatkozó alkotmányos követelményeknek is. Ezek forrása az alkotmányos büntetőjog koncepciója, a jogállamiságból, mint alapértékből az állami büntetőhatalom gyakorlására háramló következmények rendszere, ezen belül pedig a büntető jogalkotás számára adódó tartalmi korlátok és formai követelmények.

Ennek megfelelően az Alkotmánybíróság a Btk 269. §-a alkotmányosságának megítélésénél a következő kérdéseket vizsgálta:

- elkerülhetetlenül szükséges-e a véleménynyilvánítás és sajtószabadság korlátozása a tényállásban leírt magatartások esetén,

- a korlátozás megfelel-e az arányosság követelményeinek, azaz az elérni kívánt célhoz a büntetőjog eszközrendszere általában és ezen belül az adott büntető tényállás szükséges és megfelelő-e.

A büntető tényállás két magatartási típust szankcionál: a gyűlöletkeltést /gyűlöletre uszít/ és a megvetés kifejezésre juttatását /sértő vagy lealacsonyító kifejezések használata, vagy ilyen cselekmény elkövetése/. A Btk 269. § (1) és (2) bekezdésében foglalt bűncselekmények mind az elkövetési magatartást magát, mind pedig veszélyességüket tekintve

lényegesen eltérnek, így az Alkotmánybíróság e két elkövetési magatartás alkotmányosságát külön vizsgálta.

IV.

A Btk 269. § (1) bekezdésében büntetni rendelt magatartások tekintetében az Alkotmánybíróság a következőket állapította meg.

1. A gyűlöletkeltésnek, az emberek egyes csoportjait megvető, megalázó megnyilvánulásoknak potenciálisan kártékony voltáról az emberiség bőséges történelmi tapasztalatokkal rendelkezik.

A szavak erejére már 1878-ban a Csemegi Kódex miniszteri indokolása így hívta fel a figyelmet: "Az eszmék szabad közlése, a minek legszebb vívmányait köszönheti az emberiség, ép oly ártalmassá válhatik, mint a tűz, mely világít és melegít, de mely ellenőrizetlenül és féktelenül csapongva, igen gyakran nagy szerencsétlenségnek, sok nyomornak és pusztulásnak lett már okozója."

Századunk súlyos történelmi tapasztalatai bizonyítják, hogy a faji, etnikai, nemzetiségi, vallási szempontú alsóbb- vagy felsőbbrendűséget hirdető nézetek, a gyűlölködés, megvetés, kirekesztés eszméinek terjesztése az emberi civilizáció értékeit veszélyeztetik.

Történelmileg és napjaink eseményei által is igazolt, hogy az emberek meghatározott csoportja elleni gyűlöletkeltési szándékot kifejező bármely megnyilvánulás alkalmas a társadalmi feszültségek kiélezésére, a társadalmi harmónia és béke megzavarására, legsúlyosabb kifejletében a társadalom egyes csoportjai közötti erőszakos összeütközésekre.

A gyűlöletkeltés legszélsőségesebb, már ténylegesen bekövetkezett kártékony hatását bizonyító történelmi és jelenkori tapasztalatok mellett figyelembe kell venni azokat a mindennapi veszélyeket is, amelyek a gyűlölet felkeltésére alkalmas nézetek, eszmék korlátok nélküli kinyilvánításával járnak. E megnyilvánulások akadályozzák, hogy az emberek bizonyos közösségei harmonikus kapcsolatban éljenek más csoportokkal. Ez, növelve egy adott, kisebb vagy nagyobb közösségen belüli érzelmi, szociális feszültségeket, szétszakítja a társadalmat, erősíti a szélsőségeket, az előítéletességet és intoleranciát. Mindez csökkenti a plurális értékrendet, a különbözőséghez való jogot elismerő, toleráns, multikulturális, az emberek egyenlő méltóságának elismerésén alapuló, a diszkriminációt értékként el nem

ismerő társadalom kialakulásának esélyét.

2. A véleménynyilvánítás és sajtószabadság körében az emberek meghatározott csoportjai elleni gyűlöletkeltés alkotmányos védelemben részesítése feloldhatatlan ellentmondásban lenne az Alkotmányban kifejezésre jutó politikai berendezkedéssel és értékrenddel, a demokratikus jogállamiságra, az emberek egyenlőségére, egyenlő méltóságára, valamint a diszkrimináció tilalmára, a lelkiismereti és vallásszabadságra, a nemzeti, etnikai kisebbségek védelmére, elismerésére vonatkozó alkotmányos tételekkel.

Az Alkotmány 2. § (1) bekezdése szerint a Magyar Köztársaság demokratikus jogállam. A demokrácia fogalma rendkívül összetett. A vizsgált kérdés szempontjából azonban lényeges, hogy tartalmilag jelenti a különbözőséghez való jogot, a kisebbségek védelmét, az erőszakról és az erőszakkal fenyegetésről, mint a konfliktusmegoldás eszközeiről való lemondást.

A gyűlöletkeltés a fenti tartalmi jegyek tagadása, az erőszak érzelmi előkészítése. Visszaélés a véleménynyilvánítás szabadságával, az emberek meghatározott csoportjának, egy kollektivitásnak olyan intoleráns minősítése, amely nem a demokrácia, hanem a diktatúra jellemzője. A véleménynyilvánítási és sajtószabadság gyakorlása olyan formáinak eltűrése, amelyet a Btk 269. § (1) bekezdése tilalmaz, ellentmondana a demokratikus jogállamiságból fakadó követelményeknek.

Az Alkotmány 54. § (1) bekezdése szerint minden embernek veleszületett joga van az emberi méltósághoz. Így tehát az emberi méltóság a véleménynyilvánítási szabadság korlátja lehet.

3. A véleménynyilvánítási és sajtószabadság korlátozásának szükségessége következik a magyar állam nemzetközi kötelezettségeiből is. Az Alkotmány 7. § (1) bekezdése szerint a Magyar Köztársaság jogrendszere elfogadja a nemzetközi jog elismert szabályait, biztosítja a vállalt nemzetközi jogi kötelezettségek és a belső jog összhangját. A vizsgált kérdés tekintetében fennálló nemzetközi kötelezettségek a következők:

3. 1. Az Egyesült Nemzetek Közgyűlése XXI. ülésszakán, 1966. december 16-án elfogadott, az 1976. évi 8. törvényerejű rendelettel kihirdetett Polgári és Politikai Jogok Egyezségokmánya rögzíti a gondolatszabadságot /18.c./, valamint a szabad véleménynyilvánításhoz való jogot /19.c./.

Ez utóbbi szerint:
1. Nézetei miatt senki sem zaklatható.

2. Mindenkinek joga van szabad véleménynyilvánításra; ez a jog magában foglalja mindenfajta adat és gondolat határokra való tekintet nélküli - szóban, írásban, nyomtatásban, művészi formában vagy bármilyen más tetszése szerinti módon történő - keresésének, megismerésének és terjesztésének a szabadságát is.

3. Az e cikk 2. bekezdésében meghatározott jogok gyakorlása különleges kötelességekkel és felelősséggel jár. Ennélfogva az bizonyos korlátozásoknak vethető alá, ezek azonban csak olyanok lehetnek, amelyeket a törvény kifejezetten megállapít és amelyek

a) mások jogainak vagy jóhírnevének tiszteletben tartása, illetőleg

b) az állambiztonság vagy a közrend, a közegészség vagy a közerkölcs védelme érdekében szükségesek."

Határozottabb állásfoglalást tartalmaz a 20. cikk 2. bekezdése: "Törvényben kell megtiltani a nemzeti, faji vagy vallási gyűlölet bármilyen hirdetését, amely megkülönböztetésre, ellenségeskedésre vagy erőszakra izgat."

3. 2. A magyar állam számára jogi kötelezettséggel jár a 1969. évi 1. tvr-rel kihirdetett, a faji megkülönböztetés valamennyi formájának kiküszöböléséről szóló nemzetközi egyezmény.

Az Egyezmény 4. cikke szerint a részes államok

a) " törvény által büntetendő cselekménnyé nyilvánítják a faji felsőbbrendűségre vagy gyűlöletre alapozott eszmék terjesztését, a faji megkülönböztetésre való izgatást, valamint bármely faj, illetve más színű vagy más etnikai származású személyek csoportja ellen irányuló minden erőszakos cselekedetet vagy arra való izgatást, továbbá fajgyűlölő tevékenység mindenféle támogatását, annak pénzelését is beleértve;

b) Törvényellenessé nyilvánítanak és betiltanak minden olyan szervezetet, valamint szervezett és minden egyéb propagandatevékenységet, amely a faji megkülönöztetést előmozdítja vagy arra izgat, az ilyen szervezetekben vagy

tevékenységben való részvételt pedig törvény által büntetendő cselekménynek tekintik;

c) nem engedik meg, hogy országos vagy helyi hatóságok vagy közintézmények a faji megkülönböztetést előmozdítsák vagy arra izgassanak."

3. 3. Az emberi jogok és alapvető szabadságok védelméről szóló Európai Egyezmény nem tartalmaz közvetlen kötelezettséget az államok számára az izgatás bűncselekménnyé nyilvánítására, hanem elsősorban a véleménynyilvánítási jog korlátozásának miként jét szabályozza.

Az Egyezmény 10. cikke szerint:
"1. Mindenkinek joga van a véleménynyilvánítás szabadságához. E jog magában foglalja a véleményalkotás szabadságát és az információk, eszmék megismerésének és átadásának szabadságát országhatárokra tekintet nélkül és anélkül, hogy ebbe hatósági szervnek joga lenne beavatkozni. E cikk nem képezi akadályát annak, hogy az államok a rádió-, mozgókép- vagy televízióvállalatok működését engedélyezéshez kössék.

2. E kötelezettségekkel és felelősséggel együttjáró szabadságok gyakorlása a törvényben meghatározott olyan alakszerűségeknek, feltételeknek, korlátozásoknak vagy szankcióknak vethető alá, amelyek szükséges intézkedéseknek minősülnek egy demokratikus társadalomban a nemzetbiztonság, a területi integritás, a közbiztonság, a zavargás vagy bűncselekmény megelőzése, a közegészség vagy az erkölcsök védelme, mások jó hírneve vagy jogai védelme, a bizalmas információ közlésének megakadályozása, a bíróságok tekintélyének és pártatlanságának fenntartása céljából."

Az Emberi Jogok Európai Bizottsága több határozatában úgy foglalt állást, hogy a 10. cikk 2. pontja értelmében a fajgyűlölő közlések megtiltása a szabad véleménynyilvánítás érvényes korlátozásának tekintendő.

Az Alkotmánybíróság álláspontját összegezve: a véleménynyilvánítás és sajtószabadság korlátozását mind az emberek meghatározott csoportjai elleni gyűlöletkeltésnek történelmileg bizonyítottan kártékony hatása, mind az alkotmányos alapértékek védelme, továbbá a Magyar Köztársaság nemzetközi kötelezettségeinek teljesítése szükségszerűvé és indokolttá teszi.

4. A büntetőjog a jogi felelősségi rendszerben az ultima ratio. Társadalmi rendeltetése, hogy a jogrendszer egészének

szankciós zárköve legyen. A büntetőjogi szankció, a büntetés szerepe és rendeltetése a jogi és erkölcsi normák épségének fenntartása akkor, amikor már más jogágak szankciói nem segítenek.

Az alkotmányos büntetőjogból fakadó tartalmi követelmény, hogy a törvényhozó a büntetendő magatartások körének meghatározásakor nem járhat el önkényesen. Valamely magatartás büntetendővé nyilvánításának szükségességét szigorú mércével kell megítélni: a különböző életviszonyok, erkölcsi és jogi normák védelmében az emberi jogokat és szabadságokat szükségképpen korlátozó büntetőjogi eszközrendszert csak a feltétlenül szükséges esetben és arányos mértékben indokolt igénybe venni, akkor, ha az alkotmányos vagy az Alkotmányra visszavezethető állami, társadalmi, gazdasági célok, értékek megóvása más módon nem lehetséges.

Az Alkotmánybíróság álláspontja szerint a Btk 269. § (1) bekezdésében tilalmazott magatartásnak a korábban elemzett, az egyént és a társadalmat érintő hatásai, következményei olyan súlyosak, hogy más felelősségi formák, így a szabálysértési vagy polgári jogi felelőségi rendszerek eszközei elégtelenek az ilyen magatartások tanusítóival szemben. E magatartások helytelenítésének, elítélésének erőteljes kifejezése, azon demokratikus eszméknek, értékeknek megerősítése, amelyek ellen e cselekmények elkövetői támadnak, valamint a megsértett jog és erkölcsi rend helyreállítása a büntetőjog eszközeit igényli.

5. Végül vizsgálandó kérdés, hogy a Btk 269. § (1) bekezdése mértéktartó és megfelelő választ ad-e a veszélyesnek, nem kívánatosnak ítélt jelenségre, azaz az alkotmányos alapjogok korlátozása esetén irányadó követelménynek megfelelően a cél eléréséhez a lehetséges legszűkebb körre szorítkozik-e. Az alkotmányos büntetőjog követelményei szerint a büntetőjogi szankció kilátásba helyezésével tilalmazott magatartást leíró diszpozíciónak határozottnak, körülhatároltnak, világosan megfogalmazottnak kell lennie. Alkotmányossági követelmény a védett jogtárgyra és az elkövetési magatartásra vonatkozó törvényhozói akarat világos kifejezésre juttatása. Egyértelmű üzenetet kell tartalmaznia, hogy az egyén mikor követ el büntetőjogilag szankcionált jogsértést. Ugyanakkor korlátoznia kell az önkényes jogértelmezés lehetőségét a jogalkalmazók részéről. Vizsgálni kell tehát, hogy, a tényállás a büntetendő magatartások körét nem túl szélesen jelöli-e ki és elég határozott-e.

A Btk 269. § (1) bekezdése megfelel a korlátozással szemben támasztott követelményeknek. Amint a határozat II/2. pontjában adott történeti áttekintés mutatja, az 1989-es módosítás a büntetőjogi felelősség lényeges szűkítését

eredményezte több ponton:

- A védendő jogi tárgyak közül elmaradt az alkotmányos rend, valamint az állam szövetségi, barátsági vagy együttműködésre irányuló egyéb nemzetközi kapcsolata.

Ennek következtében az ezen intézmények elleni gyűlöletre uszítás kiesett a büntetendő magatartások közül. A büntetőjog eszközrendszere csak akkor lép működésbe, ha valaki az alkotmányos rend erőszakos megváltoztatásaként /139. §/, az alkotmányos rend elleni szervezkedésként /139/A. §/, lázadásként /140. §/, hazaárulásként /141. §/ stb. minősülő magatartást tanúsít, amely a gyűlöletkeltéshez képest lényegesen több tevékenységet kíván meg.

- Az izgatás korábbi tényállásának súlyosabban minősített esete, a nagy nyilvánosság előtti elkövetés vált a közösség elleni izgatás alaptényállásává. Ennek fogalmát egyrészt maga a törvény, a 137. § 10. pontja határozza meg. Eszerint "nagy nyilvánosságon a bűncselekménynek sajtó, egyéb tömegtájékoztatási eszköz vagy sokszorosítás útján elkövetését is érteni kell". Másrészt e fogalom tartalma a büntető jogalkalmazásban régóta kialakult.

A közösség elleni izgatás az eredeti izgatáshoz képest kétségtelenül szélesítette a büntetőjogi felelősséget azzal, hogy a tényállás nem célzatos, azaz a bűnösség megállapításához nem szükséges a gyűlöletkeltés kifejezett, egyenes szándéka, elegendő csupán az, hogy az elkövető tudatában legyen: magatartása a gyűlölet kiváltására alkalmas.

A tényállásban a jogi tárgyak közül értelmezést igényel a lakosság egyes csoportjai kitétel. E mögött az eltérő nézetrendszer (párttagok, egyesületek, mozgalmak stb. résztvevői) vagy egyéb, tulajdonképpen bármely ismérv szerint elkülönülő személyek védelmének szándéka húzódik meg.

Értelmezést igényel továbbá a gyűlöletre uszításban megjelölt elkövetési magatartás. Önmagukban a szavak is általánosan ismert tartalommal bírnak. A gyűlölet az egyik legszélsőségesebb, negatív, a Magyar Nyelv Értelmező Szótára szerint (2. kötet 1132. o.) nagyfokú ellenséges indulat. Aki uszít, az valamely személy, csoport, szervezet, intézkedés ellen ellenséges magatartásra, ellenséges, kárt okozó tevékenységre biztat, ingerel, lázít (Értelmező Szótár 7. kötet 59. o.).

Tekintettel arra, hogy már a Csemegi Kódexben is a

gyűlöletre izgatás volt az elkövetési magatartás, a jogalkalmazók a konkrét esetek megítélésében több mint 100 év értelmezési gyakorlatára támaszkodhatnak. A Curia már a századfordulón több döntésében nagy szabatossággal határozta meg meg az izgatás fogalmát: A törvény eme kifejezés alatt "izgat" nem valamely kedvezőtlen és sértő véleménynek nyilvánítása, hanem olyan lázongó kifakadások értendők, amelyek alkalmasak arra, hogy az emberek nagyobb tömegében a szenvedélyeket oly magas fokra lobbantsák, amelyből gyűlölet keletkezvén, a társadalmi rend és béke megzavarására vezethet (Büntetőjogi Döntvénytár 7. köt. 272. l.) . Nem izgatás tehát a bírálat, helytelenítés, kifogásolás, sőt még a sértő nyilatkozat sem; izgatásról csak akkor van szó, midőn a kifejezések, megjegyzések stb. nem az értelemhez szólnak, hanem az érzelmi világra akarnak hatni s szenvedélyek, ellenséges indulatok felkeltésére alkalmasak. Az izgatás fogalmát illetően egyébként teljesen közömbös, hogy az állított tények valóak-e vagy sem; a lényeges az, hogy bár való, vagy valótlan adatoknak csoportosítása a gyűlölet felkeltésére alkalmas legyen (Büntetőjogi Döntvénytár 1. köt. 124. l.) .

A közösség elleni izgatás súlyosabb alakzata, a gyűlöletre uszítás tényállása tehát megfelel az arányosság követelményének: csak a legveszélyesebb magatartásokra terjed ki és a tényállási elemek a jogalkalmazók részéről egyértelműen értelmezhetők. Az a tény, hogy a Btk eredeti tényállásai még a közelmúltban is alkalmat teremtettek a véleménynyilvánítási szabadság olyan korlátozására, amely a demokratikus értékrend szerint nem elfogadható, önmagában nem érv a tényállás alkotmányellenessége mellett. Csupán azt bizonyítja, hogy a büntetőjog eszközeivel való visszaélés igen korlátozottan védhető ki a tényállások pontos megfogalmazásával. Az igazi védelmet a demokratikus jogállam intézményeinek működése, a bíróságok valódi függetlensége, a demokratikus értékeknek elkötelezett társadalmi környezet megteremtése biztosíthatja.

V.

1. A szabad véleménynyilvánításhoz való jog a fentiek szerint nem csupán alapvető alanyi jog, hanem e jog objektív, intézményes oldalának elismerése egyben a közvélemény, mint alapvető politikai intézmény garantálását is jelenti. A szabad véleménynyilvánítás jogának kitüntetett szerepe ugyan nem vezet arra, hogy ez a jog - az élethez, vagy az emberi méltósághoz való joghoz hasonlóan - korlátozhatatlan lenne, de mindenképpen azzal jár, hogy a szabad véleménynyilvánításhoz való jognak valójában igen kevés joggal szemben kell csak engednie, azaz a véleményszabadságot korlátozó törvényeket megszorítóan kell értelmezni. A vélemény szabadságával szemben mérlegelendő korlátozó törvénynek nagyobb a súlya, ha közvetlenül másik alanyi alapjog érvényesítésére és védelmére szolgál, kisebb,

ha ilyen jogokat csakis mögöttesen, valamely " intézmény " közvetítésével véd, s legkisebb, ha csupán valamely elvont érték önmagában a tárgya (pl. a köznyugalom) .

2. A Btk 269. § (1) bekezdésének elkövetési magatartása a "gyűlölöletre uszítás". A Curia idézett meghatározása az akkori "izgatásra" nézve nyilvánvalóvá teszi, hogy olyan magatartások értendők ide, "amelyek alkalmasak arra, hogy az emberek nagyobb tömegében a szenvedélyeket oly magas fokra lobbantsák, amelyből gyűlölet keletkezvén, a társadalmi rend és béke megzavarására vezethet." A társadalmi rend és béke - a Btk szóhasználatával a köznyugalom - ilyen megzavarása mögött ott van nagyszámú egyéni jog megsértésének a veszélye is: a csoport ellen felszított indulat fenyegeti a csoporthoz tartozók becsületét, méltóságát (szélsőséges esetben életét is), megfélemlítéssel korlátozza őket más jogaik gyakorlásában is (köztük a szabad vélemény-nyilvánításban) . Az (1) bekezdésben szankcionált magatartás olyan veszélyt hordoz egyéni jogokra is, amelyek a közvetlen tárgyként szereplő köznyugalomnak olyan súlyt adnak hogy - a IV. pontban történt kifejtés szerint - a véleményszabadság korlátozása szükségesnek és arányosnak tekinthető. Noha a mérlegelés gyakorlati eredménye hasonló, ebben a gondolatmenetben nem csupán a köznyugalom megzavarásának intenzitásáról van szó, amely egy bizonyos mérték fölött ("clear and present danger") igazolja a szabad véleménynyilvánításhoz való jog korlátozását. Itt az a döntő, hogy mi került veszélybe: az uszítás az alkotmányos értékrendben szintén igen magasan álló alanyi jogokat veszélyeztet.

A "gyalázkodásnál" ezzel szemben nem tényállási elem a sértő kifejezésnek vagy azzal egyenértékű cselekménynek a köznyugalom megzavarására alkalmas volta. A "gyűlöletre uszítással" ellentétben az elkövetési magatartásból sem következtethető ez ki. A Btk abból indul ki, hogy a nemzeti vagy vallási közösségekre nézve sértő kifejezés használata általában ellentétes a társadalom kívánatos nyugalmával. Ez az immateriális bűncselekményi tényállás tehát a közrendet, a köznyugalmat, a társadalmi békét önmagában véve, elvontan védi. A bűncselekmény megalósul akkor is, ha a sértő kifejezés a körülmények folytán nem jár annak veszélyével sem, hogy egyéni jogokon sérelem esne. A köznyugalom ilyen elvont veszélyeztetése nem elégséges érv ahhoz, hogy a véleménynyilvánítási szabadságot büntetőjogi büntetéssel alkotmányosan korlátozni lehessen.

3. A szabad véleménynyilvánításhoz való jog a véleményt annak érték- és igazságtartalmára tekintet nélkül védi. Egyedül ez felel meg annak az ideológiai semlegességnek, amelyet az Alkotmánynak az 1990. évi XL. törvénnyel való módosítása azzal fejezett ki, hogy törölte az Alkotmány 2. §-ából az 1989. októberében - éppen a pluralizmus példájaként - szerepeltetett fő eszmei irányzatokat is. A

véleménynyilvánítás szabadságának külső korlátai vannak csak; amíg egy ilyen alkotmányosan meghúzott külső korlátba nem ütközik, maga a véleménynyilvánítás lehetősége és ténye védett, annak tartalmára tekintet nélkül. Vagyis az egyéni véleménynyilvánítás, a saját törvényei szerint kialakuló közvélemény, és ezekkel kölcsönhatásban a minél szélesebb tájékozottságra épülő egyéni véleményalkotás lehetősége az, ami alkotmányos védelmet élvez. Az Alkotmány a szabad kommunikációt - az egyéni magatartást és a társadalmi folyamatot - biztosítja, s nem annak tartalmára vonatkozik a szabad véleménynyilvánítás alapjoga. Ebben a processzusban helye van minden véleménynek, jónak és károsnak, kellemesnek és sértőnek egyaránt - különösen azért, mert maga a vélemény minősítése is e folyamat terméke.

Az általa helyesnek tartott véleményeket mindenki - az állam is - támogathatja, s a helytelennek tartott ellen felléphet, mindaddig, amíg ezzel valamely más jogot nem sért olyan mértékben, hogy az előtt a véleményszabadságnak is vissza kell lépnie. A Btk 269. § (2) bekezdése azonban nem külső korlátot állít, hanem valójában a vélemény értéktartalma alapján minősít - s ehhez a köznyugalom sérelme csak feltételezés és statisztikai valószínűség révén kapcsolódik.

Nem alkotmányossági, hanem a büntetőjogra tartozó kérdés, hogy mihez képest minősül a kifejezés sértőnek vagy lealacsonyítónak. Egyes szavak stilisztikai értéke azonban annyira szituációhoz és kulturális szinthez kötött (és változó), hogy a büncselekményi tényállásba felvett hipotetikus ("alkalmas") vagy tényleges visszacsatolás nélkül (valóban megzavarta a köznyugalmat) a gyalázkodással a köznyugalomban okozott sérelem olyan feltételezés csupán, amely a szabad véleménynyilvánítás korlátozását kielégítően nem indokolhatja. Itt ugyanis a külső korlát megléte, azaz más jog sérelme, maga is bizonytalan. Ezzel a véleménynyilvánításhoz való jog korlátozása elkerülhetetlenségének és arányosságának vizsgálata idő előttivé válik.

A "köznyugalom" ráadásul maga sem független a véleményszabadság helyzetétől. Ahol sokféle véleménnyel találkozhatnak az emberek, a közvélemény toleráns lesz; míg zárt társadalmakban sokkal inkább felkavarhatja a köznyugalmat egy-egy szokatlan hang is. Másrészt a véleménynyilvánítás szükségtelen és aránytalanul szigorú korlátozása a társadalom nyitottsága ellen hat.

Az Alkotmánybíróság tekintettel van az egyes ügyek történelmi körülményeire. A rendszerváltás elkerülhetetlenül társadalmi feszültségekkel jár. E feszültségeket kétségtelenül fokozhatja, ha egyesek büntetlenül adhatnak kifejezést nagy nyilvánosság előtt bizonyos csoportokkal szembeni gyűlöletüknek, megvetésüknek vagy ellenérzésüknek.

A sajátos történelmi körülményeknek azonban van egy másfajta hatása is, s éppen ezért szükséges különbséget tenni a gyűlöletre uszítás és a sértő vagy lealacsonyító kifejezés használata között. A "nagy nyilvánosság" - a gyűlésektől eltekintve - gyakorlatilag a sajtónyilvánosságot jelenti. A létrejött sajtószabadságban senki nem hivatkozhat külső kényszerre, aki a nyilvánosság elé lép, minden sorral, amit leír, magát adja és teljes erkölcsi hitelét kockáztatja. Politikai kultúra és egészségesen reflektáló közvélemény csakis öntisztulással alakulhat ki. Aki tehát gyalázkodik, magát bélyegzi meg, s lesz a közvélemény szemében "gyalázkodó". A gyalázkodásra bírálat kell hogy feleljen.

E folyamatba tartozik az is, hogy számolni kelljen magas kártérítésekkel. Büntetőjogi büntetésekkel azonban nem a közvéleményt és a politikai stílust kell formálni - ez paternalista hozzáállás -, hanem más jogok védelmében az elkerülhetetlenül szükséges esetekben szankcionálni.

4. A Btk 269. § (2) bekezdése a fent kifejtettek alapján alkotmányellenes és ezért azt az Alkotmánybíróság megsemmisíti. A köznyugalom fenntartásához nem elkerülhetetlen, hogy a magyar nemzetet, valamely nemzetiséget, népet, felekezetet vagy fajt sértő vagy lealacsonyító kifejezés nagy nyilvánosság előtti használatát önmagában véve (illetve az ezzel egyenértékő cselekményt) büntetőjogi büntetéssel fenyegesse a törvény. Ez a törvényi tényállás szükségtelenül, és az elérni kívánt célhoz képest aránytalanul korlátozza a szabad véleménynyilvánításhoz való jogot. A köznyugalom elvont, esetleges fenyegetettsége nem elégséges indok arra, hogy a véleménynyilvánításhoz való alapjogot, amely a demokratikus jogállam működéséhez nélkülözhetetlen, a büntetőtörvény a 269. § (2) bekezdése szerint korlátozza. Az Alkotmánybíróság határozata szerint a közösségek méltósága a véleménynyilvánítási szabadság alkotmányos korlátja lehet. Nem zárja ki tehát a határozat azt, hogy erről a törvényhozó akár a gyűlöletre uszítás tényállásán túlmenő büntetőjogi védelemmel is gondoskodjék. A közösségek méltóságának hatékony védelmére azonban más jogi eszköz, például a nem vagyoni kártérítés alkalmazási lehetőségeinek bővítése is alkalmas.

5. A Btk 269. § (2) bekezdése alapján folyt, jogerősen lezárt büntetőeljárások felülvizsgálatának elrendelése az AB tv 43. § (3) bekezdésén alapul.

Budapest, 1992. május 18.

Dr. Sólyom László

előadó alkotmánybíró
az Alkotmánybíróság elnöke

Dr. Ádám Antal
alkotmánybíró

Dr. Herczegh Géza
alkotmánybíró

Dr. Kilényi Géza
alkotmánybíró

Dr. Lábady Tamás
alkotmánybíró

Dr. Schmidt Péter
alkotmánybíró

Dr. Szabó András
előadó alkotmánybíró

Dr. Tersztyánszky Ödön
alkotmánybíró

Dr. Vörös Imre
alkotmánybíró

Dr. Zlinszky János
alkotmánybíró

Első / előző / következő / utolsó dokumentum Becsuk

12. Hungary

12.1 Legislation prohibiting incitement to national, racial and religious hatred

The present constitutional position with respect to the balance to be found between freedom of expression and the prohibition of hate speech make it impossible to predict when the Additional Protocol to the Convention on Cybercrime will be ratified.
Amendments to Article 269 of the Criminal Code adopted in December 2003 were struck down by the Constitutional Court, which considered that they infringed the acceptable limits on freedom of expression as protected by the Constitution. In its decision (No. 18/2004), it reaffirmed its previous case-law (Decisions Nos. 30/1992 and 12/1999, themselves relying on positions taken by the Supreme Court at the turn of the twentieth century), reasoning that the legislator could limit freedom of speech through criminal sanctions only in cases of the most dangerous conduct, i.e. behaviour capable of whipping up such intense emotions in the majority of the people that, upon giving rise to hatred, they could result in the disturbance of the public peace; moreover, the Court stressed that an abstract threat is insufficient to meet this threshold: the danger to the public peace must be "clear and present".

As a result of this judgment – and whereas, in the views of many actors involved in combating racism, the Constitution could be interpreted differently – incitement against specific communities is not criminalised, and only the most extreme forms of hate speech, i.e. incitement liable to provoke immediate violent acts, are presently outlawed under Article 269 of the Hungarian Criminal Code. Moreover, as currently interpreted by the Constitutional Court, the Constitution appears to leave only a very narrow margin to legal draftsmen in defining what action may constitute a criminal offence when the freedom of speech has to be balanced against the protection of others' rights. Two new attempts have been made since this judgment was delivered to introduce broader prohibitions on hate speech into Hungarian law. In early 2008, on the initiative of six of its members, Parliament enacted a new amendment to the Criminal Code, taking a new approach based on abuse, and which would allow the prosecutor to initiate an investigation on broader grounds, including non-verbal abuse (such as the use of Nazi salutes). In October 2007, at the government's initiative, Parliament had also already amended the Civil Code. Previously, only identifiable individuals who were personally targeted by insulting or defamatory statements could seek civil law remedies such as damages; under the 2007 amendments, this right would be extended to individuals or associations belonging to a group of people generally targeted by broadly defined insults based on national, ethnic or racial identity.

However, neither of these sets of provisions has come into force, as they were each referred to the Constitutional Court for review prior to their promulgation. The Court was asked to examine the provisions from a number of angles, including possibly disproportionate limits on freedom of expression, questions as to whether the provisions were sufficiently clear to ensure legal certainty, possible discrimination against persons who are not members of minority groups protected by the provisions, and possible infringements of the right to selfdetermination of members of civil society organisations

who did not feel insulted by a given statement but whose association decided to initiate legal proceedings. On 30 June 2008, the Constitutional Court found the 2008 amendments to the Criminal Code unconstitutional. At the time of writing, the result of the review of the Civil Code was not yet known.

Article 269B of the Criminal Code prohibits the use of certain totalitarian symbols. However, beyond this specific prohibition, none of the additional forms of racist expression listed above are prohibited under the criminal law in Hungary. Criminal law provisions: Article 174B of the Criminal Code defines specific offences, notably acts of violence, cruelty, or coercion by threats, committed against persons who are members or supposed members of national, ethnic, racial or religious groups. These offences are subject to more severe penalties than similar offences committed against persons not belonging to such groups. There is no specific form of crime or aggravating circumstance related to acts committed against property with a hate motivation; property is protected regardless of any special characteristics of the victims.

The Hungarian authorities have indicated that the overall scheme of specific, hate-motivated offences in Hungary includes the offences of genocide (Article 155 of the Criminal Code) and apartheid (Article 157), as well as the offences of violence against a member of a national, ethnic, racial or religious group (Article 174/B), incitement against a community (Article 269), and use of symbols of despotism (Article 269/B), mentioned above. In addition, certain articles of the Criminal Code, such as those covering murder or grievous bodily harm, expressly grant judges discretion to take account in sentencing offenders of the latters' "base motivations", where these are averred, and the Supreme Court has given guidance to judges on such matters. It is thus open to the judge in each such case to consider an offender's racist motivation as a form of base motivation and take it into account as an aggravating circumstance. Racist motivation is not, however, expressly listed in the relevant provisions as a form of base motivation, and no general provision exists in Hungarian law under which, for all ordinary criminal offences, racist motivation constitutes an express aggravating circumstance. ECRI observes that as a result, it is practically impossible to monitor the situation with respect to racially motivated offences in Hungary; moreover, the absence of such a provision may mean that ordinary offences committed with racist motivations are not systematically prosecuted or punished as such. the fact that the harsher penalties provided for under Article 174B of the Criminal Code mean alleged perpetrators have a strong interest in not admitting to any racist elements in the acts they committed. As regards hate speech in particular, many NGOs voice deep disappointment at the highly restrictive interpretation applied by the courts to the limits that may be imposed on free speech in this context.

Many argue that the existing provisions of the Constitution could be interpreted differently and a different balance struck between freedom of expression and freedom from hate speech. Others observe that even when conditions exist in which the present interpretation of Article 269 of the Criminal Code could have been used as a basis for bringing criminal charges, reliance has instead been placed on provisions concerning simple breaches of the peace. In early 2008, the Chief Prosecutor's Office of the capital brought proceedings for the dissolution of a newly created radical right-wing group. It

seems that these proceedings are not based on the provisions of the Criminal Code, however, but on the Associations Act; the key question for the court is whether the organisation is acting contrary to its own articles of association or to the Associations Act, for example by restricting the liberty of other groups or by arming its members. The authorities have observed that similar proceedings were brought several years ago against another extreme right-wing organisation, which was dissolved by the Budapest Court on 1 December 2004.

Source: ECRI Report on Hungary, 2009, available at: http://www.coe.int/t/dghl/monitoring/ecri/country-by-country/hungary/HUN-CbC-IV-2009-003-ENG.pdf

[Input to OHCHR Expert workshops on prohibition of incitement to national, racial or religious hatred while ensuring respect of the freedom of expression (Addendum), pp. 18-20]

Hungary

Constitutional Court: http://www.mkab.hu/index.php?id=hatarozatkereso

Public Policies

Kisebbségekért Díj 2010

2010-12-20

A Kisebbségek Napján, december 18-án átadták a Kisebbségekért Díjat a Sándor-palotában. Az ünnepségen Dr. Kállai Ernő kisebbségi biztos is részt vett.

tovább

Szimpózium a romák társadalmi felzárkózásáról

2010-12-16

Dr. Kállai Ernő előadást tartott a Magyar Tudományos Akadémia szimpóziumán.

tovább

Ombudsmani látogatás Komárom-Esztergom megyében

2010-12-13

Dr. Kállai Ernő a nemzeti és etnikai kisebbségi jogok országgyűlési biztosa országjáró körútja során, 2010. december 9-10. között Komárom-Esztergom megyébe látogatott, ahol több településen tájékozódott a megyében élő kisebbségek helyzetéről.

tovább

Dr. Kállai Ernő gondolatai az Emberi Jogok Napján

2010-12-10

Az Emberi Jogok Egyetemes Nyilatkozatát az ENSZ Közgyűlése 62 évvel ezelőtt a mai napon fogadta el. December 10. azóta az Emberi Jogok Napja is.

tovább

A kisebbségi ombudsman fogadta a Washingtoni Külügyminisztérium roma ügyekkel foglalkozó tanácsadóját

2010-12-08

Daniel Nadel, az Amerikai Egyesült Államok Külügyi Államtitkárságának roma ügyekkel foglalkozó szakértője látogatást tett a Nemzeti és Etnikai Kisebbségi Jogok Országgyűlési Biztosánál.

tovább

Kállai Ernő találkozója a Szlovák Köztársaság nagykövetével

2010-12-07

Peter Weiss, a Szlovák Köztársaság budapesti nagykövete látogatást tett a Nemzeti és Etnikai Kisebbségi Jogok Országgyűlési Biztosánál.

tovább

Találkozó a Cseh Szenátus delegációjával

2010-12-02

Példaértékű és inspiráló a magyarországi kisebbségvédelmi rendszer a Cseh Szenátus Oktatási, tudományos, kulturális, emberi jogi és petíciós bizottságának delegációja szerint, akikkel Dr. Kállai Ernő kisebbségi biztos folytatott megbeszélést.

tovább

„A romák felzárkózása európai dimenzióban”

2010-11-25

Dr Kállai Ernő előadást tartott a Polgári Magyarországért Alapítvány szervezésében megrendezésre kerülő nemzetközi romakonferencián.

tovább

Kerekasztal konferencia a romák társadalmi beilleszkedéséről

2010-11-23

Dr. Kállai Ernő részt vett a romák társadalmi beilleszkedéséről szóló kerekasztal konferencián.

tovább

Előadás a Corvinus Egyetemen

2010-11-23

Dr. Kállai Ernő kisebbségi biztos előadást tartott a Budapesti Corvinus Egyetem Közigazgatás-tudományi Karának Államigazgatási Továbbképző Intézetében.

tovább

Kállai Ernő találkozója Pordány Lászlóval

2010-11-23

Pordány László, a Magyar Köztársaság jövőbeni kanadai nagykövete bemutatkozó látogatást tett a Nemzeti és Etnikai Kisebbségi Jogok Országgyűlési Biztosánál.

tovább

II. Egri Roma-zenei fesztivál

2010-11-19

Dr. Kállai Ernő nyitotta meg a II. Egri Roma-zenei fesztivált.

tovább

XI. Regionális Német Nemzetiségi Kulturális Gála

2010-11-13

Dr. Kállai Ernő nyitotta meg a XI. Regionális Német Nemzetiségi Kulturális Gálaműsort, Budaörsön.

tovább

Kállai Ernő és Morten Kjaerum találkozója

2010-11-11

Dr. Kállai Ernő hivatalában fogadta Morten Kjaerum urat, az Európai Unió Alapjogi Ügynökségének igazgatóját.

tovább

Szociális EXPO

2010-11-11

Dr. Kállai Ernő rész vett a Szociális Expo „Roma felzárkóztatás" címmel megrendezésre kerülő kerekasztal beszélgetésén.

tovább

Multikulturális Magyarország a médiában

2010-11-10

Dr. Kállai Ernő ombudsman előadást tartott Egerben, a Független Médiaközpont által szervezett műhelyfoglalkozáson.

tovább

Évzáró a Független Médiaközpontban

2010-10-26

Dr. Kállai Ernő kisebbségi biztos részt vett a Független Médiaközpont roma újságíró-gyakornoki program évzáró ünnepségén.

tovább

Több nyelven egy hazában

2010-10-26

Kállai Ernő kisebbségi biztos, az MTA Jogtudományi Intézete valamint a Társalgó Galéria „Több nyelven egy hazában" címmel könyvbemutatóval egybekötött konferenciát szervezett.

tovább

Konferencia Burgenlandban

2010-10-22

***„Zur aktuellen Situation der Roma in Ungarn"* címmel tartott előadást Dr. Kállai Ernő Burgenlandban.**

tovább

Magyar Köztársasági Ezüst Érdemkereszt kitüntetés Dr. Szajbély Katalinnak

2010-10-21

Dr. Szajbély Katalin, a Nemzeti És Etnikai Kisebbségi Jogok Országgyűlési Biztosának munkatársa színvonalas munkájának elismeréseként a Magyar Köztársasági Ezüst Érdemkereszt kitüntetésben részesült.

tovább

Kisebbségi érdekképviselet - Haszonszerzés vagy közösségi érdek?

2010-10-21

A nemzeti és etnikai kisebbségi jogok országgyűlési biztosának jelentése a 2010. évi települési kisebbségi önkormányzati választásokról.

tovább

Kállai Ernő találkozója Bayer Mihállyal

2010-10-06

Bayer Mihály a Magyar Köztársaság kijevi nagykövete bemutatkozó látogatást tett a Nemzeti és Etnikai Kisebbségi Jogok Országgyűlési Biztosánál.

tovább

Az aradi vértanúk

2010-10-06

„Legyenek a szentemlékű vértanúk megáldottak poraikban, szellemeikben a hon szabadság Istenének legjobb áldásaival az örökké valóságon keresztül;..."

Kossuth Lajos

tovább

Kövér László és Kállai Ernő találkozója

2010-08-30

Kövér László, az Országgyűlés elnöke hivatalában fogadta Kállai Ernő kisebbségi biztost.

tovább

Dr. Kállai Ernő kisebbségi ombudsman hivatalában fogadta Andrzej Mirgát, az Európai Biztonsági és Együttműködési Szervezet (EBESZ) romaügyi főtanácsadóját.

2010-08-24

A nemzeti és etnikai kisebbségi jogok országgyűlési biztosa hivatalában fogadta Andrzej Mirga urat, az Európai Biztonsági és Együttműködési Szervezet (EBESZ) romaügyi főtanácsadóját.

tovább

A roma holokauszt nemzetközi emléknapja

2010-08-02

Dr. Kállai Ernő kisebbségi biztos gondolatai a roma holokauszt nemzetközi emléknapja alkalmából.

tovább

Jelentés a 2009. november 15-16-i sajóbábonyi eseményekről

2010-07-28

A nemzeti és etnikai kisebbségi jogok országgyűlési biztosának jelentése a 2009. november 15-16-i sajóbábonyi eseményekről és az azzal összefüggő jogértelmezési problémáról

tovább

Manuel Sarrazin látogatása Kállai Ernőnél

2010-07-21

Manuel Sarrazin látogatást tett hivatalunkban.

tovább

Utolsó frissítés:
2010.12.20. 09:54:11

lap tetejére

1051 Budapest, Nádor u. 22. Tel. (06-1) 475-7100
info@kisebbsegiombudsman.hu

Nagy kontrasztú változat vakok és gyengénlátók számára

TÁMOP-5.5.5/08/1 - A diszkrimináció elleni küzdelem - a társadalmi szemléletformálás és a hatósági munka erősítése

Törvény az egyenlő bánásmódról
könnyen érthető nyelven

A Hatóság elérhetősége:

Budapest 1024. Margit krt. 85.
Telefon: 336-7843, 336-7851
Fax: 336-7445
Postafiók:
Pf. 672. Budapest 1539.
e-mail: ebh@ebh.gov.hu

A hatóság **hírlevele**

Virtuális könyvtár - diszkriminációval kapcsolatos tanulmányok

Tájékoztató videók

Tájékoztató a rendezett munkaügyi kapcsolatok igazolásának új rendjéről

A rendezett munkaügyi kapcsolatok **követelményének meg nem felelő munkáltatók**

Felhívás a megváltozott munkaképességű munkavállalókat foglalkoztató munkáltatók részére

Letölthető segédlet a megváltozott munkaképességű munkavállalókat foglalkoztató munkáltatók részére

Tájékoztató az esélyegyenlőségi terv elfogadására kötelezett szervezetekről

Partnerkapcsolatok

Nemzeti Erőforrás Minisztérium

Közigazgatási és Igazságügyi Minisztérium

Tájékoztatás a Hatóság ügyfélfogadásával kapcsolatban

Tekintettel arra, hogy országos hatáskörű szerv vagyunk, a bejelentéseket, panaszokat **diszkriminációs ügyekben** az egész ország területéről fogadjuk. Javasoljuk, hogy azokat elsősorban a honlapunkon megadott postafiók, vagy e-mail címre küldjék el.

Tájékoztató és letölthető bejelentés minta az EBH eljárások megindításához.

Mindazok számára, akik személyesen szeretnék felkeresni a hatóságot - pl. azért, mert segítséget kérnek a beadványok megfogalmazásához, vagy a velünk való találkozás alapján szeretnék eldönteni, hogy egyáltalán kérik az eljárás megindítását - lehetőséget biztosítunk arra, hogy az alábbi helyszíneken és időpontokban felkereshessék munkatársainkat.
Az esetleges várakozás elkerülése érdekében, javasoljuk, hogy a megadott telefonszámokon előzetesen szíveskedjenek bejelentkezni az ügyfélfogadásra.

Az egyenlő bánásmód referensek neve és elérhetősége.

A Hatóság nyilvános határozatai:

Az egyenlő bánásmódról és az esélyegyenlőség előmozdításáról szóló 2003. évi CXXV. törvény 16. §-a meghatározza, hogy az egyenlő bánásmód megsértése esetén a Hatóság milyen szankciót alkalmazhat. Egyik ilyen ***szankcionálási lehetőség a jogsértést megállapító határozat nyilvánosságra hozatala.*** *A Hatóság azon határozatait hozza nyilvánosságra, amelyek az abban foglalt információkkal hozzájárulhatnak jövőbeni hasonló jogsértések megelőzéséhez, illetve, ha a közzététel hozzájárul a hátrányosan megkülönböztetett személy, vagy csoport sérelmének csökkentéséhez.*
Az alábbi határozatok ilyen rendelkezéseket tartalmaznak, ezért azokat honlapunkon közétesszük.

EBH/106/2009 (2010.07.13.-2011.01.13.)
EBH/656/2010 (2010.11.17.-2011.01.17.)
EBH/63/2010 (2010.10.27.-2011.01.27.)
EBH/804/2010 (2010.11.17.-2011.02.17.)
EBH/1144/2010 (2010.12.06.-2011.03.06.)

A korábban közzétett, archivált határozatok itt találhatóak.

Tájékoztató az Egyenlő Bánásmód Hatóság 2009. évi tevékenységéről

Tájékoztató az Egyenlő Bánásmód Hatóság 2008. évi tevékenységéről

Tájékoztató az Egyenlő Bánásmód Hatóság 2007. évi tevékenységéről

Egyenlő Bánásmód Hatóság 2009. évi tevékenysége a számok tükrében

Egyenlő Bánásmód Hatóság 2008. évi tevékenysége a számok tükrében

Egyenlő Bánásmód Hatóság 2007. évi tevékenysége a számok tükrében

A korábbi, archivált beszámolók itt találhatóak

A Tanácsadó Testület jogalkotási javaslatai:

- A Tanácsadó Testület jogszabály módosítási javaslata a munkaköri orvosi alkalmassági véleményekkel kapcsolatos jogorvoslati lehetőségre vonatkozóan
- A Tanácsadó Testület a következő jogalkotási javaslattal fordult a Magyar Köztársaság Kormányához
- A Tanácsadó Testület a jogszabály módosítási javaslata a fogyatékossággal élőket érintő ésszerű alkalmazkodás követelményének kodifikálására

A Tanácsadó Testület állásfoglalásai.

Diszkriminációval kapcsolatos tanulmányok itt olvashatók.

Bírósági döntések

Esélyegyenlőségi tervek készítésével kapcsolatos információk:
Fővárosi Esélyegyenlőségi Módszertani Iroda

2010. December 23. Csütörtök,
Viktória napja van.

Keresés

Hírek

Tájékoztató a Tanácsadó Testület 2010. december 17-ei üléséről

Tájékoztató a Tanácsadó Testület 2010. noveber 19-ei üléséről

Az Egyenlő Bánásmód Hatóság Évértékelő konferenciája

Tájékoztató a Tanácsadó Testület 2010. október 15-ei üléséről

Tájékoztató a Tanácsadó Testület 2010. szeptember 9-ei üléséről

Hírlevél regisztráció

az Ön e-mail címe

Feliratkozás

Küldés

Acrobat Reader letöltése

2007 - Egyenlő Esélyek Mindenki Számára Európai Év

Országgyűlési Biztos Hivatala

Magyar Nemzeti Vagyonkezelő Zrt.

Oktatási és Kulturális Minisztérium

Miniszterelnöki Hivatal Kisebbség- és Nemzetpolitikáért Felelős Szakállamtitkárság

Országos Esélyegyenlőségi Hálózat

RomaWeb.hu

Kormányzati Civil Kapcsolatok Főosztálya

Európai Roma Jogok Központja

Foglalkoztatási és Szociális Hivatal

Nemzeti Fogyasztóvédelmi Hatóság

Országos Munkavédelmi és Munkaügyi Főfelügyelőség

Nemzeti és Etnikai Kisebbségi Jogvédő Iroda

Kézenfogva Alapítvány

Budapest Esély

Budapesti Esélyek Háza

Jogpont hálózat

LIGA szakszervezetek

KSZK www.kszk.gov.hu

Linkek

Közadatkereső
SuliNova
Magyar emberi jogi szervezetek, Civil jogvédő irodák
Nemzetközi emberi jogi civil szervezetek
Nemzetközi emberi jogi szervek

European Commission against Racism and Intolerance
Commission européenne contre le racisme et l'intolérance

CRI(2009)3

ECRI REPORT ON HUNGARY

(fourth monitoring cycle)

Adopted on 20 June 2008

Published on 24 February 2009

TABLE OF CONTENTS

FOREWORD

The European Commission against Racism and Intolerance (ECRI) was established by the Council of Europe. It is an independent human rights monitoring body specialised in questions relating to racism and intolerance. It is composed of independent and impartial members, who are appointed on the basis of their moral authority and recognised expertise in dealing with racism, xenophobia, antisemitism and intolerance.

In the framework of its statutory activities, ECRI conducts country-by-country monitoring work, which analyses the situation in each of the member States regarding racism and intolerance and draws up suggestions and proposals for dealing with the problems identified.

ECRI's country-by-country monitoring deals with all member States of the Council of Europe on an equal footing. The work is taking place in 5 year cycles, covering 9/10 countries per year. The reports of the first round were completed at the end of 1998, those of the second round at the end of 2002, and those of the third round at the end of the year 2007. Work on the fourth round reports started in January 2008.

The working methods for the preparation of the reports involve documentary analyses, a contact visit in the country concerned, and then a confidential dialogue with the national authorities.

ECRI's reports are not the result of inquiries or testimonial evidences. They are analyses based on a great deal of information gathered from a wide variety of sources. Documentary studies are based on an important number of national and international written sources. The in situ visit allows for meeting directly the concerned circles (governmental and non-governmental) with a view to gathering detailed information. The process of confidential dialogue with the national authorities allows the latter to provide, if they consider it necessary, comments on the draft report, with a view to correcting any possible factual errors which the report might contain. At the end of the dialogue, the national authorities may request, if they so wish, that their viewpoints be appended to the final report of ECRI.

The fourth round country-by-country reports focus on implementation and evaluation. They examine the extent to which ECRI's main recommendations from previous reports have been followed and include an evaluation of policies adopted and measures taken. These reports also contain an analysis of new developments in the country in question.

Priority implementation is requested for a number of specific recommendations chosen from those made in the new report of the fourth round. No later than two years following the publication of this report, ECRI will implement a process of interim follow-up concerning these specific recommendations.

The following report was drawn up by ECRI under its own and full responsibility. It covers the situation as of 20 June 2008 and any development subsequent to this date is not covered in the following analysis nor taken into account in the conclusions and proposal made by ECRI.

SUMMARY

Since the publication of ECRI's third report on Hungary on 8 June 2004, progress has been made in a number of fields covered by that report.

The enactment of the Equal Treatment and Promotion of Equal Opportunities Act in December 2003 introduced into Hungarian law a prohibition on discrimination in a variety of public- and private-law relationships, on nineteen grounds, including racial origin, colour, nationality, national or ethnic origin, mother tongue and religious convictions, and the subsequent establishment of the Equal Treatment Authority on 1 February 2005 provided individuals with a direct avenue of redress for violations of that prohibition. The creation of this body has generated considerable interest in Hungarian society, with nearly 500 complaints being lodged the first year, a number that has risen steadily every since. The Act also includes an important innovation in Hungarian law, in the form of the possibility for non-governmental organisations to act as plaintiffs in cases where they consider a provision to be discriminatory even though no individual has yet suffered any harm, and provisions on the sharing of the burden of proof that are designed to overcome the difficulties often experienced by victims of discrimination in proving their case. The possibility of turning to the Equal Treatment Authority – empowered to impose fines on offending parties and to publish the names of bodies that have breached the requirement of equal treatment – co-exists with other remedies such as seeking compensation through the courts, or turning to one of the Parliamentary Commissioners where public authorities are concerned.

The authorities have also enacted important new legislation which has improved the asylum system in Hungary in particular by ensuring that persons granted subsidiary protection benefit from almost the same status as refugees. Child asylum-seekers and refugees are now entitled and indeed obliged to attend compulsory schooling, under terms and conditions equivalent to those applicable to Hungarian nationals, from the day of submission of their application for recognition. Importantly, the cases in which non-citizens can be subjected to administrative detention under immigration laws have also been restricted, and maximum lengths of detention in such cases significantly reduced.

In June 2007, the Parliament approved a resolution on the Decade of Roma Inclusion Programme Strategic Plan, setting a framework for action in a series of fields where Roma experience discrimination and disadvantage in daily life. This resolution complements a large number of measures that have been taken in recent years that may serve to improve the situation of Roma in fields such as education and employment. Particularly wide-ranging measures have been taken in the field of education, with steps taken to address segregation through facilitating the access of multiply disadvantaged children to kindergarten, introducing stricter requirements on the manner in which local authorities draw the boundaries between catchment areas or may organise the composition of classes within schools, and the drawing up of new cognitive tests designed to take better account of cultural differences and socio-economic disadvantage in testing children's development. Some landmark decisions of courts in this field have also been handed down in recent years, including on the basis of the provisions of the Equal Treatment Act. A number of measures have also been taken to increase the number of Roma employed in the police force.

In the field of minority self-governments, a series of measures were taken prior to the last elections, which went some way towards preventing past abuses of the system.

ECRI welcomes these positive developments in Hungary. However, despite the progress achieved, some issues continue to give rise to concern.

As regards the Roma minority, their situation of disadvantage is such that long-term but intensive efforts will be needed to turn it around; while many of the measures taken to date may have a positive impact, they need to be continued and in some cases intensified in order to achieve lasting results. In the field of employment, many initiatives have been taken, often with a twin aim of assisting in finding employment and in developing new skills, but these measures are often short-term and can only help a small number of Roma at a time. In practice, Roma continue to face both a disproportionately high rate of unemployment and discrimination in access to employment. In the fields of education and housing, the efforts of the central authorities are frequently hampered by the manner in which local authorities translate the measures taken into practice: numerous abuses have been reported, and the central authorities appear somewhat hamstrung in their efforts to achieve change. Roma families are deprived of access to social housing by discriminatory rules and practices of local authorities; and Roma children are still confronted with segregation in schools, which has a devastating impact on education outcomes for these children and leaves them with correspondingly limited future life choices and employment prospects.

A particularly alarming development has occurred in Hungary since ECRI's third report, in the form of a sharp rise in racism in public discourse. Antisemitic articles regularly appear in the press and on the internet, and anti-Roma discourse appears to be becoming increasingly virulent and wide-spread. The creation and increasing visibility of one radical right-wing group in particular has led to grave concerns amongst members of civil society and the government, due not only to the group's openly anti-Roma and antisemitic discourse but also to its paramilitary-style uniforms and insignia that are strongly reminiscent of a right-wing party that briefly held power in Hungary during the second World War, and during whose term in power tens of thousands of Jews and Roma were killed. At least one act of racist violence appears to have been linked to the racist discourse of this group.

At the same time, the very high level of constitutional protection afforded to the freedom of expression has to date made it impossible for the authorities to legislate effectively against racist expression: under Hungarian law, only the most extreme forms of racist expression, i.e. incitement liable to provoke immediate violent acts, appear to be prohibited, a standard so high that it is almost never invoked in the first place. While it is true that legislation alone cannot turn racist attitudes around, the almost total absence of limits on free speech in Hungary complicates the task of promoting a society that is more open and tolerant towards its own members.

Refugees, asylum-seekers and migrants are also the subjects of prejudice and negative stereotyping, reporting particular difficulties in gaining access to housing and employment. Moreover, children of refugees and asylum-seekers, while entitled in theory to benefit from the same rights to compulsory education as Hungarian children, in practice have difficulty exercising their rights as they are met with resistance from schools to accepting them, and, if they are accepted, frequently do not have access to adequate assistance in learning the Hungarian language. The absence of a national integration strategy to assist these new members of Hungarian society in participating fully in it is a further contributing factor in the problems faced by this group.

There is also a real lack of data disaggregated by ethnicity that could assist the Hungarian authorities in clearly identifying problems that need to be addressed and in monitoring the effectiveness of measures already taken.

In this report, ECRI recommends that the Hungarian authorities take further action in a number of areas.

These range from making clear information available to the public concerning the various avenues of redress open to them in cases where they consider they have been the victims of a breach of the prohibition on discrimination, to awareness-raising measures aimed at officials working in various capacities with minority groups or at the general public with the aim of tackling xenophobia and intolerance head on, to implementing more vigourously the criminal law provisions already in force, to ratifying certain international instruments such as Protocol No. 12 to the European Convention on Human Rights as an extra weapon in the arsenal of the fight against racism.

ECRI strongly recommends in particular in the present report that the Hungarian authorities keep the adequacy of the criminal law provisions against racist expression under review. It strongly recommends that they take into account in this respect the recommendations on criminal law provisions contained in ECRI's General Policy Recommendation No. 7 on national legislation to combat racism and racial discrimination, and paying especial attention to ensuring that, in so far as these standards may mean imposing certain limits on the freedom of expression, these limits are interpreted in line with Article 10 of the European Convention on Human Rights and the relevant case-law of the European Court of Human Rights, and requests priority implementation for this recommendation in the next two years.

ECRI also recommends that the Hungarian authorities introduce an independent monitoring system at national level to ensure the compliance with centrally enacted legislation of measures taken by school maintainers; it considers that this system should in particular be instrumental in ensuring that the prohibition on segregation is respected in practice, and requests priority implementation for this recommendation in the next two years.

ECRI also recommends in this report that ways of measuring the situation of minority groups in different fields of life be identified, stressing that such monitoring is crucial in assessing the impact and success of policies put in place to improve the situation, and that it should be carried out with due respect to the principles of data protection and privacy and should be based on a system of voluntary self-identification, with a clear explanation of the reasons for which information is collected; ECRI also requests priority implementation for this recommendation in the next two years.

FINDINGS AND RECOMMENDATIONS

I. Existence and Implementation of Legal Provisions

International legal instruments

1. In its third report, ECRI urged Hungary to ratify Protocol No. 12 to the European Convention on Human Rights.

2. The Hungarian authorities informed ECRI that, as the everyday work of the Equal Treatment Authority set up under the Equal Treatment and Promotion of Equal Opportunities Act 2003[1] was closely linked to the ratification of Protocol No. 12, the experience of the Authority needed to be taken into account in setting the date of ratification of the Protocol. ECRI notes with interest that the authorities consider that sufficient experience has now been gathered for a step forward to be taken, and that, while the ratification of the Protocol does not yet appear in the legislative schedule of Parliament, the ramifications of its ratification are currently being analysed. ECRI hopes that this analysis will be carried out expeditiously and that a timetable for ratification will soon be established.

3. ECRI strongly encourages Hungary to ratify Protocol No. 12 to the European Convention on Human Rights as soon as possible.

4. In its third report, ECRI also urged Hungary to sign and ratify the Additional Protocol to the Convention on Cybercrime, concerning the criminalisation of acts of a racist or xenophobic nature committed through computer systems. ECRI encouraged Hungary to sign and ratify the United Nations Convention on the Protection of the Rights of All Migrant Workers and Members of their Families. It furthermore recommended that Hungary ratify without delay the Revised Social Charter and the Convention on the Participation of Foreigners in Public Life at Local Level.

5. As regards the Additional Protocol to the Convention on Cybercrime, the authorities have indicated that certain acts covered by the Protocol are not currently punishable under Hungarian law. They have also indicated that, despite their legislative efforts in this direction, the present constitutional position with respect to the balance to be found between freedom of expression and the prohibition of hate speech[2] make it impossible to predict when the Protocol may be ratified.

6. As of April 2008, the procedure for ratifying the Revised Social Charter was well under way, and the authorities planned to table the relevant Bill in Parliament before the summer. In addition, since ECRI's third report, the United Nations Convention on the Protection of the Rights of All Migrant Workers and Members of their Families has been translated into Hungarian and made available for consultation; however, little progress has been made towards ratifying the Convention on the Participation of Foreigners in Public Life at Local Level.

7. ECRI encourages Hungary to ratify the Revised Social Charter without delay and reiterates its recommendation that Hungary ratify as soon as possible the Convention on the Participation of Foreigners in Public Life at Local Level and

[1] See below, *Anti-discrimination bodies and other institutions.*

[2] See below, *Provisions covering racist expression.*

the United Nations Convention on the Protection of the Rights of All Migrant Workers and Members of their Families.

8. It urges the Hungarian authorities to find a solution as soon as possible so as to open the way towards ratifying the Additional Protocol to the Convention on Cybercrime, concerning the criminalisation of acts of a racist or xenophobic nature committed through computer systems.

Provisions covering racist expression

9. In its third report, referring to amendments to Article 269 of the Criminal Code adopted in December 2003, ECRI recommended that the authorities actively implement this new legislation aimed at reinforcing the fight against racism, at the same time drawing attention to the need to apply these provisions in conformity with Article 10 ECHR and the related case-law of the European Court of Human Rights. Subsequently, however, these amendments were struck down by the Constitutional Court, which considered that they infringed the acceptable limits on freedom of expression as protected by the Constitution. In its decision (No. 18/2004), it reaffirmed its previous case-law (Decisions Nos. 30/1992 and 12/1999, themselves relying on positions taken by the Supreme Court at the turn of the twentieth century), reasoning that the legislator could limit freedom of speech through criminal sanctions only in cases of the most dangerous conduct, i.e. behaviour capable of whipping up such intense emotions in the majority of the people that, upon giving rise to hatred, they could result in the disturbance of the public peace; moreover, the Court stressed that an abstract threat is insufficient to meet this threshold: the danger to the public peace must be "clear and present". As a result of this judgment – and whereas, in the views of many actors involved in combating racism, the Constitution could be interpreted differently – incitement against specific communities is not criminalised, and only the most extreme forms of hate speech, i.e. incitement liable to provoke immediate violent acts, are presently outlawed under Article 269 of the Hungarian Criminal Code. Moreover, as currently interpreted by the Constitutional Court, the Constitution appears to leave only a very narrow margin to legal draftsmen in defining what action may constitute a criminal offence when the freedom of speech has to be balanced against the protection of others' rights.

10. Two new attempts have been made since this judgment was delivered to introduce broader prohibitions on hate speech into Hungarian law. In early 2008, on the initiative of six of its members, Parliament enacted a new amendment to the Criminal Code, taking a new approach based on abuse, and which would allow the prosecutor to initiate an investigation on broader grounds, including non-verbal abuse (such as the use of Nazi salutes). In October 2007, at the government's initiative, Parliament had also already amended the Civil Code. Previously, only identifiable individuals who were personally targeted by insulting or defamatory statements could seek civil law remedies such as damages; under the 2007 amendments, this right would be extended to individuals or associations belonging to a group of people generally targeted by broadly defined insults based on national, ethnic or racial identity. However, neither of these sets of provisions has come into force, as they were each referred to the Constitutional Court for review prior to their promulgation. The Court was asked to examine the provisions from a number of angles, including possibly disproportionate limits on freedom of expression, questions as to whether the provisions were sufficiently clear to ensure legal certainty, possible discrimination against persons who are *not* members of minority groups protected by the provisions, and possible infringements of the right to self-determination of members of civil society organisations who did not feel insulted by a given statement but whose association decided to initiate legal

proceedings. On 30 June 2008, the Constitutional Court found the 2008 amendments to the Criminal Code unconstitutional.[3] At the time of writing, the result of the review of the Civil Code was not yet known.

11. ECRI notes that, whatever the final evaluation made of any possible technical flaws in the remaining civil law provisions at issue, unless there is a significant development in constitutional case-law, it would appear that there is little chance that these or any future attempts to strengthen the legislation against hate speech in Hungary may come into force. In this context, ECRI recognises the efforts made by the Hungarian legislative and executive powers to strengthen the legislation applicable in this field. ECRI notes with particular concern that the present situation in Hungary may not be in conformity with the case-law of the European Court of Human Rights.

12. ECRI recalls in this context the standards set forth in its own General Policy Recommendation No. 7 on national legislation to combat racism and racial discrimination, in which it recommends the prohibition under the criminal law of a wide range of acts including, inter alia, public incitement to violence, hatred or discrimination, public insults and defamation, or threats against a person or a grouping of persons on the grounds of their race, colour, language, religion, nationality, or national or ethnic origin.[4] ECRI also recalls that in the same recommendation, the criminalisation of the public expression, with a racist aim, of an ideology which claims the superiority of, or which depreciates or denigrates, a grouping of persons on the grounds of their race, colour, language, religion, nationality, or national or ethnic origin is also recommended.[5]

13. ECRI strongly recommends that the Hungarian authorities keep the adequacy of the criminal law provisions against racist expression under review. It strongly recommends that they take into account international standards in this respect, including the recommendations on criminal law provisions contained in ECRI's General Policy Recommendation No. 7 on national legislation to combat racism and racial discrimination, according to which the law should penalise racist acts including public incitement to violence, hatred or discrimination as well as public insults, defamation or threats against a person or a grouping of persons on the grounds of their race, colour, language, religion, nationality, or national or ethnic origin. It recommends that the authorities pay special attention in this regard to ensuring that, in so far as these standards may mean imposing certain limits on the freedom of expression, these limits are interpreted in line with Article 10 of the European Convention on Human Rights and the relevant case-law of the European Court of Human Rights. ECRI further recommends that the Hungarian authorities take measures to increase awareness among judges of international standards against racist expression.

14. In its third report on Hungary, ECRI also encouraged the Hungarian authorities to take into account the recommendations on criminal law provisions contained in its General Policy Recommendation No. 7 on national legislation to combat racism and racial discrimination, according to which the law should penalise racist acts including: the public denial with a racist aim of the crime of genocide; the dissemination and distribution with a racist aim of racist material; and the creation and activities of a group which promotes racism.

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[3] Decision No. 236/A/2008. AB

[4] ECRI General Policy Recommendation No. 7, paragraphs 18a-c (and paragraphs 38-40 of the Explanatory Memorandum).

[5] ECRI General Policy Recommendation No. 7, paragraph 18d (and paragraphs 38-39 of the Explanatory Memorandum).

15. ECRI notes that in addition to the provisions examined above, proscribing the most extreme forms of racist expression,[6] Article 269B of the Criminal Code prohibits the use of certain totalitarian symbols. However, beyond this specific prohibition, none of the additional forms of racist expression listed above are prohibited under the criminal law in Hungary.

16. ECRI again encourages the Hungarian authorities to take into account the recommendations on criminal law provisions contained in its General Policy Recommendation No. 7 on national legislation to combat racism and racial discrimination, according to which the law should penalise racist acts including: the public denial with a racist aim of the crime of genocide; the dissemination and distribution with a racist aim of racist material; and the creation and participation in the activities of a group which promotes racism. It recalls in this respect its recommendation made above with respect to the ratification of the Additional Protocol to the Convention on Cybercrime, concerning the criminalisation of acts of a racist or xenophobic nature committed through computer systems.

Criminal law provisions covering racially motivated offences

17. Article 174B of the Criminal Code defines specific offences, notably acts of violence, cruelty, or coercion by threats, committed against persons who are members or supposed members of national, ethnic, racial or religious groups. These offences are subject to more severe penalties than similar offences committed against persons not belonging to such groups. There is no specific form of crime or aggravating circumstance related to acts committed against property with a hate motivation; property is protected regardless of any special characteristics of the victims.

18. The Hungarian authorities have indicated that the overall scheme of specific, hate-motivated offences in Hungary includes the offences of genocide (Article 155 of the Criminal Code) and apartheid (Article 157), as well as the offences of violence against a member of a national, ethnic, racial or religious group (Article 174/B), incitement against a community (Article 269), and use of symbols of despotism (Article 269/B), mentioned above. In addition, certain articles of the Criminal Code, such as those covering murder or grievous bodily harm, expressly grant judges discretion to take account in sentencing offenders of the latters' "base motivations", where these are averred, and the Supreme Court has given guidance to judges on such matters. It is thus open to the judge in each such case to consider an offender's racist motivation as a form of base motivation and take it into account as an aggravating circumstance. Racist motivation is not, however, expressly listed in the relevant provisions as a form of base motivation, and no general provision exists in Hungarian law under which, for all ordinary criminal offences, racist motivation constitutes an express aggravating circumstance. ECRI observes that as a result, it is practically impossible to monitor the situation with respect to racially motivated offences in Hungary; moreover, the absence of such a provision may mean that ordinary offences committed with racist motivations are not systematically prosecuted or punished as such.[7]

19. ECRI recommends that the Hungarian authorities make specific provision in the criminal law for racist motivations for ordinary offences to constitute an aggravating circumstance, taking account of the recommendations contained in ECRI's General Policy Recommendation No. 7 on national legislation to combat racism and racial discrimination.

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[6] See above, paragraphs 9-13.

[7] See below, *Implementation of existing provisions of criminal law.*

Implementation of existing provisions of criminal law

20. In its third report on Hungary, ECRI reiterated its recommendation concerning the need for more vigorous implementation of criminal law provisions relating to the fight against racism. It recommended that further human and financial resources be allocated to measures aimed at ensuring that the investigation and prosecution of racist crimes are carried out in a thorough and systematic fashion, and that the Hungarian authorities continue their efforts to provide training to police officers, legal advisers, prosecutors and judges on issues pertaining to the implementation of criminal legislation addressing racism and racial discrimination.

21. Statistics do not appear to be readily available concerning the application of the criminal law provisions described above,[8] whether as regards convictions recorded, prosecutions initiated or complaints lodged. In addition, as Article 174B of the Criminal Code applies only to certain racist offences against the person, figures on the application of this provision could not in any case provide any indication as to the prevalence of racially motivated crimes against property. The Hungarian authorities have also indicated that, as regards ordinary offences for which judges may have exercised their discretion to impose a heavier sentence due to the racist motivation of the offender, such verdicts would list the broader "base motivation" as the aggravating factor, not racism, meaning past cases involving racism would again not be easy to identify.

22. Doubts continue to be reported as to whether all cases in which crimes may have been committed for racist motives are systematically investigated and prosecuted as such. Reasons advanced for this situation include the reluctance of some victims to pursue the issue,[9] the fact that the harsher penalties provided for under Article 174B of the Criminal Code mean alleged perpetrators have a strong interest in not admitting to any racist elements in the acts they committed, as well as the usual difficulties experienced in proving racist motivations. It has been reported that in some instances, even where there was strong enough evidence of racist motivations to support an indictment for racist violence, the offence was finally treated by the courts as having arisen solely out of a conflict situation rather than as having had racist motivations.

23. As regards hate speech in particular, many NGOs voice deep disappointment at the highly restrictive interpretation applied by the courts to the limits that may be imposed on free speech in this context. Many argue that the existing provisions of the Constitution could be interpreted differently and a different balance struck between freedom of expression and freedom from hate speech. Others observe that even when conditions exist in which the present interpretation of Article 269 of the Criminal Code could have been used as a basis for bringing criminal charges, reliance has instead been placed on provisions concerning simple breaches of the peace.

24. In early 2008, the Chief Prosecutor's Office of the capital brought proceedings for the dissolution of a newly created radical right-wing group.[10] It seems that these proceedings are not based on the provisions of the Criminal Code, however, but on the Associations Act; the key question for the court is whether the organisation is acting contrary to its own articles of association or to the Associations Act, for example by restricting the liberty of other groups or by arming its members. The

[8] See above, *Provisions covering racist expression*, *Criminal law provisions covering racially motivated offences.*

[9] See also below, *Racist violence*.

[10] See below, *Racism in Public Discourse*.

authorities have observed that similar proceedings were brought several years ago against another extreme right-wing organisation, which was dissolved by the Budapest Court on 1 December 2004.[11]

25. ECRI urges the Hungarian authorities to intensify their efforts to ensure a more vigourous implementation of criminal law provisions relating to the fight against racism.

26. In this context, ECRI reiterates its recommendation that further human and financial resources be allocated to measures aimed at ensuring that the investigation and prosecution of racist crimes are carried out in a thorough and systematic fashion.

27. It also reiterates its recommendation that the Hungarian authorities continue their efforts to provide training to police officers, legal advisers, prosecutors and judges on issues pertaining to the implementation of criminal legislation addressing racism and racial discrimination.[12]

28. ECRI recommends that the Hungarian authorities take steps to introduce systematic and comprehensive monitoring of all incidents that may constitute racist offences, covering all stages of proceedings, including complaints lodged, charges brought and convictions recorded. It draws the authorities' attention in this respect to ECRI's General Policy Recommendation No. 11 on combating racism and racial discrimination in policing, and in particular to Part III of the Recommendation, concerning the role of the police in combating racist offences and monitoring racist incidents.

Legislation to combat racial discrimination

29. In its third report on Hungary, ECRI welcomed the enactment of the Equal Treatment and Promotion of Equal Opportunities Act (hereinafter: "Equal Treatment Act") in December 2003 and recommended that the Hungarian authorities implement it swiftly and monitor its application closely. It encouraged the authorities to inform the general public about the content and scope of the Act. It also encouraged the authorities to organise training for judges and legal advisers on the content and implementation of the civil and administrative provisions aimed at combating discrimination, including the new legislation.

30. ECRI recalls that the Equal Treatment Act prohibits both direct and indirect discrimination on 19 express grounds, including racial origin, colour, nationality, national or ethnic origin, mother tongue and religious convictions. The Act covers a broad range of fields such as employment, social security, health care, housing, education and training, and supply of goods and services, and applies to a wide range of actors in both the public and private sectors. Positive measures of temporary duration aimed at promoting equal opportunities for certain disadvantaged groups are expressly permitted. The Act provides for the burden of proof to be shared between the victim and the discriminator in administrative and civil law. In addition, the Act provides for the setting up of an Authority in charge of ensuring compliance with the principle of equal treatment.[13]

31. Since its enactment, the Equal Treatment Act has been amended on several occasions. It now expressly prohibits unlawful segregation. In order to bring the Act into line with Council Directive 2000/43/EC, it is now provided that the

[11] As regards the atmosphere surrounding the hearings in the present case, see below *ibid*.

[12] See below, § 174.

[13] See below, *Anti-discrimination bodies and other institutions*, for more details regarding the Authority.

general exemption clause contained in Article 7(2) of the Act can no longer be invoked in cases of direct discrimination on the grounds of race, colour, nationality or national or ethnic origin; only certain specific exemption clauses enumerated in the Act and related to the particular legal relation in question may be invoked in cases of direct discrimination on these grounds. In the field of employment, the payment of different salaries, wages or other benefits to individuals on the basis of their sex, colour, race, nationality or national or ethnic origin is now always considered to violate the principle of equal treatment (i.e. it cannot be justified in any circumstances). Institutions financed by the State budget and employing more than 50 people, as well as legal entities in which the state has a majority ownership, are also now required to adopt an equal opportunities plan, and the Equal Treatment Authority is entitled to monitor whether or not such a plan has been adopted.[14]

32. At the procedural level, another significant innovation is the possibility for NGOs and other organisations representing special interests to institute public interest (*actio popularis*) claims, not only where they consider there has already been a violation of the principle of equal treatment based on an essential characteristic of an individual (i.e. one of the grounds listed under Article 8 of the Act) and affecting a larger group of persons that cannot be accurately identified, but also where there is an imminent threat of such a violation. As regards the shared burden of proof, some initial problems, where first instance courts did not apply the mechanism correctly, were rectified at second instance and ECRI has not been informed of any subsequent similar cases. In addition, the new rules no longer require complainants to demonstrate that they have in fact been treated differently from another individual not possessing the relevant characteristic: it is sufficient for complainants to show that in a hypothetically comparable situation, such a person would be treated more favourably.

33. ECRI welcomes the above-mentioned improvements to the Equal Treatment Act, which constitute an important part of the fight against racial discrimination in Hungary and generally reflect the standards contained in ECRI's General Policy Recommendation No. 7 on national legislation to combat racism and racial discrimination.

34. ECRI recommends that the Hungarian authorities ensure that sufficient financial and human resources are available to the Equal Treatment Authority to allow it to fulfil its terms of reference, especially taking into account the Authority's new powers with respect to the monitoring of the adoption of equal opportunities plans by employers.

Anti-discrimination bodies and other institutions

35. In its third report, ECRI examined the powers, functioning and co-ordination between the various existing or soon to be created specialised bodies involved in the fight against racism and racial discrimination and made a number of recommendations in these respects. It recommended, inter alia, that the Hungarian authorities grant sufficient human and financial resources to each of the existing and future bodies involved in the fight against racism and racial discrimination adequate powers to enable them to operate in the best possible conditions.

36. Below, issues specific to each of the various bodies are dealt with in turn, followed by over-arching questions concerning co-ordination and co-operation.

[14] See below, *Anti-discrimination bodies and other institutions*, for more details regarding the monitoring by the Equal Treatment Authority of equal opportunities plans.

- *Equal Treatment Authority*

37. In its third report, in addition to its recommendation that adequate resources be granted to this body, ECRI strongly encouraged the authorities to consider guaranteeing full independence to the Equal Treatment Authority, with due regard to ECRI's General Policy Recommendations Nos. 2 and 7.

38. The Equal Treatment Authority commenced functioning on 1 February 2005, and its case-load has increased significantly each year since then. 491 cases were filed with the Authority in 2005, 592 in 2006, and 756 in 2007.[15] Of the cases filed in 2006, 202 were closed by a binding decision.[16] Amongst these, infringements of the requirement of equal treatment were found in 13% of cases; arrangements were found between the complainant and the party complained against in 6% of cases; 35% were dismissed as unfounded after an examination on the merits; a further 20% were dismissed without an investigation on the merits as they fell outside the Authority's powers; and 26% were dismissed on procedural grounds.[17] The Authority has noted that many individuals introduce complaints without having first received legal advice; it provides information to these complainants to help increase their understanding of the law. It also provides information on the availability of free legal advice and refers complainants to the Anti-Discrimination Lawyers' Network of the Ministry of Justice and Law Enforcement where appropriate.

39. In parallel with its key role in dealing with individual complaints, the Authority has taken a number of steps to increase public awareness of its work and of the important issues that fall within its remit. These include the launch of its official website (www.egyenlobanasmod.hu) and of a second site (www.antidiszko.hu) aimed at making antidiscrimination information available to the general public in more accessible form, as well as the publication of a short pamphlet outlining the Authority's powers and procedural rules and the distribution of a regular newsletter to several thousand recipients. The Authority's members and staff participate regularly in conferences and other awareness-raising events organised by both public bodies and civil society actors; they also appear regularly in the media. ECRI welcomes these initiatives and observes that the continually rising number of cases lodged with the Authority no doubt indicates a growing level of public awareness of the existence of this body. However, the high proportion of cases (a total of 55% in 2006) dismissed either as unfounded on the merits or because they fell outside the Authority's remit would seem to indicate that, for the moment at least, there remains a certain lack of understanding in Hungary of the concept of discrimination, as well as a certain lack of knowledge of the Authority's fields of competence. In this context, ECRI regrets that no follow-up appears to have been given to the Authority's proposal that both the obligation to observe the principle equal treatment and the relevant legal avenues of redress available to members of the public form part of the compulsory training of public servants.[18]

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[15] All figures given for 2005 and 2006 were drawn from the relevant annual reports of the Equal Treatment Authority. At the time of writing, full figures for 2007 were not yet available; where these appear, they are based on information provided in writing by the Equal Treatment Authority to ECRI during its visit. Questions of substance (fields in which discrimination occurs, grounds on which it is based) are dealt with below, under *Discrimination in Various Fields* and *Vulnerable/Target Groups*.

[16] The remaining 390 cases were either referred to another authority (49) or still pending at the end of the year (35), or were dealt with through the provision of advice rather than by initiating an investigation (306).

[17] Withdrawal of the complaint, lack of action by the complainant, procedure already commenced before another competent body, etc.

[18] Equal Treatment Authority, Annual Report 2005, pp. 55-56.

40. As part of the recent amendments to the Equal Treatment Act,[19] the Equal Treatment Authority was given the power to investigate whether employers obliged to do so have approved an equal opportunities plan. ECRI understands, however, that this power is limited to examining whether or not such a plan exists, and to imposing a fine if not; it does not appear to extend to investigating the adequacy of the contents of the plan. Even so, the new power imposes a considerable new workload on the Authority, with all the financial and human resource implications that entails.[20]

41. Since ECRI's third report, the legal status of the Equal Treatment Authority has changed, in that it is no longer subject to ministerial supervision but to ministerial direction.[21] This would appear to signal a diminishing of the Authority's independence. ECRI notes that, as regards preservation from interference in the substance of the Authority's work, Article 13(2) of the Equal Treatment Act, which previously provided that the Authority worked "under the instruction of the government, under the supervision of a member of the government",[22] has been repealed, and the Act now simply provides (Article 13(3)) that "[t]he Authority shall not be instructed in relation to exercising its duties defined in this Act". In budgetary terms, however, the situation is not so clear, as the Authority's budget is now placed (albeit with its own budgetary line) within the budget of the Ministry of Social and Labour Affairs. It may be noted in this context that the Authority continues to have jurisdiction throughout the territory of Hungary; however, it does not have regional or local branches. In the majority of cases occurring outside the capital, the investigating officers of the Authority are therefore obliged to travel to the seat of the local government where the applicant resides in order to hold a hearing. The Authority has drawn up a proposal to formalise its present arrangements with the Houses of Equal Opportunities[23] and in particular to ensure that a certain number of procedures are completed at local level before applications are sent to the Authority itself. However, despite these measures and despite an increase in staff previously granted by the government, in the light of the Authority's continually increasing workload, further resources may again be needed in future.

42. ECRI recalls its recommendation above with respect to the resources available to the Equal Treatment Authority. It further recommends that the Hungarian authorities take measures to raise awareness among national and ethnic minority groups of the anti-discrimination legislation now in force – including as to what is meant by discrimination – and the mechanisms available for invoking this legislation.

- *Parliamentary Commissioner for the Rights of National and Ethnic Minorities*

43. In its third report, referring to its earlier recommendation on the possibility of granting the Parliamentary Commissioner for the Rights of National and Ethnic Minorities the power to lodge complaints before the courts, ECRI urged the Hungarian authorities to extend the Commissioner's mandate with due regard to ECRI's General Policy Recommendation No. 2 on specialised bodies to combat racism, xenophobia, antisemitism and intolerance at national level and

[19] Introduced by Articles 3 and 12(1) of Act CIV of 2006; in force since 1 January 2007.

[20] Concerning further possible sanctions against offending employers, see below, *Discrimination in Various Fields – Employment*.

[21] Amendment of Government Decree No. 362/2004 (XII.26) by Government Decree No. 332/2006 (XII.23).

[22] ECRI, Third Report on Hungary, § 34.

[23] See below, *Co-operation and co-ordination between the various specialised bodies involved in the fight against racism and racial discrimination.*

General Policy Recommendation No. 7 on national legislation to combat racism and racial discrimination.

44. ECRI notes from the outset that the Commissioner continues to provide a highly valuable avenue of recourse to members of national and ethnic minorities regarding unconstitutional practices essentially in the public domain.[24] This body's powers, based on the Hungarian Constitution, have remained as strong as they were at the time of ECRI's third report. The creation of the Equal Treatment Authority and the absence of any clear legislative delineation of the limits of the two bodies' respective powers has not reduced the scope of action of the Parliamentary Commissioner but means that in some cases, concerning public authorities in particular, applicants who belong to a national or ethnic minority may have a choice of avenues of redress, providing different remedies: whereas the Equal Treatment Authority can impose a fine on parties that have breached the requirement of equal treatment, the Parliamentary Commissioner primarily seeks an amicable solution and may make recommendations for broader change.

45. ECRI observes that the two other Parliamentary Commissioners (for Civil Rights and Data Protection respectively), while they do not specialise in the fields covered by ECRI's mandate, may from time to time be called upon to deal with matters relevant to ECRI. The Parliamentary Commissioner for Civil Rights released a report in April 2008 concerning a complaint lodged with respect to Debrecen Reception Centre,[25] and questions related to the protection of personal data are often of direct interest to members of national and ethnic minorities.[26] ECRI therefore welcomes the good relationship established between the Parliamentary Commissioner for the Rights of National and Ethnic Minorities and the Data Protection Commissioner,[27] and hopes that all three institutions will continue to maintain open and constructive working relationships with each other.

46. Finally, ECRI notes that the Parliamentary Commissioner for the Rights of National and Ethnic Minorities has a specific role to play in protecting the rights to which members of national and ethnic minorities may be entitled, and which is distinct from the antidiscrimination role played by the Equal Treatment Authority.

- *Co-ordination and co-operation between the various bodies involved in the fight against racism and racial discrimination*

47. While ECRI welcomed in its third report the establishment of many new bodies working in the field of its mandate, it drew the authorities' attention to the vital need for coordination and cooperation between all existing bodies and for the continuity of programmes that have demonstrated their effectiveness. It hoped that the new institutions would operate in close cooperation with the Parliamentary Commissioner for the Rights of National and Ethnic Minorities and with the Office for National and Ethnic Minorities in order to avoid any overlap or gaps in the work of all of these institutions.

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[24] For detailed information on the Commissioner's work, see his annual reports.

[25] See below, *Vulnerable/Target Groups, - Migrants, refugees and asylum-seekers.*

[26] See throughout the present report, and in particular below, *Monitoring Racism and Racial Discrimination.*

[27] Parliamentary Commissioner for the Rights of National and Ethnic Minorities, Annual Report 2004, Chapter VI.1.

48. An additional source of overlaps may arise due to the possibility for individuals to choose to refer their complaint both to the Equal Treatment Authority and to a competent court. Many sources have pointed out that there is not a complete overlap between these two bodies, as the remedies that may result from the two types of proceedings are not the same: whereas the Equal Treatment Authority may impose a fine on an offending party, the courts are empowered to award compensation to the victim. A complainant may prefer to turn first of all to the Authority, where proceedings are simple and fast, seeking the imposition of a fine against another party, and then to present the Authority's findings as persuasive evidence to a court in order to support and expedite a subsequent claim of damages. If, however, the complainant turns to a court while his or her complaint is still pending before the Authority, the latter must suspend its proceedings until the court has decided the case, and the court's conclusions are binding on the Authority. ECRI observes that, while these arrangements may appear obvious to lawyers, complainants less well versed in procedural issues may not find them so easy to grasp. It is thus particularly important –in order to ensure both the effective protection of individuals and the efficient functioning of the institutions set up in this field – that complainants (who are not required to have legal representation before the Equal Treatment Authority) have access to clear and simple information explaining the different remedies that may be granted by the different bodies, and the effect in practice of lodging a number of complaints simultaneously.

49. ECRI notes with interest that in late 2006, in order to improve accessibility for people outside Budapest, the Equal Treatment Authority signed a formal co-operation agreement with the Houses of Equal Opportunities now operating in each of Hungary's 19 counties. Under the agreement, the Authority will provide legal and practical training to staff of the Houses, to enable them to provide local complainants with legal advice and refer any apparent cases of discrimination to the Authority. The Houses are to provide rooms for holding hearings where necessary, as well as a weekly customer service for complainants. To date the Authority has run one training event attended by all the Houses, and several sessions with representatives of Houses in various counties.

50. ECRI recommends that the Hungarian authorities make available clear and comprehensive information to the public regarding the various avenues of redress available to individuals where they feel that they have been victims of violations of the principle of equal treatment or, where applicable, of their rights as members of national or ethnic minorities; this information should cover the rights and grounds protected, the various remedies available, the procedures to be followed and the effects of bringing several sets of proceedings simultaneously.

51. ECRI reiterates its recommendation that the Hungarian authorities ensure that sufficient human and financial resources are given to the anti-discrimination network to enable it to act as an efficient tool to help combating any form of discrimination against Roma throughout Hungary.

Provisions governing the rights of national and ethnic minorities

52. In its third report on Hungary, while recognising the positive role of the minority self-government system in the protection and enforcement of the rights of the national and ethnic minorities in Hungary, ECRI recommended that the Hungarian authorities continue their review of this system in order to identify and address any shortcomings, either in the relevant legislation or existing practice, so as to increase the efficiency and the credibility of such institutions. ECRI also encouraged the Hungarian authorities to give national and ethnic

minorities the possibility of exercising their legally guaranteed right to be represented in Parliament as soon as possible.

- *Minority self-government system*

53. In making the above recommendations, ECRI acknowledged the efforts already made in the area of the rights of national and ethnic minorities and noted that Act No. LXXVII of 1993 on the Rights of National and Ethnic Minorities was generally regarded as a comprehensive and progressive tool for the protection of the rights of minorities. However, it also noted that it was generally argued that there was a need to review certain shortcomings identified in the practice of minority self-government. Key shortcomings under the provisions in force at the time of ECRI's third report included serious abuses with respect to candidacies in the 2002 minority self-government elections, with many candidates standing in elections for local self-governments of minorities with which they had no links. Minority self-governments were also reported to have only rarely exercised their right to co-manage or co-run public institutions such as schools, museums and cultural centres, in part due to the lack of available public funding to cover such transferred activities. Difficult relationships were also reported between minority self-governments and local authorities, again due partly to questions of funding.[28]

54. Large-scale amendments were made to the law governing minorities in 2005 (Law No. CXIV/2005). These amendments introduced a three-tier system, providing for minority self-governments to be created at regional level as well as at the existing local and national levels. In addition, in order to remove barriers to voter turnout, voters are now able to cast their votes locally for all minority self-government elections, including those at national level. Specific measures were also taken with the aim of ensuring that in future, only persons belonging to national and ethnic minorities would be able to elect their self-governments and stand as candidates in the relevant elections: voters are now required to register on specific electoral rolls set up for the duration of the minority self-government elections (in order to protect personal data, these rolls are not published but are kept by the local notary and are maintained only until the final results of the elections have been established); candidates must also be registered on these electoral rolls and can no longer be nominated by individuals but must be nominated by an organisation whose charter includes the representation of the relevant national or ethnic minority and which has been operating for at least three years; candidates must also make a statement that they are familiar with the language and culture of the national or ethnic minority they seek to represent.

55. Notwithstanding the scale of these changes, a number of actors in the field of national and ethnic minority rights have voiced concerns about the new rules. In particular, the reliance on individuals' self-declaration as a member of a national or ethnic minority, coupled with the fact that electoral bodies are not entitled to investigate the truth of such declarations, means that abuses of the right to vote may still occur. At the same time, fears have been expressed that the requirement that voters register their ethnicity in writing with the local authorities, rather than registering with their minority self-governments, may discourage voters from enrolling to vote. In this respect it has been noted that considerably fewer persons registered as voters in the 2006 minority self-government elections than the number having declared their affiliation to a minority in the 2001 census. Allegations were also made that in some cases, local authorities had acted to impede the registration of a sufficient number of

[28] Advisory Committee on the Framework Convention for the Protection of National Minorities: Second Opinion on Hungary, adopted on 9 December 2004 (ACFC/INF/OP/II(2004)003), §§24-29, 113-119.

voters to elect a minority self-government. Furthermore, concerns remain under the new system with respect to the participation of minority representatives in local government decision making, as well as with respect to financial management issues.[29] These concerns led the Parliamentary Commissioner for National and Ethnic Minority Rights to propose the introduction of a series of new safeguards, to guarantee the proper involvement of minorities in the election process and to exclude abuses.[30] The authorities have noted that consultations continue in this field, and that a legal working group has been set up under the auspices of the State Secretariat for the National and Minority Policy, which includes representatives of the national and ethnic minorities. Over and beyond legal matters, the authorities have also emphasised that, in addition to general operational support, task-based financial support is now provided for, allowing minority self-governments to apply for funding to implement specific activities for the protection and promotion of minority interests.

56. ECRI recommends that the Hungarian authorities continue to keep the minority self-government system under review in order to identify and address any new or remaining shortcomings, either in the relevant legislation or existing practice, and so as to increase the efficiency and the credibility of such institutions and ensure that they are able to fulfil the positive role for which they were conceived.

- *Representation of national and ethnic minorities in Parliament*

57. Since ECRI's third report, no changes have been made to the laws governing elections to the national Parliament in order to provide specifically for the representation of national and ethnic minorities in that forum. Some members of national or ethnic minorities have been elected to the national and European Parliaments on mainstream party lists. However, some minority representatives have argued that the current situation does not suffice to ensure the proper representation of minority interests at national level.

58. In recent months the Prime Minister's Office and the Parliamentary Commissioner for National and Ethnic Minority Rights have drawn up proposals to improve the situation. At the time of writing, political consultations with the parliamentary parties had not yet begun, however. It may be noted in this context that a broad consensus will be required to achieve any change, as, in accordance with Article 71(3) of the Constitution, a two-thirds majority of members voting in Parliament is needed to change the laws governing elections to Parliament.

59. ECRI encourages the Hungarian authorities to pursue their efforts so as to open the way, as soon as possible, for national and ethnic minorities to exercise their legally guaranteed right to be represented in Parliament.

II. Racism in Public Discourse

60. In its third report on Hungary, ECRI strongly encouraged the Hungarian authorities to strengthen their efforts to carry out awareness-raising campaigns on the problems of racism and intolerance, not only in the capital and the large cities, but also and particularly, in small local communities and less populated regions.

[29] See in particular Parliamentary Commissioner for National and Ethnic Minority Rights, Annual Report for 2006.

[30] Parliamentary Commissioner for National and Ethnic Minority Rights, Annual Report for 2006.

61. Since then, and apparently building on, at least in part, from a series of highly charged anti-government demonstrations at the end of 2006, there has been a disturbing increase in racism and intolerance in public discourse in Hungary. In particular, the creation and rise of the radical right-wing Hungarian Guard (*Magyar Garda*) – a group bearing close ties to a well known radical right-wing political party – is consistently cited as a cause for deep concern. Since its creation in August 2007 and the public swearing in of several hundred new members in October 2007, the Hungarian Guard has organised numerous public rallies throughout the country, including in villages with large Roma populations; despite apparently innocuous articles of association, amongst the group's chief messages is the defence of ethnic Hungarians against so-called "Gypsy crime". Members of the Hungarian Guard parade in matching, paramilitary-style black boots and uniforms, with insignia and flags closely resembling the flag of the Arrow Cross Party, an openly Nazi organisation that briefly held power in Hungary during World War II, and during whose spell in power tens of thousands of Jews and Roma were killed or deported.

62. In January 2008, the Prosecutor General initiated court proceedings to ban the Hungarian Guard; at the time of writing, these proceedings were still pending.[31] As reported by eyewitnesses, an ugly atmosphere prevailed, however, at the hearing held in spring 2008. No police were present outside the courtroom, and dozens of uniformed members of the group blockaded the room, filling it with their own supporters and physically preventing members of the public not wearing the group's colours from entering. A complaint, which is also still pending, was lodged against the judge for failing to keep order.

63. Other extremist marches and rallies have also been held in recent months, along with increasingly strong counter-demonstrations. In February 2008, an annual rally commemorating the attempt by German and Hungarian troops to break out of a besieged Budapest in 1945 was held in the Budapest city centre. During the march, a wooden cross displaying the words "Blood and Honour" (the name of the banned extremist group[32] of which the organiser of the rally was formerly a leader) was erected. At the same time, hundreds of anti-fascists protested nearby. In March, a neo-Nazi rally outside a Budapest ticket office attracted around 1000 demonstrators; close by, around 3000 people, including the Prime Minister, held a counter-demonstration.[33]

64. Beyond the contents of the message propounded by the Hungarian Guard, civil society actors have emphasised their concern that some mainstream political parties have made little or no effort to distance themselves from the group, sending at least an implicit message to the broader public that there is nothing disquieting in its stance. Some NGOs have also underlined that by repeatedly giving prominent coverage to this group – which, though active and highly vocal, at present remains relatively small –, the Hungarian media is contributing to its rise. Moreover, latent racist and xenophobic attitudes are already reported to be strong and deeply rooted. This is reflected, for example, in a survey carried out in February 2007 in which 68% of the respondents said they would not accept in Hungary immigrants and refugees from Pyresia, a fictitious country.[34] It is also reflected in at least some instances of the media's reporting of crimes in which the accused is a member of the Roma minority,[35] as well as

[31] See above, *Implementation of existing provisions of criminal law*.

[32] See above, *Implementation of existing provisions of criminal law*.

[33] See also below, *Antisemitism.*

[34] See also below, *Antisemitism.*

[35] See below, *Vulnerable/Target Groups – Roma communites.*

in reactions in some villages to the arrival of Roma residents.[36] Overall, many actors emphasise a trend in which racist and xenophobic discourses are increasingly seen as legitimate by Hungarian society.

65. ECRI is deeply concerned at this turn of events in Hungary. It observes that a vital part of the fight against racism and intolerance is the need not only to develop clear and effective legal provisions and to implement them in practice, but also to take preventive action to change racist, antisemitic and xenophobic attitudes and to promote an open, more tolerant and inclusive society. It emphasises that the authorities, public figures and the media have a key role to play in this field.

66. ECRI strongly recommends that the Hungarian authorities step up their efforts to raise public awareness of human rights and of the need to combat racism and intolerance, not only in the capital and the large cities, but also in small local communities and less populated regions. It emphasises that such campaigns should target all sectors and ages of the population, and stresses that political leaders on all sides should take a firm and public stance against the expression of racist and xenophobic attitudes in both words and deeds.

III. Racist Violence

67. No specific figures were available regarding racist violence in Hungary, and reliable information is hard to come by given both the lack of statistics relating to the application of relevant provisions of the Criminal Code and the lack of relevant data disaggregated by ethnicity.[37] Isolated incidents of particularly severe racist violence have, however, been reported by the media, and further incidents reported by numerous actors in civil society – including some incidents of police brutality against Roma,[38] and one incident in which, only a few days after the group had held a march there, two Roma women in a small town were beaten by two sympathisers of the Hungarian Guard, who openly stated that they assaulted the women because they were Roma. ECRI notes with concern that such anecdotal evidence does not provide a reliable basis for building up a true picture of the prevalence or otherwise of racist violence in Hungary, or for taking effective preventive action against such violence or combating it adequately when it occurs. NGOs emphasise in this respect that a rarity of reports of racist violence is not in itself an indication that such acts are not committed, as victims of such acts may often be reluctant to come forward at all or to report the racist elements of violent offences against the person, whether owing to a sense of shame, due to fear of retribution, or because they feel it is unlikely that serious follow-up will be given to this aspect of a crime.

68. ECRI reiterates its recommendation, made earlier in this report, that the Hungarian authorities take steps to introduce systematic and comprehensive monitoring of all incidents that may constitute racist violence, and draws the authorities' attention in this respect to ECRI's General Policy Recommendation No. 11 on combating racism and racial discrimination in policing, in particular to Part III of the Recommendation, concerning the role of the police in combating racist offences and monitoring racist incidents. It also refers in this context to its recommendations elsewhere in this report[39] concerning the monitoring of racism and racial discrimination.

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[36] See below, *Discrimination in Various Fields – Housing.*

[37] See above, *Implementation of existing provisions of criminal law*, and below, *Monitoring Racism and Racial Discrimination.*

[38] See also below, *Conduct of Law Enforcement Officers*.

[39] See below, *Monitoring Racism and Racial Discrimination*

IV. Antisemitism

69. In its third report on Hungary, ECRI recommended that the Hungarian authorities remain vigilant in respect of antisemitic acts and discourse and that they take all appropriate measures, including criminal prosecution when necessary, to respond to them with the greatest vigour.

70. Since then, the Government has taken certain steps to combat antisemitism. A permanent Holocaust Memorial Centre was opened in February 2006, and efforts have been made to determine the status and whereabouts of Hungary's Holocaust records. In addition, Act XLVII of 2006 created an opportunity for individuals whose immediate relatives were killed in the Holocaust or were sent to Soviet forced labour camps to seek compensation. A lump sum of 400 000 HUF (around 1 500 €) may be awarded to eligible individuals for each parent, sibling or child who was killed. The Act took effect on 31 March 2006 and, though initially scheduled to remain in force for only four months, was subsequently extended so as to expire in January 2007. 97 500 claims were made, many of which are still being processed. On a more symbolic level, the name of a former high-ranking Nazi official was removed from the title of the National Epidemiology Centre.

71. Overall, however, the situation does not appear to have improved. As regards the expression of antisemitic views, two weekly newspapers regularly publish antisemitic material. In March 2008, a particularly virulent antisemitic article was published by one of the major daily newspapers, and led to considerable protest. Numerous far-right web-sites that include antisemitic material also exist. The content of these is reported to be subject to some monitoring by the authorities, due to the prohibition on the use of certain Nazi symbols;[40] however, ECRI is not aware of any steps taken by the authorities against any of these sources, or indeed whether any of them have in fact contravened Hungarian law.

72. Whereas antisemitic attacks against persons appear to be rare, incidents of vandalism against synagogues and Jewish cemeteries are not uncommon. Amongst the most serious incidents reported, in June 2005, 130 graves were vandalised in the largest Jewish cemetery in Budapest. The investigation into this incident is still open, although no developments have been reported for two years. A police investigation into another such incident at a synagogue in Vac (north of Budapest) – in which the synagogue's fence was painted black, then sprayed with antisemitic graffiti, swastikas and other fascist symbols – was closed in November 2006 as no suspects could be identified. In early 2008, two youths were arrested for painting fascist symbols on Jewish gravestones in Kaposvar (southwest Hungary).

73. Antisemitism has also been openly espoused by certain political parties,[41] which used xenophobic and antisemitic slogans during the April 2006 elections for the National Assembly. Groups such as the Hungarian Guard also openly express antisemitic views,[42] and NGOs report that even some mainstream parties do little to distance themselves from such opinions. Overall, the sense is that the expression of antisemitic views is currently on the rise in Hungary.

74. ECRI recommends that the Hungarian authorities continue and intensify their efforts to address all manifestations of antisemitism in Hungary. In this respect, ECRI reiterates the recommendations made elsewhere in this report relating to

[40] See above, *Criminal law provisions covering racially motivated offences.*

[41] Notably the radical right-wing Hungarian Justice and Life Party (MIEP-Jobbik).

[42] See above, *Racism in Political Discourse*.

implementation and development of criminal law provisions and countering racism in public discourse. It stresses the role to be played by various opinion leaders in society, in particular politicians and the media, in consistently speaking out against any manifestations of antisemitism and in taking action to ensure that their own bodies present an unambiguous and consistent stand against this phenomenon.

V. Discrimination in Various Fields

Education

75. Discrimination suffered by Roma in the field of education – and in particular, segregation in the field of education – was a subject of particular concern in both ECRI's second and third reports on Hungary. As detailed in particular in ECRI's third report, segregation is known to take a variety of forms: from the disproportionate channelling of Roma children into "special" education designed for children with mental disabilities; to schools attended entirely, or not at all, or by disproportionately high or low numbers, of Roma children; to segregated classes within schools; to the removal of Roma children from schools by channelling them into "private" (at home) education; to low attendance of Roma children at kindergartens. All of these practices or phenomena have a devastating impact on education outcomes for Roma children, who experience high drop-out rates at secondary level and low enrolment at tertiary level, as well as correspondingly limited future life choices and employment prospects.[43]

76. Against this background and as a matter of general principle, ECRI welcomes the inclusion in the Equal Treatment Act[44] and Public Education Act 1993 of an express prohibition on unlawful segregation, and notes with satisfaction that the authorities have taken a wide range of measures in recent years with the aim of addressing these issues. However, bearing in mind the extent of the problems to be addressed, sustained efforts will be required for a considerable time to come in order to achieve lasting improvement. Below, each of the above-mentioned forms of segregation or discrimination in education, as well as measures so far taken to redress them and recommended future action, are examined in turn.

- *Disproportionate representation of Roma children in special schools for children with mental disabilities*

77. In its third report, ECRI urged the Hungarian authorities urgently to take further steps to end the over-representation of Roma children in special schools, including the preparation and implementation of means of assessment that were not culturally biased and the training of teachers and other involved persons to ensure that they made appropriate decisions. ECRI also recommended that measures be taken to facilitate the integration of Roma children then in special schools into the mainstream school system.

78. In 2003 a programme was launched to fight the practice of classifying Roma and socially disadvantaged children, without just cause, as children with mental disabilities. According to information provided by the authorities, 2100 children who had been classified as having mental disabilities were reassessed by independent medical experts (the Rehabilitation Expert Committees Examining

[43] According to the background information provided in the Parliamentary Resolution on the Decade of Roma Inclusion Programme Strategic Plan, 82.5% of Roma aged 20-24 had completed primary school; only 5% of Roma aged 20-24% had completed secondary schooling (compared with a national average of 54.5% of 18-year-olds); and only 1.2% of Roma aged 20-24 attended higher educational institutions.

[44] See Article 7(1) of the Equal Treatment Act.

Learning Skills) in 2004 and 11% of these children, who were found to be mentally sound, were reintegrated into the school system.

79. Despite these advances and the financial means provided to support them, the authorities have observed that no radical improvements or breakthroughs have been achieved in the field of equal opportunities for these children. Thus, in the last two years, the authorities' focus has shifted from a review and reintegration approach to influencing broader processes, such as financing and diagnosis. A new cognitive assessment instrument ("WISC-IV"), designed to take account of socio-cultural differences, has thus been introduced for use by rehabilitation committees from 2008 onwards. These processes are financed under the New Hungary Development Plan.

80. Actors outside the education system stress two key points of concern. First, the local rehabilitation committees – which assess, upon referral of a child by their kindergarten teacher, whether the child should be oriented towards the special school system, and whether children already attending special schools should remain there – are also the bodies that run the special schools, for which funding increases with the number of children, and is higher per capita than in mainstream schools. They thus have a vested interest in maintaining, or even increasing, the number of children attending their schools. While some safeguards have been put in place, such as the requirement of parental consent to enrol a child in a special school, many parents who accept the placement of their child in a special school may not understand the long-term implications of that decision for their child, and doubts may be raised as to whether their consent is in all cases genuine and informed. Moreover, the significant number of children who were returned to mainstream schools following the 2004 rehabilitation programme would seem to confirm that decisions to place children in special schools need to be carefully monitored.

81. Second, of the three levels of disabilities into which children in special schools may fall ("very serious" (requiring residential care), "medium-severe" or "mild disability"), the vast majority of children assessed as having a "mild disability" could, in the view of many NGOs, be integrated relatively easily in the ordinary school system: many children are misdiagnosed due to a failure to take due account of cultural differences or of the impact of socio-economic disadvantage on the child's development, and others suffer from only very minor learning disabilities that do not warrant the child's removal from the mainstream system. ECRI repeatedly heard that investments in teacher training should primarily be directed towards ensuring that teachers in the mainstream school system are equipped to deal with diverse, integrated classes, rather than towards perpetuating a system from which children, once streamed into it, are unlikely to break out, and which overwhelmingly results in low levels of educational achievement and a high risk of unemployment. Some actors have suggested that – bearing in mind that the best way of ensuring that children do not wrongly become trapped in special schools is to ensure that they are never sent down that track in the first place – the category of children with mild disabilities should simply be deleted from the Education Act and all children with mild disabilities integrated in the mainstream school system.

82. ECRI notes that the efforts made to date to combat the disproportionate representation of Roma children in special schools for children with mental disabilities, though they have had some positive effects, cannot be said to have had a major impact in practice so far. It stresses that, in parallel to assisting wrongly diagnosed children already in the special school system to return to the mainstream system, putting an end to this form of segregation also implies ensuring that children are not wrongly streamed into special schools.

83. ECRI urges the Hungarian authorities to intensify their efforts to reintegrate Roma children currently enrolled in special schools into mainstream schools. It urges them in this context to monitor carefully the effectiveness of the new cognitive assessment instrument (WISC-IV) in taking account of socio-economic disadvantage and cultural diversity, and to adapt it further if necessary. ECRI furthermore strongly urges the Hungarian authorities to ensure that only those children who cannot cope with education in an integrated classroom are sent to special schools. To this end, all possible avenues should be explored, including the option of removing from the Education Act the possibility of placing children with "mild disabilities" in special schools.

84. ECRI recommends that the Hungarian authorities intensify their efforts to train teachers working in mainstream schools to deal with diverse classes including children from different socio-economic, cultural or ethnic backgrounds.

85. ECRI strongly urges the Hungarian authorities to review the procedures by which children's aptitude for commencing or returning to mainstream schools is examined, in order to eliminate all possible conflicts of interest of persons involved in the process.

- *Separate or remedial classes in mainstream schools including solely or mainly Roma children*

86. In its third report, ECRI urged the Hungarian authorities to take all necessary steps to end the segregation resulting from certain catch-up or remedial programmes involving the channelling of Roma children into separate special classes in mainstream schools.

87. An important judgment in this field was delivered by the Budapest Court of Appeal in October 2004 against the local authorities and a school in Tiszatarjan. The court found that these bodies had wrongly kept a number of children – mostly Roma – in separate classes of a lower academic standard for several years, without any legal or medical basis. It found that this practice would have a long-term impact on the children and that, in deciding to put them in classes of a lower academic level, the school had failed to recognise properly or to address their learning difficulties. The families of the nine children were awarded a total of approximately 650 000 forints (14 600 €) in compensation.[45]

88. Since 2003, the authorities have introduced new measures, targeting the integration of multiply disadvantaged children. These are children whose parents meet two criteria: first, that they receive welfare benefits, and second, that they did not themselves progress beyond primary education. Many – though by no means all – of these children are Roma.[46] Children are recognised as falling into this category on the basis of a voluntary declaration made by their parents. Schools that have adopted equal opportunity plans can apply for (financial) integration support if the proportion of multiply disadvantaged children in their various classes remains below 50% (with the exception of one class, for which the proportion of multiply disadvantaged children must not exceed 70%). The difference between the ratios of multiply disadvantaged children in parallel classes must furthermore not exceed 25%. Subsidies granted can be used for creating a child- and pupil-friendly environment, for training pupils individually, for acquiring the necessary development equipment, for compensating social disadvantages and for setting up and operating pedagogical development groups. The National Education Integration Network (OOIH) – the basic tasks of which are to promote the integrated education of

[45] Decision of the Budapest Court of Appeal (Fovarosi Itelotabla) of 7 October 2004.

[46] See also below, *Monitoring Racism and Racial Discrimination.*

multiply disadvantaged pupils, provide professional services with the aim of ensuring the successful education and further education of such pupils, and establish a professional network based on the horizontal co-operation of teachers and their institutions – concludes co-operation agreements with the schools having joined the programme and provides professional support to them. Schools that are not entitled to apply for integration support because over 50% of their students are multiply disadvantaged children may apply for skill development support. More than 2 billion HUF (€8 million) were allocated to these programmes and to kindergarten development programmes in 2007. The number of institutions having participated in the program has moreover grown each year, from 9 935 in the 2003-2004 school year to more than 25 000 in 2007-2008.

89. ECRI welcomes these measures, which, though not explicitly targeted at Roma children, should benefit them. However, it notes that the way in which the funds provided by the central authorities are used in practice depends on the local authorities responsible for administering the schools, which appear to be subject to little effective subsequent monitoring. Monitoring is not carried out by the central authorities but at local level, by experts appointed by the local authorities themselves, leaving civil society with little confidence in the impartiality or objectivity of the exercise. ECRI has moreover received reports that in practice, schools granted funds under the programme described above have not always used them to create integrated classes, meaning that in these cases, at least, the expected desegregation was not achieved.

90. ECRI strongly encourages the Hungarian authorities to continue their efforts to desegregate classes within mainstream schools, and to monitor the effectiveness in practice of the measures currently targeting multiply disadvantaged children in ensuring the integration of Roma pupils in mainstream classes. It draws attention in this context to its recommendation elsewhere in this report that the Hungarian authorities introduce an independent monitoring system at national level to ensure the compliance with centrally enacted legislation of measures taken by school maintainers; this system should in particular be instrumental in ensuring that the prohibition on segregation is respected in practice.

- *Schools attended solely or mainly by Roma children*

91. In its third report, ECRI recommended that the Hungarian authorities closely examine the situation as regards mainstream schools mainly attended by Roma in order to develop measures to foster integrated schools. The need for more effective measures in this field was subsequently highlighted in a case brought against the local authorities of Miskolc, which had merged seven schools into three, but without also merging their catchment areas; children of different ethnic backgrounds thus continued to go to school in physically separate buildings of what was an “integrated” school in nothing but name. In a landmark judgment under the Equal Treatment Act in 2006, the Debrecen Appeal Court found that the authorities had violated the prohibition on segregation on the basis of ethnic origin. However, several sources reported that, in 2007, the local authorities once again separated the catchment areas of the merged schools.

92. Two main causes for the phenomenon of segregated mainstream schools are widely referred to. First, as the proportion of the Roma population in small, declining villages and in the poorer urban areas increases, Roma are becoming increasingly isolated, meaning that schools in many areas where they live are more and more frequently attended only by Roma pupils. Second, the system of granting parents free choice of schools has allowed parents to request to enrol their children in any school, and has in the past also allowed schools to accept

or reject whichever pupils they wished. In practice, segregation has actually worsened in recent years.[47] Serious disparities in the quality of schooling available to children depending on their socio-economic status have in turn been reported. Schools with high proportions of Roma students are in particular reported to have lower quality infrastructures – in some cases, with no running water, toilets or heating – and sometimes unqualified, frequently less well trained teachers than schools with few or no Roma pupils.

93. The Government has acted in recent years to counteract this situation and achieve a more even balance of multiply disadvantaged children between schools. Thus, amendments to the rules on school catchment areas in Article 66 of the Public Education Act came into force as from 2007, taking as their starting point that a place must be available in public education for every child. School maintainers (the authorities responsible for running schools) are now required to ensure that there is no more than a 25% disparity in the proportions of multiply disadvantaged children attending the various schools within their remit; should such a disparity arise, the authorities are required to redraw the boundaries of the relevant catchment areas to bring them back into line with the above requirement.

94. At the same time, schools' rights to choose among children having applied for first-grade places have been drastically limited, without changing the principle of parents' freedom to apply to schools they choose. Schools are now required to accept children in clear priority order: first, all applicants from within their catchment area; second, if places remain, any multiply disadvantaged children that apply; third, if places still remain, special situations should be taken into account (for example, children having a sibling already attending the school); finally, if any places still remain, the school must apply a lottery system. It should be noted, however, that this obligation applies only to public (state-funded) schools, and not to church-run schools, although these too receive state funding. Villages have been cited where practically all non-Roma children attend a church-run school, leaving only Roma in the state-funded school. The Public Education Act, while imposing less stringent conditions on church-run schools, now requires them to provide at least 25% of their places to local children; they also cannot refuse entry to any multiply disadvantaged child.

95. ECRI welcomes the steps taken to reduce disparities between schools as to the socio-economic background of their pupils, which should serve to benefit Roma students falling within the category of multiply disadvantaged children. Nonetheless, it observes that in the field of education, the high degree of autonomy granted to local authorities in Hungary would unfortunately appear to leave little sense of collective responsibility for quality education for all children. In one well known case, when a local authority closed the only school it ran, attended by mostly Roma children, none of the neighbouring authorities agreed to accept the Roma children in their schools; it took the intervention of the Parliamentary Commissioner for National and Ethnic Minority Rights to resolve the issue. Moreover, there does not appear to be effective monitoring of the implementation of the centrally enacted legislation to reduce segregation, for the reasons given earlier (§ 89). ECRI emphasises that autonomy does not entitle local authorities to ignore nationally applicable standards, and can never justify a breach of the prohibition on segregation.

[47] Official (research-based) figures, indicate that the number of homogeneous non-Roma classes rose from 5.6% in 2000 to 10.1% in 2004, and the number of homogeneous Roma classes rose from 10.6 to 13.6%. See National Institute for Public Education, Hungary, *Education in Hungary 2006*, http://www.oki.hu/oldal.php?tipus=kiadvany&kod=eduhun2006, Table 9.5 (accessed 28 May 2008).

96. ECRI strongly encourages the Hungarian authorities to pursue their efforts to desegregate schools, and to monitor the effectiveness in practice of the measures currently targeting multiply disadvantaged children in ensuring the integration of Roma pupils in mainstream schools.

97. ECRI strongly recommends that the Hungarian authorities introduce an independent monitoring system at national level to ensure the compliance with centrally enacted legislation of measures taken by school maintainers; this system should in particular be instrumental in ensuring that the prohibition on segregation is respected in practice.

- *Channelling of Roma children into "private" (at home) education*

98. In its third report, ECRI urged the Hungarian authorities to monitor closely the decision-making process of registering children as private pupils in order to assess its possible discriminatory effects and to take all necessary measures to ensure that this system is not used as a means of taking Roma children out of schools.

99. The authorities have indicated that amendments made to the Public Education Act in 2003 make it possible to take into account in the process of registering a child as a private pupil the opinion not only of the school principal but also of the guardians of the child and the child care authorities. The latters' opinion must be sought in all cases where a disadvantaged child is to be registered. The authorities have stated that there has been no increase in the number of private pupils, perhaps because of the introduction of these more stringent rules.

100. ECRI encourages the authorities to continue to monitor closely the impact of the new rules on registering children as private pupils, in order to ensure their effectiveness in eliminating past discriminatory practices in this area.

- *Access to kindergarten education*

101. In its third report, ECRI recommended that the Hungarian authorities develop and restructure kindergarten education to ensure that all Roma children attend kindergarten. ECRI also urged the Hungarian authorities to take further measures to ensure that poverty did not prevent children from attending kindergarten.

102. Since 2003, and recognising the importance of effective access to kindergarten education in ensuring better outcomes for Roma children, the government has adopted wide-ranging measures in this field. First, in order to promote the attendance of multiply disadvantaged children at kindergartens, school maintainers are obliged to provide admission to all multiply disadvantaged children in their area. Three-year kindergarten education must therefore be put in place even in villages that previously had no kindergarten. Around 120 billion HUF (nearly € 500 million) has been allocated in recent years to developing the necessary infrastructure. To ensure that multiply disadvantaged children start attending kindergarten as early as possible, maintainers of kindergartens can also apply for state support, provided at least 70% of multiply disadvantaged children in their districts attend kindergarten, and provided that these children form at least 15% of the children in kindergarten. Free meals have also been provided, and it is also planned to introduce kindergarten admission support, to be paid to parents of kindergarten-aged multiply disadvantaged children, to allow them to buy the necessary clothes and supplies for their children.

103. ECRI welcomes these measures, and stresses the importance of continuing to invest in increasing the attendance of Roma children at kindergarten level in order to ensure better long-term educational outcomes for them. Increasing

Roma children's access to the full three-year pre-school programme may in particular be an influential factor in reducing the number of Roma children wrongly oriented into special schools when they reach primary school age. ECRI further notes in this context that not all children are assessed for streaming into the special schools described at the beginning of this section: only children selected by their kindergarten teachers are obliged to undergo the tests. ECRI observes that the basis on which children are referred for assessment seems unclear. Greater awareness on the part of teachers of the impact that cultural factors and socio-economic disadvantage may have, without constituting a learning disability, on children's educational development may constitute a further key to reducing the number of Roma children wrongly directed from kindergarten into special schools.

104. ECRI strongly encourages the authorities to continue their efforts to improve the access of multiply disadvantaged children, including Roma, to the full cycle of kindergarten education, as a cornerstone of any measures to eliminate long-term discrimination against Roma in the field of education; these measures should cover all the relevant practical aspects, including infrastructures, teachers' skills and financial support to parents.

105. ECRI further recommends that the authorities take measures, with a view to reducing the numbers of children required to undergo cognitive testing, to raise the awareness of all kindergarten teachers to the impact that cultural factors and socio-economic disadvantage may have, without constituting a learning disability, on children's educational development

- *Access to secondary and tertiary education*

106. In its third report, ECRI recommended that further measures be taken to encourage the participation of Roma children in education at the secondary and tertiary level. It indicated that such measures should include financial subsidies to ensure that children from poorer families are able to continue their studies, as well as awareness-raising initiatives among Roma communities concerning the importance of education for their children.

107. Several programmes are currently in place to promote equal opportunities for disadvantaged pupils and encourage them to pursue their education beyond primary level. 17 000 pupils in 2006-7 and 11 000 in 2007-8 received grants and tutorial assistance under the "Provision for Pupils" grant programme, aimed at helping them to reach and complete secondary level education. A further 3 450 especially disadvantaged pupils participated in Arany János programmes to prepare them to enter secondary education, and an additional facet of these programmes was launched in the 2007-8 school year, covering vocational schooling. Finally, a programme was launched in 2005 to assist disadvantaged young persons in entering and pursuing higher education, under which the students' course fees are paid and tutorial assistance is provided.

108. ECRI welcomes these steps taken to promote access to secondary and tertiary education of disadvantaged students, particularly Roma.

109. ECRI encourages Hungarian authorities to pursue their efforts to promote equal access to secondary and tertiary education, and recommends that they monitor closely the impact of the measures in improving outcomes for Roma students in particular, in order to allow them to be revised and fine-tuned if necessary.

- *Combating prevailing prejudices and stereotypes and other transversal issues*

110. In its third report, ECRI recommended that further steps be taken to combat prejudice and discrimination in schools, including specific training for headmasters and teachers, who should then be responsible for countering any hostility or prejudices among parents from the majority population.

111. The authorities have stated that social awareness-raising and integration promotion training continue to form part of the training organised for teachers in the framework of two overarching programmes to ensure equal opportunities for disadvantaged children in the educational system and to ensure integration. ECRI welcomes these initiatives but emphasises the importance of ensuring that they produce an impact in practice, as it is all too easy for teachers to leave this training at the door once they return to the school environment. In one telling case, a headmaster who had followed such training nonetheless ran a segregated school.

112. ECRI encourages the Hungarian authorities to continue incorporating social awareness-raising and integration promotion in the training programmes organised for teachers; it further recommends that follow-up assessments be carried out with teachers having undergone such training, in order to assess the degree to which it has had a practical impact on their work and adjust training programmes if necessary.

Employment

113. In its third report on Hungary, ECRI recommended that further efforts be made to improve the employment situation of the Roma community. It considered that, given the long-term and endemic nature of the disadvantage Roma experienced on the labour market, special measures were necessary to place them in a position in which they could compete on an equal footing with members of the majority population.

114. The unemployment rate of Roma in Hungary remains extremely high.[48] Hungary's rapidly changing and increasingly competitive economy has left many Roma with few or no educational qualifications marginalised, and with few prospects of finding employment. But Roma also continue to experience both indirect and direct discrimination in seeking employment – with many employers not afraid to admit to openly discriminatory attitudes, saying clearly that they have refused to hire a Roma solely because of their ethnic origin. Direct discrimination experienced by Roma has been documented in empirical studies but also recognised in the decisions of the Equal Treatment Authority. The latter reports that since its inception the majority of complaints it has dealt with have concerned the field of employment, and many of these complaints are lodged by Roma.[49]

115. The antidiscrimination provisions in the Labour Code and the Equal Treatment Act – including the power granted to the Equal Treatment Authority to publish a list of employers who have been fined for violating the principle of equal treatment, which disqualifies these employers for two years from benefiting from state aid – at least theoretically constitute a deterrent, and do provide a basis in practice for seeking redress in individual cases. However, as NGOs point out,

[48] Whereas in the early 1990s the employment rate of male Roma was only 4 or 5% lower than that of male members of the majority population, by the mid-1990s the gap had leaped to 45%. See Gabor Kertesi, *Budapest Working Papers on the Labour Market; The Employment of the Roma – Evidence from Hungary*, Institute of Economics of the Hungarian Academy of Sciences, Budapest 2004, p. 19.

[49] Equal Treatment Authority, Annual Reports for 2005 and 2006.

these provisions alone cannot suffice to advance the situation of Roma with respect to employment, not least because they cannot address the broader causes for inequality experienced by large groups of people in a disadvantaged position.

116. The government has taken a number of initiatives in recent years to reduce exclusion from the labour market, including through specific programmes targeting disadvantaged people or long-term unemployed, many of whom are Roma. Some of these programmes aim to give unskilled workers new skills; others, such as some public works programmes, combine short-term employment and education. Still others provide incentives to employers, in the form of reduced employer contributions, to employ workers from specific groups; an example of the latter is the Start-Extra programme, targeting long-term unemployed who either are over 50 or have completed no more than 8 years of school education. A Roma Employment Network has also been set up to ensure that there is a Roma desk officer in each labour exchange centre and employment office. Moreover, the authorities have pointed out that employment is a key chapter of the Decade of Roma Inclusion Programme Strategic Plan, and the government will be required to report to Parliament on progress achieved with respect to all the tasks set out in the Strategic Plan.

117. ECRI notes that the initiatives taken are generally well received, but that civil society actors nonetheless point out that their impact is limited and not lasting: the programmes provide helpful and rewarding experiences in the short term for the participants concerned, but the solutions they provide are only temporary and concern only a limited number of participants (a few thousand in each case). In short, they constitute positive steps, but are not enough on their own to remedy the widespread long-term unemployment of disadvantaged groups such as the Roma. Moreover, their overall impact remains difficult to evaluate due to a lack of available data disaggregated by factors such as ethnicity; government estimates in fact rely on census figures as to the proportions of the population that are Roma in the various counties of Hungary in order to build a picture of how many Roma may have benefited from a given measure.

118. ECRI strongly encourages the authorities to continue their efforts to improve the employment situation of the Roma community and reiterates the view that, against the background of the long-term and endemic nature of the disadvantage Roma experience on the labour market, special measures continue to be necessary to place them in a position in which they can compete on an equal footing with members of the majority population. These measures should also be directed towards overcoming prejudices and negative stereotypes on the part of employers.

119. ECRI recommends that the authorities keep under review the effectiveness of the measures taken in improving the situation of Roma with respect to employment, refine their monitoring of the impact of the measures taken if necessary, and adapt the measures where needed to improve their effectiveness.

Housing

120. In its third report, ECRI recommended that urgent measures be taken to improve the housing situation of Roma, and particularly to ensure that no arbitrary forced eviction of Roma families took place. ECRI strongly encouraged the authorities to develop a social housing policy that could benefit members of the Roma community living in poor conditions. In particular, it recommended that Roma families who were living without access to even basic amenities be provided with a decent standard of housing and infrastructure.

121. ECRI also stressed the need to address the problem of segregation of Roma communities from the majority community, and the attitudes on the part of the majority community that contributed to such segregation, and considered that the principal objective of housing policy should be to allow Roma communities to live as a part of majority communities.

122. Since ECRI's third report, Roma families have continued to face disproportionate numbers of evictions. According to one study, victims were identified as Roma in 55% of eviction or threatened eviction cases reported by the media, though Roma constitute only around 6% of the population of Hungary.[50] Forced evictions are now widely and frequently reported in Hungary: since May 2000, local government notaries have been entitled to order the eviction of tenants without official papers, and appeals against such decisions do not have a suspensive effect. While this provision applies to all tenants, it has been found to have a disproportionately adverse effect on Roma, due to their difficult socio-economic situation.[51]

123. The majority of Roma in Hungary live outside the main cities and towns, with large numbers living in unfavourable or even slum-like conditions, a phenomenon that has worsened over the past decade.[52] The authorities have stated that their primary aim in the present context is to reduce segregation in housing by eliminating Roma ghettoes. They have thus introduced a programme to refurbish social housing and encourage Roma living in segregated settlements outside towns and villages to move into the refurbished social housing inside the town or village. In addition, in order to ensure that the principle of desegregation is taken into account in the award of state or European Union funding for various projects, the authorities are introducing an equal opportunities subsidy policy. Thus, in order to receive funding for urban development projects, whether or not these are directly related to desegregation efforts, a town will be required to submit a desegregation plan aimed at the elimination of segregated living in the town. There are, however, reports of occasional resistance from local authorities and individuals when a Roma family has sought to move into a new neighbourhood; these have involved members of the local population causing physical damage to, or even destroying, houses bought by Roma; locals forming human chains to prevent Roma families from moving in; or local authorities acting to prevent Roma families from moving in, following petitions by local inhabitants.

124. Access by Roma to social housing is also hindered, partly by the sale in recent years of significant proportions of public housing stocks (including social housing),[53] and in some areas by the adoption by local authorities of arbitrary rules as to eligibility for public (including social) housing, which in practice result in indirect discrimination against Roma. In some cases, access to social housing has, for example, been made conditional on demonstration by the applicants that they possess large amounts of money, thereby, almost by definition, excluding persons who are unemployed, reliant on social welfare or otherwise in situations of poverty or extreme poverty from gaining access to

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[50] Data from the European Parliament's Country Profile on Hungary, available at http://www.europarl.eu.int/enlargement_new/applicants/pdf/hungary_profile_en.pdf.

[51] European Committee on Social Rights, Conclusions XVIII-1, Hungary, Article 16.

[52] In 1993-94, "13.9% of the Roma population (about 70 000 people) lived in segregated settlements or colony-type neighbourhoods with insufficient utility supply, and low infrastructure, or in urban colonies in poor conditions. Another study carried out in 2000 found that approximately 20% of the Roma population (100 000 people) lived in segregated settlements." See Joint Memorandum on Social Inclusion of Hungary, 18 December 2003, Brussels, p. 13. Available at http://europa.eu.int/comm/employment_social/soc-prot/soc-incl/hu_jim_en.pdf (accessed 28 May 2008).

[53] Joint Memorandum on Social Inclusion of Hungary, 18 December 2003, Brussels, p. 13.

social housing. This impacts many Roma, who are disproportionately represented in these groups. In other cases, the rental of social flats is auctioned off, with bids outreaching the resources of many Roma families who are most in need of such flats, or auctions of social flats are notified only to a select few, again excluding Roma from access to such housing.

125. Many local governments have also enacted provisions barring persons caught squatting in property from having access to social housing for a number of years, generally between three and five years (ten in Debrecen). These provisions result in indirect discrimination against Roma, who are proportionally far more often unable to afford even nominal housing costs, forcing them into occupying homes without legal authorisation. Their impact may be especially negative on the neediest families, as the refusal of social housing may lead to the removal of children from their families. One such provision was struck down as unconstitutional by the Hungarian Constitutional Court on 22 February 2005, and in March 2006 the Hungarian Housing Act was amended to include as an explicit requirement that of retaining social criteria for the allocation of social housing. ECRI notes that the impact in practice of this amendment remains to be seen, and observes that, as in the field of education, the principal source of the discrimination experienced in everyday life by Roma in the field of housing is not the contents of legislation enacted at central level, but appears rather to be the manner in which local authorities exercise their powers.

126. ECRI strongly encourages the Hungarian authorities to continue addressing segregation in housing through measures designed to facilitate their moving into more mixed neighbourhoods, and, in parallel, to intensify their efforts to combat negative community attitudes towards Roma neighbours.

127. ECRI recommends that the authorities intensify their efforts to ensure that Roma are not arbitrarily deprived of social housing; it recommends in particular that the authorities take all the necessary measures to ensure that local authorities, in applying legislation enacted at central level, do so in accordance with the law, and in conformity with the prohibition on discrimination.

128. ECRI recommends that the authorities keep under review the impact in practice of the amendments made to the Housing Act in 2006 in safeguarding Roma in particular from forced and arbitrary evictions, and strengthen the measures taken if necessary to ensure their effectiveness.

Health

129. In its third report, ECRI urged the Hungarian authorities to examine thoroughly allegations of discrimination and segregation in access to health care and, where appropriate, to take all necessary measures to combat such practices. It recommended that measures be taken to ensure that members of Roma communities enjoyed equal access to health care. ECRI also recommended taking a series of measures to improve communication between Roma patients and hospital staff, including awareness-raising and training initiatives aimed at health care personnel to combat stereotypes and prejudices that could lead to discriminatory treatment of Roma patients, and considered that the appointment of assistants who speak the Romani language and could serve as mediators between Roma patients and health care personnel would be a positive step.

130. In 2006, the authorities launched a wide-ranging reform of the health care system in Hungary. As part of this reform, a new Health Insurance Supervisory Authority was created, with the primary goal of reducing territorial inequalities in health care. It is also responsible for dealing with complaints about the health care system, and like the Equal Treatment Authority, can impose fines on health service providers who infringe patients' rights and publish the list of

providers that have been fined. The authorities have stated that, of a total of 7000 complaints that it has received since its inception, of which proceedings were initiated in about one-sixth of the cases, direct discrimination related to ethnicity has to date been established in only one case. Indirect discrimination could be assumed to have occurred in a few dozen cases.

131. As regards measures to combat prejudices and stereotypes, the authorities have indicated that cross-cultural nursing is included as part of the training of nurses studying at college level, and health visitors who go out to see patients in their homes also have cross-cultural features in their curriculum. No Roma mediators have been appointed; the authorities have indicated that progress on this point would require a co-ordinated approach between all sectors, in order to create sufficient interest amongst possible future candidates for such jobs. A programme is also planned for 2008-9 with the aim of increasing the sensitivity of medical staff in general to cultural differences, with the specific target of increasing the percentage of Roma in the medical professions to 3-5%. In terms of improving health status, the government is also seeking to provide incentives to small communities to co-operate with each other to set up local hospitals and psychiatric clinics, with a view to reducing inequalities between regions. Bearing in mind that people with the poorest health status often have less frequent recourse to the health system than those with a better health status, and that existing demand is therefore not always a good indicator of real needs, the authorities' intention is also that as part of the overall reforms, resources are to be allocated as a function of the number and health characteristics of people in each area rather than on the basis of present use of existing facilities. The government is also placing particular emphasis on preventive measures, such as free screening for breast and cervical cancer.

132. ECRI welcomes the recent steps taken towards reducing inequalities experienced with respect to the health care system, including measures set out under the Decade of Roma Inclusion Programme Strategic Plan. It observes that the overall health status of Roma in Hungary remains for the moment, however, considerably less favourable than that of non-Roma. The average life expectancy of Roma in Hungary is more than ten years shorter than that of non-Roma.[54] Their situation continues to be compounded by difficulties in access to health care. Though nation-wide statistics are lacking, empirical studies show that Roma continue to suffer difficulties in receiving treatment in hospitals. Emergency assistance is reportedly slow, or even denied altogether, and the isolation of Roma communities in rural areas in particular means that access to a general practitioner is often more difficult. Patients report that doctors refuse to touch them, or make only cursory examinations, leading in some cases to misdiagnosis or the prescription of inadequate medicines. Patients are also subject to discriminatory attitudes or to extortion from health workers when they do receive treatment. Segregation of Roma women in maternity wards has also been reported, in one case reportedly leaving the women in a ward which they were required to clean themselves.

133. On 29 August 2006, the Committee on the Elimination of Discrimination against Women found that Hungary had breached the relevant Convention in the case of A.S. v. Hungary,[55] in which the author, a Roma woman, had been sterilised without her informed consent. The Committee recommended that the victim be awarded compensation, that the legislation allowing sterilisation to be carried out without following the standard information procedure in certain circumstances be reviewed, that all health workers be fully informed of the

[54] E/C.12/HUN/CO/3, 22 May 2007, § 25.

[55] CEDAW/C/36/D/4/2004; CEDAW/C/HUN/CO6.

Committee's standards, and that the practice in all public and private health centres be monitored. ECRI is concerned that to date, it would seem that none of the recommendations in this case has yet been followed up in practice. ECRI stresses that failing to remove the possibility, provided for by law, of performing "emergency" sterilisations on women without their informed consent is unacceptable and serves to undermine Roma women's confidence in the health system.

134. ECRI strongly encourages the Hungarian authorities to pursue their efforts to reduce inequalities in health care status and in access to health care across Hungary, and to monitor the impact on Roma of these measures, in terms of both their health status and access to health care, in order to enable them to be fine-tuned if needed to improve their effectiveness.

135. ECRI strongly encourages the authorities to implement the planned measures to increase the number of Roma working within the health care system, as a cornerstone of the efforts needed to improve the confidence of Roma in the health care system as a whole. In parallel, it encourages the authorities to continue and intensify their efforts to combat stereotypes and prejudices that can lead to discriminatory treatment of Roma patients, through continuing training aimed at all levels of the health care system.

136. ECRI urges the authorities to implement the recommendations of the Committee for the Elimination of Discrimination against Women in the case of Ms A.S. v. Hungary, and to repeal the legal provisions allowing for "emergency" sterilisations to be performed without a woman's informed consent; it emphasises that Roma women's experience of and overall confidence in the health system can only be positively affected by such a step.

Access to public places

137. ECRI did not examine, in its third report, discrimination in the field of access to public places. However, it notes that the Equal Treatment Authority has underlined in both its 2005 and 2006 annual reports the discrimination faced by Roma in this field, and that Roma NGOs also stress that it is an issue of particular concern. The Authority has particularly emphasised that the denial of services in the establishments of the commercial and catering industries (shops, bars, restaurants) not only affects members of the Roma minority, but is in fact almost exclusively experienced by them.[56]

138. ECRI draws the Hungarian authorities' attention to this phenomenon, and recalls its related findings elsewhere in this report regarding latent racist and xenophobic attitudes in Hungarian society.[57] It emphasises that, while the Equal Treatment Act has made it easier for individuals who are victims of discrimination in this field to seek redress, litigation cannot on its own provide an adequate means of overcoming entrenched negative stereotypes and attitudes.

139. ECRI recommends that the Hungarian authorities take comprehensive measures to implement the law prohibiting discrimination in access to public places, in particular as it is applied to Roma and visible minorities.

[56] Equal Treatment Authority, Annual Report 2005, p19, Annual Report 2006, p10, p55.

[57] See above, *Racism in Public Discourse.*

VI. Vulnerable/Target Groups

Roma communities

140. In its third report, ECRI stressed that discrimination by local authorities should not be tolerated by national authorities and underlined that it was essential to ensure that national policies and legislation in favour of the Roma community were understood and applied at local level. ECRI also urgently called for training of officials working within local administrations to raise awareness and combat prejudices. ECRI also recommended that further emphasis be placed on ensuring that the Roma community was involved at all stages of the planning and implementation of measures which concern them, at as local a level as possible, and stressed the importance of encouraging projects and initiatives which emanate from the Roma community itself.

141. ECRI observes that, as other parts of this report show,[58] acts or failures to act by local authorities, and in particular, failures in implementing centrally enacted legislation in conformity with the prohibition on discrimination, continue to lie at the heart of much of the discrimination experienced by Roma in daily life. It emphasises again that the autonomy granted to local authorities can never justify violations of the prohibition on discrimination, and is concerned that such violations reveal continuing high levels of prejudice and negative stereotypes amongst local government officials against Roma.

142. ECRI also notes that at a more general level, Roma are able (as are persons belonging to other minorities) to choose whether or not to identify themselves as Roma in order to benefit from specific minority rights such as minority education or enrolling to vote in minority self-government elections. The recent extension of the application of the European Charter for Regional or Minority Languages to cover the Romani and Beash languages is a welcome step forward in this field.[59] However, it appears much more difficult for Roma to realise the freedom *not* to be identified as members of the Roma minority unless they so wish, as here, other individuals' perceptions – frequently negative stereotypes – come into play.[60] ECRI stresses that fighting to overcome prejudice and negative stereotypes is essential to any strategy to eliminate discrimination against Roma and place members of this minority on an equal footing with other members of Hungarian society.

143. Finally, ECRI notes with concern reports that Roma children are substantially over-represented in the child protection system, and thereby exposed to a risk of rejection by their own community, while still being subject to discrimination by members of majority society on the basis of the latters' perceptions of them as Roma. The term "endangerment" also appears to be sometimes wrongly interpreted as authorising the removal of children on purely material grounds, meaning children in families having undergone forced evictions[61] are also at greater risk of unwarranted removal from their families. Moreover, it appears that Roma children in the child protection system are also disproportionately qualified as having mental disabilities. All of these factors are likely to have a particularly negative impact on the life-chances of children who experience them, leaving them especially vulnerable to further discrimination in later life.

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[58] See above, *Discrimination in Various Fields.*

[59] Act No. XVIII of 2008.

[60] See also Parliamentary Commissioner for the Rights of National and Ethnic Minorities, Annual Report for 2004, Chapter VI.3.

[61] See above, *Discrimination in Various Fields, - Housing.*

144. ECRI recommends that the Hungarian authorities intensify their efforts to ensure that discrimination by local authorities is not tolerated. In this respect it emphasises that it is essential to ensure that national policies and legislation in favour of the Roma community are understood and applied at local level.

145. ECRI reiterates its urgent call for training of officials working within local administrations to raise awareness and combat prejudices, and recommends that the Hungarian authorities implement a nation-wide awareness-raising campaign to combat negative stereotypes by promoting positive images of the Roma minority.

146. ECRI recommends that further emphasis be placed on ensuring that the Roma community is involved at all stages of the planning and implementation of measures which concern them, at as local a level as possible.

147. ECRI recommends that the Hungarian authorities investigate in depth the situation of Roma children within the child protection system and take all necessary action both to eliminate the root causes of disproportionate representation of Roma children in the system and return children to their families wherever appropriate.

- *Decade of Roma Inclusion Programme Strategic Plan*

148. ECRI observes that, in view of the particular disadvantage experienced by Roma and a broad range of fields of daily life,[62] a coherent overall framework of action in the short, medium and long term is clearly needed to give members of the Roma minority the chance of participating on an equal footing in Hungarian society.

149. ECRI is pleased to note that on 28 June 2007, the Hungarian Parliament adopted a resolution on the Decade of Roma Inclusion Programme Strategic Plan for 2007-2015. This Resolution explains the background to the Strategic Plan and sets out a series of tasks to be accomplished in the fields of education, employment, housing, healthcare and equal treatment (non-discrimination), as well as culture, media and sports. The government is required to frame two-year action plans, monitor their implementation, keep public and civil actors informed and report at regular intervals to the Parliament. Specific measures to implement the plan in 2008 and 2009 were thus set out by the government in December 2007, in its Resolution 1105/2007. In parallel, the Resolution requests other concerned parties (such as NGOs, local authorities and Roma minority self-governments) to make every effort towards the implementation of the Plan; the mass media to contribute to its dissemination and to the promotion of positive changes in social attitudes towards the Roma; and members of the Roma population to take an active role in initiating and participating in steps taken at all levels to improve their daily lives.

150. ECRI encourages the Hungarian authorities to implement the Decade of Roma Inclusion Programme Strategic Plan with due attention to involving members of the Roma community in ensuring that the measures taken are well suited to achieving the aims sought, as well as to monitoring the impact in practice of the measures taken and adjusting them if necessary.

[62] See above and *Discrimination in Various Fields*.

Migrants, refugees and asylum seekers

- *Asylum-seekers and refugees*

151. In its third report, ECRI recommended that the authorities examine possible changes to legislation and practice pertaining to refugees, asylum-seekers and "persons authorised to stay" in order to improve their general situation. ECRI urged the Hungarian authorities to swiftly take steps to resolve the problems encountered by the latter group due to the precariousness of their status, notably by granting them humanitarian residence permits.

152. In 2007, the Hungarian authorities enacted new legislation to bring the rules governing asylum procedures in Hungary into line with EU harmonisation requirements. Under the new Asylum Act (Act No. LXXX of 2007), the asylum procedure is divided into two phases. The first is a preliminary screening phase for establishing whether a Dublin procedure is to be conducted and – if the conditions for the application of the Dublin regulations do not exist – for filtering out inadmissible applications, with a new (shorter) time-limit of 15 days. This phase is followed by examination on the merits, with a time-limit of 60 days, provided that the application is considered to be admissible. Both phases can be followed by appeal procedures. Throughout these proceedings, and unless they are subject to administrative detention (see below) applicants are accommodated in reception centres, organised by stage of proceedings. They are thus housed in a (closed) centre in Békécsaba at the preliminary stage, in Debrecen Reception Centre during the examination on the merits, including during the entire length of any appeal proceedings, and then for a 6 months' "integration" phase at Bicske Admission Centre if their application is accepted. The new law, implementing Council Directive 2004/83/EC, introduced the category of "subsidiary protection" into Hungarian law, as well as the category of "temporary protection", and granted almost the same rights to beneficiaries of subsidiary protection as to refugees – in other words, they have essentially the same rights as Hungarian citizens. At the same time, the category of "persons authorised to stay" (that is, persons who do not meet the criteria for recognition as Convention refugees or as beneficiaries of subsidiary or temporary protection but who cannot be sent back to their country of origin due to other protection granted under international law (Article 33 of the Refugee Convention, Article 3 ECHR)) continues to be provided for under the Admission and Right of Residence of Third Country Nationals Act (Act No. II of 2007). Following an amendment, Article 110 of the Public Education Act also now specifies the date from which non-Hungarian minors who are asylum-seekers, refugees or the beneficiaries of temporary protection are entitled to kindergarten or compulsory school attendance in the same way as Hungarian citizens and from which these children are obliged to attend compulsory schooling. This date is the date on which the application for recognition is submitted.

153. The new Asylum Act is broadly recognised as having introduced significant improvements to the asylum regime in Hungary. ECRI shares this view. However, despite the positive steps taken, ECRI notes that some problems remain. It seems that the conditions in the centre in which asylum-seekers are required to stay during the initial screening phase, even if they have not committed a border violation, are in practice so closed as to amount to detention; in one case reported to ECRI, an asylum-seeker had been kept in such closed conditions for two months while awaiting the outcome of the screening process. At the merits stage, over 400 asylum-seekers from

41 countries are housed together in the Debrecen Reception Centre,[63] not always co-existing peacefully. Two especially violent incidents occurred on 7 and 8 March 2008, as a result of which nine men had to be hospitalised, and both of which required the intervention of the police.[64] Although single women and single mothers are housed separately from families and single men, such a climate is clearly not the most favourable one in which to help these often particularly vulnerable refugees to find their feet in their new country.

154. As regards education, asylum-seeking and refugee children are, as mentioned above, entitled to benefit from the compulsory education provided for under Hungarian law from the day on which they submit their application for recognition. ECRI is pleased to note that all the school-aged children at Debrecen Reception Centre were in fact attending school in April 2008; however, the same was not true for kindergarten-aged children at the Centre. Of the 9 children, who should, in accordance with the Public Education Act, have been attending kindergarten for four hours a day, and despite the efforts of the Parliamentary Commissioner for Civil Rights to achieve this, only one such child, who already spoke Hungarian, was able to find a place in a kindergarten.[65] ECRI notes with concern reports that educational institutions reject the enrolment of asylum-seeking and refugee children (also children in the Bicske Admission Centre) because the institutions lack the necessary funds to provide Hungarian language training and cultural orientation, or because they fear that local Hungarian parents may remove their children if refugees are allowed to attend.[66] Moreover, even when children are able to enrol, language barriers in particular make it difficult for them to follow classes; schools, teachers and municipalities are rarely equipped to deal with the children they receive, and parents are unable to assist their children, again because of language barriers. Furthermore, pupils complain of daily discrimination through racist attitudes manifested by other children and teachers, not to mention buses failing to stop at the bus-stop outside the refugee reception centre.[67]

155. ECRI strongly recommends that the Hungarian authorities act to ensure that schools comply with their obligation to provide schooling to asylum-seeking and refugee children within their catchment areas. It recommends that the Hungarian authorities provide additional resources to these schools, in order to ensure that the schools are effectively equipped to provide adequate education to these children. In this respect, it also emphasises the need to ensure that teachers are fully trained to deal with culturally diverse classrooms and to provide leadership to pupils in this field.

156. ECRI recommends that the authorities keep under review the new structure of accommodating asylum-seekers and refugees, and adapt it if needed to ensure that all asylum-seekers and refugees live in safe and secure conditions.

157. ECRI again encourages the Hungarian authorities to take all appropriate measures to combat any prejudice or negative stereotypes concerning non-citizens by strengthening awareness-raising and human rights training for all officials working in relation with refugees and asylum-seekers

[63] Parliamentary Commissioner for Civil Rights, Report of the Parliamentary Commissioner for Civil Rights on the OBH 2004/2008 case, Debrecen Refugee Reception Centre, 2008, p1.

[64] Ibid, p5.

[65] Ibid, p6.

[66] On xenophobic attitudes in Hungary, see also above, *Racism in Public Discourse*, and below, *Prejudice and negative stereotypes with respect to non-citizens*.

[67] See below, *Prejudice and negative stereotypes with respect to non-citizens*.

- *Administrative detention of non-citizens under immigration laws*

158. Hungary applies a detention policy for foreigners, including asylum-seekers, apprehended for unlawful entry or stay. In its third report, ECRI expressed concern at the manner in which this detention policy was applied and recommended that the Hungarian authorities closely monitor the use of detention with respect to non-citizens and take steps to ensure that it would be used only as a last resort and that no discrimination on the grounds of nationality would take place in this respect.

159. Since then, the enactment of the Admission and Right of Residence of Third-Country Nationals Act (Act No. II of 2007) has introduced some important changes, which should serve to reduce any risk of arbitrary or excessively long detention of foreigners. In particular, the total maximum period of detention under Hungary's immigration laws has been reduced from one year to sixth months. A formal decision is required to order detention, and the maximum period for which a person can be detained without being brought before a judge has been reduced from 5 days to 72 hours. The competent court may extend the detention by a maximum of thirty days at a time, until the person's departure or up to the total maximum of six months. The procedures for contesting such detention have also been simplified. Moreover, under the new legislation the immigration authorities are no longer empowered to detain a third-country national subject to an expulsion order on the grounds that he or she is suspected of having committed a petty or criminal offence: only the authorities responsible for criminal proceedings may detain individuals in such cases.

160. These amendments constitute a welcome step forward; however, some actors stress that a number of problems still need to be resolved. It has been stressed that detainees who committed only a minor offence in crossing the border are often subjected to harsher conditions in detention centres than criminals in penitentiary institutions, and that women may experience harsher conditions than male detainees, especially as guards in some detention facilities are almost all men. Families are also reported often to be separated in detention, due to the separation of women and men, with alternatives to detention only being offered to separated children. Some groups have also reported that they suffer from inadequate dietary arrangements. All of these problems are compounded by language difficulties that seriously hinder communication.

161. ECRI reiterates its recommendation that the Hungarian authorities closely monitor the use of detention with respect to non-citizens and take any necessary steps to ensure that it is used as a last resort.

162. ECRI recommends that the Hungarian authorities monitor closely the detention conditions of non-citizens detained under immigration laws, and take all necessary steps to ensure that these conditions are not disproportionately harsh.

- *Prejudice and negative stereotypes with respect to non-citizens*

163. In its third report, ECRI encouraged the Hungarian authorities to take all appropriate measures to combat any prejudice or negative stereotypes concerning non-citizens by strengthening awareness-raising and human rights training for officials working in relation with refugees and asylum-seekers. ECRI also considered that the Hungarian authorities should strengthen their efforts to adopt a general integration policy covering the whole territory of Hungary and concerning not only recognised refugees but also other non-citizens such as economic immigrants or "persons authorised to stay". It indicated that the integration policy should include measures designed to improve knowledge of

the Hungarian language and culture, offered to non-citizen adults as well as schoolchildren.

164. The authorities have indicated that their direct participation in the UNHCR's Age, Gender and Diversity Mainstreaming Programme has helped them to identify and make concrete changes to improve the situation of refugees and asylum-seekers in the field, such as providing assistance in improving schooling for children, renovating buildings, providing more appropriate meals, and preparing an information leaflet for release in 2008. However, as yet a sustainable integration policy for refugees, going beyond the provision of necessary Hungarian language classes, is lacking, and continues to be urgently needed. The fact that recognised refugees are housed together in a single admission centre, separate from the community of Bicske where it is based, for at least the first six months after they are recognised as refugees would moreover seem to run directly counter to the express aims of the centre, namely assisting recognised refugees in integrating into Hungarian society.

165. ECRI observes in this respect that the main problems faced by refugees and other migrants in integrating in Hungarian society appear to stem directly from the deeply entrenched negative stereotypes and attitudes of the general public towards them. In addition to problems in access of children to education, as described above, refugees report problems in gaining employment and in access to housing, both through refusals of owners to rent property to foreigners and visible minorities and refusals of banks to provide loans. While no official figures are available on departures of recognised refugees from Hungary, anecdotal evidence received by ECRI is to the effect that the departure rate is high, and that the obstacles faced by refugees in integrating in Hungarian society, due largely to prejudices towards them, are a major factor in this phenomenon. While some awareness-raising campaigns and activities are run, these are generally carried out by civil society with support from international organisations or the European Union. ECRI stresses that in an overall context where overt xenophobia and racism appear to be on the rise, it is all the more important that the authorities themselves take a clear position condemning such attitudes and play an open and active role in combating them.

166. ECRI recommends that the Hungarian authorities review the policy of accommodating all newly recognised refugees and other protected persons in a single admission centre separate from the rest of the community, and replace it with other forms of accommodation and support better adapted to allowing them to integrate rapidly in Hungarian society.

167. ECRI recommends that the Hungarian authorities assume responsibility for running awareness-raising campaigns promoting a positive image of refugees, asylum-seekers and other immigrants. It emphasises in this context that political leaders on all sides should take a firm and public stance against the expression of racist and xenophobic attitudes in both words and deeds.

National and ethnic minorities

168. In its third report on Hungary, ECRI encouraged the Hungarian authorities to monitor the 1993 legislation with a view to ensuring the rights of minorities to cultural autonomy and minority language education. It also recommended that further consideration be given to the need to raise the awareness of the general public and media professionals concerning the culture of national and ethnic minorities.

169. ECRI is pleased to note that, except in a few rare cases, members of the twelve recognised national and ethnic minorities other than the Roma community do not report discrimination in their daily lives. The main challenge faced by

members of these minorities remains the realisation of the right to cultural autonomy and minority language education. Provision is made in the Hungarian system for a variety of different forms of minority education, at various stages of schooling, where it is requested. These include minority language schools, bilingual schools, and the teaching of minority languages as a second or foreign language. However, it seems that the form most often used in practice is the last, least intensive form. Because most schools offering minority language teaching are maintained by local authorities, rather than national-level minority self-governments, joint decision-making processes are required. Many complaints in the field of minority education accordingly centre on the rights to consent and opinion. Some minorities also do not have access within Hungary to teacher training for language teachers at all levels, but only to some levels. The authorities have indicated that consultations on the rules governing national and ethnic minority education are on-going.

170. As regards awareness-raising amongst the general public and media professionals concerning the culture of national and ethnic minorities, ECRI has not received new reports of specific problems in this field. However, it draws attention to the current climate of increasing intolerance in Hungarian society and emphasises the role of the authorities in ensuring that a positive image of the diverse groups that make up Hungarian society is promoted.

171. ECRI recommends that the Hungarian authorities keep under review the legal conditions under which the right to maintain schools is transferred to national or ethnic minority self-governments, in order to ensure that the right to minority language education in its various forms can be effectively realised.

172. ECRI recommends that the Hungarian authorities keep the situation as concerns the availability of minority language education under review and take steps where necessary to ensure that students learning in minority language schools or studying minority languages in bilingual schools or as a second or foreign language have sufficient access to fully qualified teachers, reflecting the requirements of the minority to which they belong.

VII. Conduct of Law Enforcement Officials

173. In its third report, ECRI urged that further measures be taken to put an end to incidents of police misbehaviour and mistreatment towards members of minority groups, in particular Roma and non-citizens. In addition, ECRI recommended that all necessary measures be taken to raise the awareness of the general public concerning the prohibition of racist acts as well as to combat any obstacle that might prevent victims from coming forward and bringing complaints to the police, such as a lack of confidence in the institution.

174. As regards training of the relevant institutional actors, curricula at both the Police Academy and medium-level in-service police training now include subjects related to human rights and basic freedoms, tolerance and how to deal on the spot with cases involving members of minority groups. In the county of Somogy, a reciprocal programme has also been set up in which police officers and representatives of minority self-governments learn how to deal with each other better. Other, short-term projects have also been run, one of which led to the setting up of minority desk officers in each county-level police station.

175. ECRI welcomes these measures but notes that incidents of police brutality towards Roma continue to be reported.[68] Empirical evidence also suggests that Roma are disproportionately subjected to police stop and search activities,[69] which in turn contributes to disproportionate representation of Roma within the criminal justice system.[70] Prejudice against Roma still permeates the police force, as other sectors of society. At the end of 2006, a number of anti-Roma postings were reported by two police officers to have been made on an internal web site of the national police. The web site was immediately suspended and an investigation launched. Several police officers found to be responsible for the postings were later sent to tolerance training. In parallel to these problems, low levels of confidence in the police force prevail amongst members of the Roma minority, as the number of complaints received by the Parliamentary Commissioner for National and Ethnic Minority Rights attests.

176. ECRI strongly recommends that the authorities continue to take measures to prevent the occurrence incidents of police misbehaviour and mistreatment towards members of minority groups, in particular Roma. It emphasises the need for continuing training to combat prejudices and negative stereotypes, and stresses the positive impact that can be achieved through programmes designed to build mutual confidence.

177. In its third report, ECRI considered that further impetus should be given to efforts to recruit members of minority groups, particularly Roma, as law enforcement officials, and particularly as police officers. To this end, ECRI recommended that any barriers to the recruitment of Roma into the police be identified and, where possible, removed, and encouraged the authorities to inform members of the Roma communities about the possibilities of joining the police force.

178. Measures have been in place for a number of years to boost the recruitment of Roma police officers, including measures to ensure that financial difficulties do not prevent Roma students from joining the police force – such as since 2004, scholarships to cover the boarding costs of Roma students who meet key eligibility criteria for official service. After it was observed that a disproportionate number of Roma applicants failed one or other of the aptitude tests for entry into the police force, the "107 Opportunities with Sports" programme was drawn up in spring 2008, to help disadvantaged young persons aged 10-12 gain new life skills and orient towards careers within the police. At the time of writing, the programme was being funded by the Ministry of Justice and Law Enforcement. By the end of the school year the programme had been carried out in 8 schools, with the participation of 200 pupils.

179. Following the merger of the Police and Border Guards in 2007, the number of officers in the combined force is around 45 000. Roma representatives estimate that not more than 800 (around 1-2%) of them are Roma, compared with an estimated 6-10% of the overall population. The positive measures so far put in place may not be sufficient to remedy this situation, as competitions do not benefit children living in great poverty, and scholarships for adults attending the police academy do not include a salary; in practice, young Roma adults whose parents cannot support them financially are thus excluded from such programmes. The National Organisation of Roma Police Officers has proposed

[68] Parliamentary Commissioner for the Rights of National and Ethnic Minorities, Contribution to the 5th Regular Report of Hungary to the CCPR, Article 7, p19.

[69] In one study, in which police were invited to indicate the ethnicity of persons they had subjected to stop and search procedures, they indicated in around 25% cases that they believed the person to be of Roma origin – compared with a proportion of around 6-8% of Roma in Hungarian society.

[70] See below, *Administration of Justice*.

the setting up of a technical school for policing that would take in children from the age of 14-15 years, who could obtain their high-school qualifications in parallel to preparing to enter the police force. It does not appear that the authorities have given any concrete follow-up to this proposal at this stage.

180. ECRI observes that the authorities have made considerable efforts towards increasing the diversity of the Hungarian police force. At the same time it notes that, while the authorities are well able to identify the minority groups to which candidates applying to join the force belong, in so far as candidates declare at that time their affiliation to any such groups, in contrast, no official figures are available on the composition of the police force itself, or, for example, on career paths or average lengths of time for which Roma police officers remain with the force. Given the manner in which the provisions governing data protection are currently interpreted and implemented, there also does not appear to be any intention of gathering such data in the immediate future.[71] Accordingly, it is difficult to assess the extent to which the programmes put in place have been successful.

181. ECRI strongly encourages the Hungarian authorities to pursue their efforts to recruit members of minority groups, particularly Roma, as law enforcement officials, and particularly as police officers. It recommends that the authorities seek effective means to monitor the impact of the programmes put in place, in order to allow them to be reviewed and adapted where necessary.

182. In its third report, ECRI also stressed the importance of setting up an independent investigatory mechanism distinct from the public prosecution offices, to conduct enquiries into allegations of police misconduct and where necessary, ensure that the alleged perpetrators are brought to justice.

183. ECRI notes with satisfaction that in 2007, the Hungarian authorities enacted legislation creating an Independent Police Complaints Board, which began functioning in spring 2008. The Board is composed of five members who are elected by Parliament for a six-year, non-renewable term, and eight staff members are employed to assist it in its work. Anyone who considers he or she has been a victim of a violation of their rights by a member or members of the police force may lodge a complaint with the Board. The task of the Board is then to determine whether the complainant's rights have been violated, rather than to establish individual responsibilities in such cases. At the time of writing, around 80 complaints had already been received within the first two months of operation of the Board.

184. ECRI recommends that the Hungarian authorities ensure that all the necessary human and financial resources are available to the new Independent Police Complaints Board in order that it be able at all times to carry out its functions effectively.

VIII. Administration of Justice

185. No official data disaggregated by ethnicity exist concerning the representation of various groups within the criminal justice system, and the authorities have pointed out that there is no obligation at any stage for any individuals involved in the criminal justice system to identify themselves as belonging to a particular ethnic group. However, empirical studies indicate that Roma are over-represented in the criminal justice system in Hungary. In one survey, around 45% of the members of the prison population indicated that they belonged to the Roma minority. NGOs emphasise that the fact that Roma are more often

[71] See also below, *Monitoring Racism and Racial Discrimination*.

subjected to police stop and search operations[72] increases the likelihood that they will end up in the criminal justice system. It has also been pointed out that, because Roma are often amongst the poorest members in society, they are more likely to need to rely on officially appointed defence counsel, who are poorly paid and tend to be less active in defending their clients. Moreover, in the Hungarian system, it is the investigative authority – whose interests are directly in conflict with those of the suspect – that selects officially appointed defence lawyers.[73] This compounds the chances that Roma brought before the courts will find themselves entering the prison system. Due to the lack of available data disaggregated by ethnicity, information as to trends in convictions and sentencing patterns of Roma is not available.

186. ECRI observes that the above information indicates at very least that doubts may exist as to whether the criminal justice system as a whole operates without discriminating against Roma. It emphasises that such discrimination may in turn tend to reinforce the cycle of poverty experienced by many Roma, and considers that these questions need to be examined and addressed by the authorities.

187. ECRI urges the Hungarian authorities to take steps to monitor more precisely the impact on the Roma minority, and on other disadvantaged strata of society, of the operation of the criminal justice system at every stage, from police activities to prosecution, convictions and sentencing. It also refers in this context to its recommendations elsewhere in this report that awareness-raising measures be taken to overcome prejudices and negative stereotyping in all sectors of Hungarian society, and emphasises the particular importance of overcoming such attitudes in the criminal justice system, wherever they exist.

IX. Monitoring Racism and Racial Discrimination

188. In its third report, ECRI recommended that ways of measuring the situation of minority groups in different fields of life be identified, stressing that such monitoring is crucial in assessing the impact and success of policies put in place to improve the situation. It indicated that such monitoring should take into consideration the gender dimension, particularly from the viewpoint of possible double or multiple discrimination, and that it should be carried out with due respect to the principles of data protection and privacy and should be based on a system of voluntary self-identification, with a clear explanation of the reasons for which information is collected.

189. The main reason given by the authorities for the lack of data disaggregated by ethnic origin is the high level of protection of personal data afforded by Hungarian legislation; the experience of the Second World War in particular is cited as underpinning the desire to ensure that individuals are not identifiable on the basis of their ethnicity. However, as described repeatedly, throughout this report – in the fields of education, employment, racist violence, administration of justice, to name a few – the absence of such data makes it particularly difficult for the authorities to monitor the effectiveness of the many measures they have taken in order to improve the situation of certain groups, and to adapt the measures accordingly if needed. Proxies are frequently used in designing measures, such as targeting multiply disadvantaged children in the field of education. These provide a clearly legitimate basis for improving the situation of a clearly disadvantaged group and are by no means a problem in themselves. However, they do not suffice to provide a means of assessing whether the

[72] See above, *Conduct of Law Enforcement Officials.*

[73] Parliamentary Commissioner for National and Ethnic Minority Rights, Annual Report 2005, Chapter III.3.

specific situation of children belonging to the Roma minority is in fact improving as a result of the measures taken.

190. ECRI recognises that the collection of ethnic data is a sensitive issue, but emphasises that it can also play an important role in measuring whether some groups are disproportionately adversely affected by given phenomena, whether programmes designed to assist certain groups are effectively achieving their goals, and whether new or different measures need to be taken to redress such situations. Provided that certain key requirements are met – that is, that any data collected is anonymous, confidential, used only for the purposes for which it is collected, and is collected on a voluntary basis – the collection and publication of data broken down according to ethnicity can act as a key element in effectively fighting discrimination.

191. ECRI reiterates its recommendation that ways of measuring the situation of minority groups in different fields of life be identified, stressing that such monitoring is crucial in assessing the impact and success of policies put in place to improve the situation. Such monitoring should also take into consideration the gender dimension, particularly from the viewpoint of possible double or multiple discrimination. It should be carried out with due respect to the principles of data protection and privacy and should be based on a system of voluntary self-identification, with a clear explanation of the reasons for which information is collected.

INTERIM FOLLOW-UP RECOMMENDATIONS

The three specific recommendations for which ECRI requests priority implementation from the Hungarian authorities are the following:

- ECRI strongly recommends that the Hungarian authorities keep the adequacy of the criminal law provisions against racist expression under review. It strongly recommends that they take into account international standards in this respect , including the recommendations on criminal law provisions contained in ECRI's General Policy Recommendation No. 7 on national legislation to combat racism and racial discrimination, according to which the law should penalise racist acts including public incitement to violence, hatred or discrimination as well as public insults, defamation or threats against a person or a grouping of persons on the grounds of their race, colour, language, religion, nationality, or national or ethnic origin. It recommends that the authorities pay special attention in this regard to ensuring that, in so far as these standards may mean imposing certain limits on the freedom of expression, these limits are interpreted in line with Article 10 of the European Convention on Human Rights and the relevant case-law of the European Court of Human Rights. ECRI further recommends that the Hungarian authorities take measures to increase awareness among judges of international standards against racist expression.

- ECRI strongly recommends that the Hungarian authorities introduce an independent monitoring system at national level to ensure the compliance with centrally enacted legislation of measures taken by school maintainers; this system should in particular be instrumental in ensuring that the prohibition on segregation is respected in practice.

- ECRI reiterates its recommendation that ways of measuring the situation of minority groups in different fields of life be identified, stressing that such monitoring is crucial in assessing the impact and success of policies put in place to improve the situation. Such monitoring should also take into consideration the gender dimension, particularly from the viewpoint of possible double or multiple discrimination, and should be carried out with due respect to the principles of data protection and privacy and should be based on a system of voluntary self-identification, with a clear explanation of the reasons for which information is collected.

A process of interim follow-up for these three recommendations will be conducted by ECRI no later than two years following the publication of this report.

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APPENDIX

The following appendix does not form part of ECRI's analysis and proposals concerning the situation in Hungary

ECRI wishes to point out that the analysis contained in its report on Hungary, is dated 20 June 2008, and that any subsequent development is not taken into account.

In accordance with ECRI's country-by-country procedure, ECRI's draft report on Hungary was subject to a confidential dialogue with the authorities of Hungary. A number of their comments were taken into account by ECRI, and integrated into the report.

However, following this dialogue, the authorities of Hungary requested that the following viewpoints on their part be reproduced as an appendix to ECRI's report.

"Observations from the Hungarian authorities

as to point 18

In the Criminal Code there are other facts which regards to incitement to racial hatred, but only indirectly. These crimes are: Defamation, Libel, Desecration.

Beyond that there are other crimes which can be committed „for another malicious motive or purpose". The definition of *committed for another malicious motive or purpose* covers also the acts which are committed with hate motivation. In these cases the punishment shall be more serious than in genaral. Such crime is for example Homicide.

The acts of the fourth group can be admitted as racially motivated crimes by judges if the racist motivation is proven. In these cases the judges have discretion to impose harsher penalties.

as to point 28

Complaints are being checked annually in the period from the 1st of November of the previous year to the 31st of October of the actual year. In the objected period 10 announces were registered concerning gipsy ethnical discrimination.
Criminal actions were initiated in 3 of the cases. 2 of them are still in progress, and 1 was discontinued in lack of evidence. In the remaining 7 cases the complaints resulted to be unambiguously unfounded.
In the year 2007 statistics show that 13 complaints were made in connection with racism, while in this examined year 10 cases were registered, which shows a decreasing tendency in the number of cases.

as to point 55

We consider it important to specify the composition of the participants of the legal working group of the State Secretariat for the National and Minority Policy (hereinafter: State Secretariat) in the paragraph referring to the participants. The report gives rise to misunderstanding as it gives the impression that only the representatives of the national and ethnic minorities are included in the activity of the working group concerned while the relevant ministries, the Ombudsman for National and Ethnic Minorities' Rights and independent professionals are also involved in the work.

Nevertheless it is necessary to clarify the relationship between the working group and the State Secretariat since the „auspicies" phrase is inacurrate. The legal working group operated by the State Secretariat and working beside of it is an informal deliberative body.

as to point 123

Beside the reduction of segregation in housing as a priority the main goal is to improve the housing situation of Roma. One of the priority areas of 68/2007 parliamentary resolution on the Decade of Roma Inclusion Programme Strategic Plan is housing. Some measures of implementation of this goal:

- ensuring equal access to basic public services for people living in the most disadvantaged regions.
- expansion of the potential access's to social housing for those who are in real need.
- complex development of the most disadvantaged regions densely populated with Roma people (where the existence of settlements or settlement-like environment is fairly frequent).

as to point 132

The National Programme for the Decade of Health was launched by Decision No. 46/2003. (IV.16.) OGY of the Parliament of the Republic of Hungary. The fundamental mission of the Public Health Programme is to respond to health challanges, and to assist and accelerate the life chance of the Hungarian population, so that it may approach the European Union's average as soon as possible. The continuation of the Public Health Programme is a legal obligation and an opportunity to improve the health status of the Hungarian population. Screening for breast and cervical cancer provided for in the framework of the programme, as well as equal opportunities, as a horozontal priority, are of special significance.

as to point 150

Decision of the Government on 1105/2007 on the Government Action Plan for 2008–2009 related to the Decade of the Roma Inclusion Program Strategic Plan was adopted on December 2007. Roma NGOs are involved in the implementation of the Government Action Plan in the frame of Roma Integration Council and Roma Steering and Monitoring Committee.

as to point 158

The asylum authority shall – until the initial screening process is finally closed – place the foreigner applying for recognition as a refugee or a beneficiary of subsidiary protection in reception centres which, however, cannot be regarded as detention. We do not agree with the statement that formerly persons of certain nationalities were automatically placed in detention for the maximum period on the sole ground of their nationality, irrespective of any other criteria that should normally be taken into account. Such discriminative practice has never existed. For the above reasons we do not agrre with the content of point 158.

as to point 160

Decree No. 27/2007. (V.31.) IRM contains the rules pertaining to the enforcement of detention ordered in immigration proceedings. Section 6 (4) of this Decree provides that minimum 10 900 joule food shall be provided for each detainee on a daily basis, taking into account the detainee's health status and, so far as possible, the dietetic rules of his religion. Moreover, the Decree contains provisions on the diet of pregnant women and women with babies as well.
For the above reasons we do not agree with the following sentence: „Dietary arrangements are also inadequate for some groups."

as to point 176

In accordance with ECRI recommendations human rights and anti-discrimination are subject to the curriculum and is an integral part of the professional courses.

Budapest, 5 December 2008"

Iceland

General Criminal Code, Article 125

Anyone officially ridiculing or insulting the dogmas or worship of a lawfully existing religious community in this Country shall be subject to fines or [imprisonment for up to 3 months.] 1) Lawsuits shall not be brought except upon the instructions of the Public Prosecutor.

1) Act 82/1998, Article 48.

General Criminal Code, Article 233a

Anyone who does by means of ridicule, calumniation, insult, threat or otherwise assault [a person or group of persons] 1) on account of their nationality, colour, [race, religion or sexual inclination] 1) shall be subject to fines … 2) or imprisonment for up to 2 years.] 3) 1) Act 135/1996, Article 2. 2) Act 82/1998, Article 126. 3) Act 96/1973, Article 1.

Public Policies

European Commission against Racism and Intolerance
Commission européenne contre le racisme et l'intolérance

CRI(2007)3

Third report on Iceland

Adopted on 30 June 2006

Strasbourg, 13 February 2007

COUNCIL OF EUROPE CONSEIL DE L'EUROPE

For further information about the work of the European Commission against Racism and Intolerance (ECRI) and about the other activities of the Council of Europe in this field, please contact:

Secretariat of ECRI
Directorate General of Human Rights – DG II
Council of Europe
F - 67075 STRASBOURG Cedex
Tel.: +33 (0) 3 88 41 29 64
Fax: +33 (0) 3 88 41 39 87
E-mail: combat.racism@coe.int

Visit our web site: www.coe.int/ecri

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Foreword

The European Commission against Racism and Intolerance (ECRI) was established by the Council of Europe. It is an independent human rights monitoring body specialised in questions relating to racism and intolerance. It is composed of independent and impartial members, who are appointed on the basis of their moral authority and recognised expertise in dealing with racism, xenophobia, antisemitism and intolerance.

One of the pillars of ECRI's work programme is its country-by-country approach, whereby it analyses the situation as regards racism and intolerance in each of the member States of the Council of Europe and makes suggestions and proposals as to how to tackle the problems identified.

The country-by-country approach deals with all member States of the Council of Europe on an equal footing. The work is taking place in 4/5 year cycles, covering 9/10 countries per year. The reports of the first round were completed at the end of 1998 and those of the second round at the end of the year 2002. Work on the third round reports started in January 2003.

The third round reports focus on "implementation". They examine if ECRI's main recommendations from previous reports have been followed and implemented, and if so, with what degree of success and effectiveness. The third round reports deal also with "specific issues", chosen according to the different situations in the various countries, and examined in more depth in each report.

The working methods for the preparation of the reports involve documentary analyses, a contact visit in the country concerned, and then a confidential dialogue with the national authorities.

ECRI's reports are not the result of inquiries or testimonial evidences. They are analyses based on a great deal of information gathered from a wide variety of sources. Documentary studies are based on an important number of national and international written sources. The in situ visit allows for meeting directly the concerned circles (governmental and non-governmental) with a view to gathering detailed information. The process of confidential dialogue with the national authorities allows the latter to propose, if they consider it necessary, amendments to the draft report, with a view to correcting any possible factual errors which the report might contain. At the end of the dialogue, the national authorities may request, if they so wish, that their viewpoints be appended to the final report of ECRI.

The following report was drawn up by ECRI under its own and full responsibility. It covers the situation as of 30 June 2006 and any development subsequent to this date is not covered in the following analysis nor taken into account in the conclusions and proposal made by ECRI.

Executive summary

Since the publication of ECRI's second report on Iceland on 8 July 2003, progress has been made in a number of the fields highlighted in that report. In an effort to improve co-ordination and initiative in policy-making concerning immigrants and integration, an Immigration Council has been established to formulate recommendations on policies in these areas, monitor their implementation and ensure provision of services to immigrants. The State has assumed increasing responsibility and ownership in the field of meeting asylum seekers' reception needs. Programmes aimed at promoting mutual integration of "quota" refugees and local communities have continued to be successfully implemented. Some measures have also been initiated to address the situation of disadvantage experienced by young people of immigrant background, notably in the field of education.

However, a number of recommendations made in ECRI's second report have not been implemented, or have only been partially implemented. The legal framework to combat racism and racial discrimination still remains to be strengthened and better implemented. Immigrants still often find themselves in a situation of excessive dependence on their employers, which, coupled with limited knowledge of the Icelandic language and awareness of their rights, exposes them to a higher risk of exploitation and discrimination. The position of immigrant women who are victims of domestic violence continues to be a cause for concern to ECRI. Improvements still remain to be made to the asylum procedure and to certain provisions regulating the residence rights of non-citizens.

In this report, ECRI recommends that the Icelandic authorities take further action in a number of areas. These areas include: the need to strengthen the legal framework against racism and racial discrimination, including through ratification of Protocol No.12 to the European Convention of Human Rights and the adoption of comprehensive primary antidiscrimination provisions; the need to better implement the legal framework in force; the need to reduce exposure of immigrants to exploitation and discrimination by reviewing the system for granting work permits and by providing them with adequate opportunities to learn the Icelandic language and access interpretation services; the need to ensure, including by introducing the necessary changes to the legislation, that foreign women who are victims of domestic violence are not forced to stay in violent relationships to avoid deportation; the need to improve asylum seekers' access to free legal aid and to an impartial and independent appeals mechanism. In this report, ECRI also recommends that the Icelandic authorities build on efforts made since ECRI's second report to develop co-ordinated policies concerning immigrants and integration and that they ensure that the fight against discrimination in all its forms feature prominently within these policies.

I. FOLLOW-UP TO ECRI'S SECOND REPORT ON ICELAND

International legal instruments

1. In its second report, ECRI recommended that Iceland ratify Protocol No. 12 to the European Convention on Human Rights (ECHR), the European Social Charter (Revised), the European Convention on Nationality and the Convention on the Participation of Foreigners in Public Life at Local Level. It also recommended that Iceland take steps to ratify the Framework Convention for the Protection of National Minorities, the European Charter for Regional or Minority Languages, the UNESCO Convention against Discrimination in Education and the European Convention on the Legal Status of Migrant Workers.

2. ECRI is pleased to note that Iceland ratified the European Convention on Nationality in March 2003 and the Convention on the Participation of Foreigners in Public Life at Local Level in February 2004. It welcomes the fact that Iceland has undertaken to apply all the provisions contained in the latter instrument, including its Chapter C, which concerns the attribution of eligibility and voting rights to foreign residents.

3. ECRI regrets, however, that Protocol No. 12 to the ECHR has not yet been ratified. The Icelandic authorities have reported that they do not intend to ratify this instrument before its scope has been clarified through the case law of the European Court of Human Rights. Iceland has also not yet ratified the European Social Charter (Revised). However, ECRI understands that work is underway with a view to possible ratification of this instrument.

4. The Icelandic authorities report that the implications of a possible ratification by Iceland of the Framework Convention for the Protection of National Minorities have been under consideration since ECRI's second report. However, no final conclusions have been reached at the time of writing this report and the Icelandic authorities have therefore no immediate plans to ratify this instrument. There are also reported to be no immediate plans for the ratification of the European Charter for Regional or Minority Languages.

5. Ratification of the European Convention on the Legal Status of Migrant Workers and of the International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families has not been under consideration since ECRI's second report. ECRI notes that Iceland has not yet ratified the UNESCO Convention against Discrimination in Education. However, the Icelandic authorities have stated that domestic legislation in Iceland is in line with the Convention and ECRI is pleased to note that the authorities intend to ratify this instrument in the very near future.

6. Iceland has not yet ratified the Convention on Cybercrime and its Additional Protocol concerning the criminalisation of acts of a racist and xenophobic nature committed through computer systems. However, ECRI understands that the steps towards ratification of the Convention are well under way and that work towards possible ratification of its Additional Protocol will start at the end of 2006.

Recommendations **:**

7. ECRI strongly recommends that the Icelandic authorities ratify Protocol No. 12 to the ECHR without delay. It reiterates its recommendation that the Icelandic authorities ratify the European Social Charter (Revised), the UNESCO

Convention against Discrimination in Education, the Framework Convention for the Protection of National Minorities and the European Charter for Regional or Minority Languages. ECRI also urges the Icelandic authorities to start work with a view to ratifying the European Convention on the Legal Status of Migrant Workers and the International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families. ECRI furthermore recommends that the Icelandic authorities ratify the Additional Protocol to the Convention on Cybercrime without delay.

8. In its second report, ECRI noted the important role that the incorporation of international human rights instruments into the Icelandic domestic legal system may have in facilitating and clarifying court decisions and in raising general awareness of the importance of human rights instruments. It therefore encouraged the Icelandic authorities to incorporate into domestic legislation other human rights instruments than the ECHR, which had already been incorporated in 1994. ECRI notes that no other human rights instrument has been incorporated into domestic legislation since its second report, and that there are at present no plans to do so.

***Recommendations* :**

9. ECRI reiterates its recommendation that the Icelandic authorities consider the incorporation of further human rights instruments into the Icelandic domestic legal system.

Constitutional provisions and other basic provisions

10. In its second report, ECRI encouraged the Icelandic authorities to introduce provisions specifically prohibiting racial discrimination in the Icelandic Constitution. No new provisions have been introduced since then. However, the Icelandic authorities have underlined that Article 65 of the Constitution[1], which was introduced in 1995, provides adequate protection against discrimination, as illustrated by the many judgments rendered on the basis of this article. They have stressed that, although these judgments have not concerned racial discrimination as such, they have extensively covered discrimination on other grounds.

***Recommendations* :**

11. ECRI encourages the Icelandic authorities to strengthen the protection provided by the Icelandic Constitution against racism and racial discrimination. To this end, it draws the attention of the Icelandic authorities to its General Policy Recommendation No.7 on national legislation to combat racism and racial discrimination[2], notably as concerns the need for constitutions to enshrine "the principle of equal treatment, the commitment of the State to promote equality as well as the right of individuals to be free from discrimination on grounds such as race, colour, language, religion, nationality or national or ethnic origin"[3].

[1] This Article provides that "Everyone shall be equal before the law and enjoy human rights irrespective of sex, religion, opinion, national origin, race, colour, property, birth or other status. Man and women shall enjoy equal rights in all respects".

[2] CRI (2003) 8: ECRI General Policy Recommendation N°7 on national legislation to combat racism and racial discrimination, European Commission against Racism and Intolerance, Council of Europe, February 2003.

[3] ECRI General Policy Recommendation N°7, paragraphs 2 -3 (and paragraphs 10-11 of the Explanatory Memorandum).

- ***Eligibility and voting rights for non-citizens***

12. Since 2002, non-citizens with five years of residence in Iceland have been granted eligibility and voting rights in municipal elections[4]. Information on the extent to which the persons so entitled have exercised this right in practice at the municipal elections of 2002 is not available. However, the Icelandic authorities have informed ECRI that they have taken measures to raise awareness among non-citizens of these rights, notably in view of the Municipal elections of May 2006.

Recommendations **:**

13. ECRI encourages the Icelandic authorities in their efforts to promote political participation of non-citizens and in particular to raise awareness among this part of the Icelandic population of their eligibility and voting rights in municipal elections.

Criminal law provisions

14. In its second report, ECRI noted that there had been virtually no cases of the application of the criminal law provisions in force in Iceland against racism and racial discrimination[5]. ECRI recommended that the Icelandic authorities examine the reasons behind this situation and take the necessary steps to improve the implementation of these provisions.

15. The criminal law provisions in force against racism and racial discrimination, and notably those that prohibit racial discrimination (Section 180 of the Criminal Code) and incitement to racial hatred (Section 233a of the Criminal Code) have not been applied since ECRI's second report. However, this situation still appears to be at variance with reported instances of racial discrimination, for example in access to certain establishments of the entertainment industry[6], or racist incidents, such as racist insults or harassment. The Icelandic authorities have stressed that these cases are not reported by victims to the criminal justice authorities. For instance, the police officer who, since 2001, is entrusted with special responsibilities to deal with immigrants, has received a certain number of complaints from immigrants, but never alleging a breach of the provisions against racism and racial discrimination[7]. The Icelandic authorities have also stressed that the police are trained on the implementation of these provisions, notably at the Police Academy. It does not appear to ECRI, however, that comprehensive efforts have been made since ECRI's second report to better research the reasons behind the apparent unwillingness of victims to report cases, including the role that the actors of the criminal justice system may play in this respect, nor to raise awareness among the general

[4] Nordic country nationals are granted eligibility and voting rights in municipal elections after three years of residence.

[5] Section 180 of the Criminal Code punishes with fines or imprisonment of up to six months the act of denying a person goods and services in business transactions or service activities, or access to any place intended for general public use, or any other public place, on the grounds of his or her colour, race or national origin, religion or sexual orientation, or other comparable considerations. Section 233a of the Criminal Code provides that any person that attacks another person by publicly ridiculing, slandering, insulting, threatening them on the basis of their nationality, colour, race, religion or sexual orientation shall be liable to a fine or imprisonment for a term of up to two years. Article 125 stipulates that any person who publicly ridicules or dishonours the religion or worship of a lawful religious community in Iceland shall be liable to a fine or imprisonment of up to three months.

[6] See below, Access to public services – Access to other services.

[7] See below, Conduct of law enforcement officials.

public and minority groups of the legislation in force against racism and racial discrimination. As already mentioned in ECRI's second report and highlighted below[8], the lack of comprehensive civil and administrative provisions against discrimination also play, in ECRI's opinion, a central role in limiting access to justice for victims of racial discrimination in Iceland.

16. In its second report, ECRI also recommended that the Icelandic authorities consider introducing further criminal law provisions in the areas covered by its mandate. These included provisions that expressly consider the racist motivation of an offence as a specific aggravating circumstance, but also provisions aimed at countering certain forms of racist expression. No consideration has been given since ECRI's second report to the introduction of any such provisions. The Icelandic authorities have stated that the legal review which will be carried out with a view to ratifying the Additional Protocol to the Convention on Cybercrime may provide the opportunity to do so.

***Recommendations* :**

17. ECRI recommends that the Icelandic authorities take steps to improve the implementation of the criminal law provisions in force against racism and racial discrimination. To this end, it recommends in particular that they research the reasons behind the apparent lack of complaints, and take measures to address them, including measures to raise the awareness among potential victims of racism and racial discrimination of their rights and the legislation in force.

18. ECRI furthermore recommends that the Icelandic authorities strengthen their efforts to ensure that all those involved in the criminal justice system, from lawyers to the police, prosecuting authorities and the courts, are equipped with thorough knowledge of the provisions in force against racism and racial discrimination and fully aware of the need to actively and thoroughly counter all manifestations of these phenomena.

19. ECRI strongly recommends that the Icelandic authorities introduce a criminal law provision that expressly considers the racist motivation of an offence as a specific aggravating circumstance. More generally, ECRI recommends that the Icelandic authorities keep the criminal law provisions in force against racism and racial discrimination under review and fine-tune them as necessary. To this end, ECRI draws the attention of the Icelandic authorities to its General Policy Recommendation No.7, and particularly to the recommendations concerning the criminalisation of certain forms of racist expression[9] and the prohibition of racist organisations[10].

[8] See Civil and administrative law provisions.

[9] ECRI General Policy Recommendation N°7, paragraph 18 a-f (and paragraphs 38-42 of the Explanatory Memorandum).

[10] ECRI General Policy Recommendation N°7, paragraph 18 g (and paragraph 43 of the Explanatory Memorandum).

Civil and administrative law provisions

20. In its second report, ECRI noted that although scattered civil and administrative provisions covering discrimination in certain fields existed[11], there was no comprehensive civil and administrative body of antidiscrimination legislation in Iceland covering all fields of life, from employment to education, housing, health, goods and services intended for the public and public places, exercise of economic activity and public services etc. ECRI therefore recommended that such legislation be introduced and that ECRI's General Policy Recommendation No.7 be used as reference in this process.

21. There is still no comprehensive body of civil and administrative antidiscrimination legislation in Iceland today. The Icelandic authorities have underlined that the protection provided by Article 65 of the Constitution[12] against discrimination is effective and therefore renders the adoption of such legislation somewhat less necessary. They have also stated however, that although Iceland is not a member of the European Union (EU), the two Directives of the EU on equal treatment[13] will be examined with a view to identifying the possible need for changes to domestic legislation. Thus, the newly-established Immigration Council[14] will consider the areas covered by Directive 2000/43/EC, while a Commission recently established under the auspices of the Ministry of Social Affairs will examine the aspects related to employment and occupation covered by Directive 2000/78/EC.

Recommendations :

22. ECRI urges the Icelandic authorities to adopt a body of civil and administrative antidiscrimination provisions that would cover racial discrimination across all fields of life and provide victims with effective means of redress. It recommends that, in examining the different options, the need to grant the highest level of protection to victims of racial discrimination is taken into consideration. To this end, ECRI strongly recommends that the Icelandic authorities take into account its General Policy Recommendation No. 7, including in terms of the areas to which anti-discrimination legislation should apply[15], the grounds of discrimination in respect of which protection should be afforded,[16] and the need to place public authorities under a duty to promote equality and prevent discrimination[17].

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[11] Section 11 of the Administrative Procedures Act, No. 37/1993, states that administrative authorities shall ensure legal harmony and equality in taking their decisions, and that any discrimination between individual parties based on views relating to their sex, race, colour, national origin, religion, political opinion, social status, family origins or any other similar considerations, is prohibited. Section 1 of the Rights of Patients Act, No. 74/1997 provides that any discrimination between patients on grounds of sex, religion, opinion, ethnic origin, race, colour, property, family origins or other status is prohibited. Other provisions dealing with discrimination exist in different pieces of legislation, such as the Postal Services Act, the Broadcasting Act, and the Data Protection Act.

[12] See above, Constitutional provisions and other basic provisions.

[13] Directive 2000/43/EC of the Council of the European Union implementing the principle of equal treatment between persons irrespective of racial or ethnic origin and Directive 2000/78/EC of the Council of the European Union establishing a general framework for equal treatment in employment and occupation.

[14] See below, Section II, The situation of immigrants.

[15] ECRI General Policy Recommendation N°7, paragraph 7 (and paragraphs 17-26 of the Explanatory Memorandum).

[16] ECRI General Policy Recommendation N°7, paragraphs 1b-c and 4 (and paragraph 6 of the Explanatory Memorandum).

[17] ECRI General Policy Recommendation N°7, paragraph 8 (and paragraph 27 of the Explanatory Memorandum)

Specialised bodies and other institutions

23. In its second report, ECRI recommended that Iceland establish a specialised body to combat racism and racial discrimination. Such a body, to be established in the framework of the adoption of comprehensive civil and administrative antidiscrimination legislation, should be competent, *inter alia*, for assisting victims of racism and racial discrimination in pursuing their complaints under such legislation. No such body has been established in Iceland since ECRI's second report. However, ECRI understands that this question might be examined as part of the review that, as mentioned above[18], will be carried out in the areas covered by the EU Directives on equal treatment.

24. The situation as concerns access to specialised assistance in individual cases of racism or racial discrimination in Iceland is therefore at present still as described in ECRI's second report: although the Parliamentary Ombudsman is mandated, *inter alia*, to ensure that the principle of equality is respected by the public authorities, it does not have a specific mandate on racism and racial discrimination. As was the case at the time of ECRI's second report, the Parliamentary Ombudsman receives complaints from members of immigrant communities. However, these complaints have continued to concern areas such as immigration law, benefits and social protection, and have never focused directly on racism or racial discrimination.

Recommendations **:**

25. ECRI strongly recommends that the Icelandic authorities establish a specialised body to combat racism and racial discrimination at national level. It recommends that, in so doing, they duly take into account the guidance provided by ECRI in its General Policy Recommendations No. 2[19] and No. 7 concerning the status, role and functions that should be attributed to these bodies. In particular, ECRI draws the attention of the Icelandic authorities to the need for such a body to be independent and accountable[20] and to the need for the following functions and powers to be included in its competence: assistance to victims; investigation powers; the right to initiate and participate in court proceedings; monitoring legislation and advice to legislative and executive authorities; awareness-raising of issues of racism and racial discrimination among society; promotion of policies and practices to ensure equal treatment[21].

26. In its second report, ECRI noted the important role played by the Intercultural Centre in Reykjavik (a public interest company owned by the Reykjavik Section of the Iceland Red Cross with significant financing from a number of Municipalities), the Westfjords Multicultural and Information Centre (financed and operated by the State budget) and the Intercultural Centre in Akureyri (financed and operated by the Municipality) in addressing immigrants' needs. ECRI notes that, since that report, these centres have continued to provide valuable services to members of immigrant communities, including advocacy, counselling, translation and interpretation services and language courses, and also offered a forum for dialogue and exchange between immigrant and non-immigrant communities. These centres have also carried out research

[18] See above, Civil and administrative law provisions.

[19] CRI (97) 36: ECRI General Policy Recommendation n° 2: Specialised bodies to combat racism, xenophobia, antisemitism and intolerance at national level.

[20] ECRI General Policy Recommendation N° 2, Principle 5

[21] ECRI General Policy Recommendation N°7, paragraph 24 (and paragraphs 50-55 of the Explanatory Memorandum)

concerning the situation of local immigrant communities and provided valuable advise to the Icelandic authorities concerning the problems and needs of these communities.

27. In a welcome development, an Immigration Council has also been established in Iceland in 2005. ECRI deals with this issue in Section II of this report.

***Recommendations* :**

28. ECRI encourages the Icelandic authorities to increase their support for the work of the intercultural centres, including by ensuring, as appropriate, that the human and financial resources available to these centres match the needs of an increasing immigrant population. ECRI also encourages the Icelandic authorities to thoroughly consult these centres in the elaboration and implementation of policies concerning immigrants and to make the most of these centres' knowledge of the problems faced by immigrant communities in Iceland.

29. ECRI notes that, since its last report, the Icelandic authorities have introduced changes as concerns the funding of independent organisations active in the field of protecting and promoting human rights in Iceland. Essentially, from 2005, no such organisation is funded through earmarked appropriations from the national budget approved by the Parliament. Human rights organisations can only receive funding from the Ministry of Justice, on the basis of project proposals submitted to this Ministry. ECRI notes reports according to which, in practice, these changes have resulted in a drastic cut in funding in comparison with the past and affected the quality of human rights work carried out by these organisations. It notes, for instance, that, in 2005, the Icelandic Human Rights Centre has received funds amounting to approximately one third of the funds previously allocated to it and that none of the projects for which funds were secured from the Ministry of Justice concerned monitoring activities. ECRI is concerned at the impact that this situation may have on human rights work aimed at combating racism and racial discrimination.

***Recommendations* :**

30. ECRI strongly recommends that the Icelandic authorities ensure that organisations active in the field of promoting and protecting human rights, including combating racism and racial discrimination, in Iceland receive adequate public funds for their work and that such funds are made available to them in a manner that guarantees their independence and effectiveness.

Education and awareness-raising

31. In its second report, ECRI recommended that the Icelandic authorities take further action to improve the teaching of human rights and the implementation of intercultural education in schools, including by providing teachers with better training in these subject areas and ensuring availability of adequate teaching materials.

32. As already noted in ECRI's second report, human rights are taught in Icelandic schools as part of a compulsory subject, "Life Skills". It has been reported to ECRI however, that in practice, the extent to which human rights are covered within this subject varies greatly from one school to another, partly because the curriculum is not specific enough on this aspect. ECRI notes that, as part of a general review of the curriculum guidelines for all subjects, the curriculum guidelines for "Life Skills" are currently being revised. As concerns teaching materials, ECRI notes that manuals providing teachers with guidance on how to

teach human rights are available. However, only in a few cases such material appears to have been in use in schools.

33. The Icelandic authorities report that universities offer undergraduate and graduate courses in intercultural education and diversity issues. They also report that they have funded a number of initiatives in the field of intercultural education and that intercultural education has been implemented in some schools as an official policy, although ECRI notes that the number of such schools is still limited. ECRI has furthermore been informed that surveys carried out among immigrants indicate that an important amount of people in this group consider that the school curriculum does not sufficiently reflect diversity, including cultural and religious diversity.

34. Civil society organisations have also highlighted that better human rights and intercultural school education appear to be all the more necessary in Iceland, as some research seems to point to a rather negative attitude among the younger generation towards the members of immigrant communities.

Recommendations **:**

35. ECRI recommends that the Icelandic authorities strengthen their efforts to provide human rights education in schools with special emphasis on equality and respect for difference. To this end, it recommends in particular that the importance of human rights be clearly and adequately reflected in the school curriculum. In the long term however, ECRI considers that the Icelandic authorities should consider making human rights a compulsory subject at both primary and secondary level.

36. ECRI recommends that the Icelandic authorities strengthen their efforts to ensure that intercultural education be effectively implemented in practice as a school policy in all schools.

37. ECRI recommends that as part of their efforts to improve human rights and intercultural education in schools, the Icelandic authorities pay particular attention to teacher training and to ensuring that existing teacher training material is actually used in practice. ECRI encourages the Icelandic authorities to work closely with universities to ensure adequate provision of intercultural education and diversity issues.

38. ECRI is pleased to note that a number of research projects, including surveys, have been carried out in recent years concerning both the attitudes of different segments of the Icelandic population towards members of immigrant communities and immigrants' experience of and attitude towards Icelandic society. However, it has been highlighted that some important areas have not yet been the subject of in-depth research. ECRI considers for instance, that the incidence of direct and indirect as well as structural racial discrimination still needs to be adequately investigated in Iceland. It has also been highlighted that so far, the impact of existing research on policy decisions regarding immigrants has been very limited.

Recommendations **:**

39. ECRI recommends that the Icelandic authorities support research aimed at gaining a better idea of the real situation of minority groups in Iceland and on attitudes of the majority population towards them. It recommends that such research include a strong focus on discrimination including direct, indirect and structural discrimination. ECRI furthermore recommends that the Icelandic

authorities ensure that research is used in practice to inform policy decisions targeting minority groups.

Reception and status of non-citizens

40. Since ECRI's second report, the 2002 Act on Foreigners has been supplemented by regulations in 2003[22] and amended in 2004[23]. While improvements were introduced in certain areas, civil society organisations have stressed that the overall trend since ECRI's second report in areas connected with immigration has been towards introducing restrictive measures. ECRI examines in more depth some of the provisions that raise its concern in different parts of this report[24]. However, ECRI would like to stress here that while it notes that the practice of the Icelandic authorities in a number of areas appears to limit at present the negative impact of certain provisions on the enjoyment of human rights by non-citizens, it remains concerned at the possible consequences that a change of practice in these areas might entail.

- "Quota" refugees

41. In its second report, ECRI noted that Iceland had been receiving "quota" refugees, whom it helped to resettle in Iceland through programmes involving different actors, including the Red Cross, other humanitarian organisations and municipalities. These programmes covered a wide range of areas, including provision of housing, financial support, assistance in finding employment, language courses, schooling of children, healthcare and psychological support as well as measures to favour mutual integration between the refugees and the local communities. ECRI encouraged the Icelandic authorities to develop these programmes further. It also recommended that the reception of "quota" refugees be formalised in legislation, including in order to avoid annual variations in its implementation.

42. ECRI is pleased to note that the programmes for the integration of "quota" refugees have continued. It also welcomes the fact that there continues to be general agreement in Iceland concerning the effectiveness of these programmes, although it has been highlighted that there are areas such as access to financial support measures for university education, where further improvements could be made. ECRI notes however, that reception of quota refugees has not been given a stronger legal basis -- the Icelandic authorities report that this question is currently being examined. As a result, since ECRI's second report, decisions on the number of accepted refugees have continued to vary considerably. Thus, 23 refugees were accepted in 2003, none in 2004 and 30 in 2005. ECRI also notes that in 2005, a Committee for Refugees and Asylum Seekers composed of representatives of relevant Ministries and of the Red Cross has replaced the Refugee Council, which was in place at the time of ECRI's second report. The Committee, which is in charge of the reception of "quota" refugees, will report to the newly-established Immigration Council[25].

[22] Regulation No. 53/2003 on Foreigners.

[23] Act No. 20/2004.

[24] Reception and status of non-citizens - Asylum seekers; The situation of Immigrants

[25] See below, The situation of immigrants.

Recommendations **:**

43. ECRI reiterates its recommendation that the Icelandic authorities provide reception of "quota" refugees with a stronger legal basis, in order to limit variations in the implementation and conditions of such reception. It encourages the Icelandic authorities to further develop, in close co-operation with civil society and other relevant organisations, the programmes aimed at favouring active participation of quota refugees into Icelandic society and the mutual integration of this part of the population with the local communities. It recommends that the Icelandic authorities address any shortcomings in the refugees' access to financial support measures for university education.

- ***Asylum seekers***

44. In its second report, ECRI noted that there had been an increase in asylum applications in previous years. Only one person had been granted refugee status, although other persons had been granted leave to stay in Iceland on humanitarian grounds. Although still modest, ECRI notes that figures of asylum applications are now higher than those (24 in 2000 and 53 in 2001) registered in ECRI's second report. Thus, for instance, 117 applications were received in 2002, 80 in 2003, 76 in 2004 and 87 in 2005. ECRI notes that none of these applicants were granted refugee status and that 10 persons were granted humanitarian status in the period 2002-2004. The Icelandic authorities have underlined that these low recognition rates reflect the nature of the applications received. However, many organisations have expressed concern that the low rates of recognition may also reflect a practice of granting humanitarian status as opposed to refugee status, as well as the need for improvement in the quality of first instance decision-making.

Recommendations **:**

45. ECRI recommends that the Icelandic authorities carry out research on the low rates of recognition of refugee status. It recommends that they ensure that all persons entitled to refugee status actually secure this status. To this end, it recommends that further efforts be made to improve the quality of first instance decision-making.

46. Noting that appeals against first instance asylum decisions made by the Directorate of Immigration were only possible before the Ministry of Justice, in its second report ECRI recommended that the Icelandic authorities introduce an independent mechanism to deal with asylum appeals. There have been no developments in this direction since that report. Asylum seekers who appeal against an asylum decision or a deportation order can still only apply to the Ministry of Justice -- ECRI is aware of no cases where this has been done successfully --, whose decisions are subject only to a limited court review on matters of procedure rather than substance. In addition, ECRI notes that the lodging of an appeal against an asylum decision does not, as a rule, suspend the execution of the deportation order and that therefore many rejected asylum seekers are rather quickly deported prior to a final decision. The authorities have stressed that the Ministry of Justice can suspend the execution of the deportation order if it considers that the circumstances of the case warrants such a measure. However, ECRI is not aware of cases where this possibility has been used.

47. In its second report, ECRI recommended that the Icelandic authorities provide asylum seekers with free legal aid from the outset of the asylum process. The situation in this area is still as described in ECRI's second report. Asylum seekers are entitled to five hours of free legal aid in appeals cases. However, in first instance asylum proceedings no free legal aid is available to asylum seekers, although they may be assisted in some cases by the Red Cross and hire a lawyer at their own expense.

Recommendations **:**

48. ECRI recommends that the Icelandic authorities ensure that asylum applicants may appeal against asylum decisions before an independent and impartial judicial mechanism empowered to consider the merits of the case.

49. ECRI recommends that the Icelandic authorities provide that appeals against asylum decision have an automatic suspensive effect on the decision to deport.

50. ECRI reiterates its recommendation that the Icelandic authorities ensure that free legal aid is available to asylum seekers from the outset of the asylum proceedings.

51. In its second report, ECRI addressed the issue of the role played by police and customs officials in granting admission to asylum seekers at the border. ECRI is pleased to note that the 2002 Act on Foreigners clarified the division of labour between the police and the Immigration authorities and that the police no longer decides on the admissibility of asylum claims. In its second report, ECRI recommended that border police officials receive in-depth training in asylum issues and on how to receive non-citizens arriving in Iceland. ECRI notes that since its second report, efforts have been made, in co-operation with civil society organisations and UNHCR, to provide training in these areas to border police officials. It also notes that, since its last report, asylum applications are increasingly filed at police stations within the country.

52. In its second report, ECRI recommended that the Icelandic authorities reconsider the provision contained in Section 45 of the Act on Foreigners, which excluded those foreigners who present a danger to national security from the protection against being returned to places where they would be at risk of serious human rights violations. ECRI also expressed concern at Section 46, which provides that asylum may be refused on grounds of important national interests. ECRI notes that both provisions are still in place, although the Icelandic authorities have reported that they have never been applied since ECRI's second report.

Recommendations **:**

53. ECRI recommends that the Icelandic authorities strengthen their efforts to provide border control officials with good quality training on asylum issues, including clear guidelines on the information that should be transmitted to asylum seekers concerning their rights and the way in which applications should be received and dealt with. ECRI furthermore encourages the Icelandic authorities to extend such training initiatives, as necessary, to police in service within the country.

54. ECRI recommends that the Icelandic authorities ensure that the principle of *non-refoulement* is thoroughly respected in all cases. To this end, it reiterates its recommendation that the Icelandic authorities review Sections 45 and 46 of the Act on Foreigners.

55. In its second report, ECRI welcomed the central role played by the Icelandic Red Cross in providing reception services for asylum seekers. It noted however, that provision of care was the responsibility of the State, which should take care of all aspects of reception, including housing, social care and clear rules on the access of children to education. ECRI notes that in early 2004, the Icelandic authorities concluded an agreement with the Municipality of Reykjanesbaer to set up a reception centre for asylum seekers, where asylum seekers are provided with daily necessities, a small weekly allowance and access to municipal services. The Red Cross plays a monitoring role on this new reception system of asylum seekers.

56. ECRI welcomes the fact that the public authorities have assumed increasing responsibility and ownership over the reception of asylum seekers in Iceland, although it notes that the new arrangements are based on an agreement between the central authorities and the municipality, and not embedded in law. ECRI notes that asylum seeker children attend the local schools on the basis of an informal arrangement. It has been reported to ECRI that children do not attend school during a three-month period after arrival. The authorities have explained that during this period the screening procedure for possible return of the asylum seekers to transit countries is carried out and that it is for this reason that children do not attend school during that time. It has furthermore been reported to ECRI that the asylum centre is quite isolated and that the weekly allowance is not enough to cover transportation costs to the capital city, although travel for administrative and health reasons is provided free of cost. ECRI notes that asylum seekers may be granted a work permit, but only if their identity is fully established, a condition that very few of them fulfil – in 2005, such a permit has been granted in one case. Finally, ECRI notes that the Committee for Refugees and Asylum Seekers set up in 2005[26] has not been mandated to deal with the reception and integration of asylum seekers.

Recommendations **:**

57. ECRI encourages the Icelandic authorities in their efforts to assume primary responsibility for the reception of asylum seekers. It recommends that they embed the new reception arrangements in legislation. ECRI reiterates its recommendation that the Icelandic authorities set out clear rules on the access of asylum seeker children to education, to ensure that these children are sent to school as soon as possible, and to ensure that, in taking decisions in these matters, the best interests of the child prevail in all cases. ECRI encourages the Icelandic authorities to take steps to alleviate the relative isolation of asylum seekers in the new centre. It furthermore encourages the Icelandic authorities to further extend the possibilities for asylum seekers to work pending the examination of their claims. Finally, ECRI encourages the Icelandic authorities to ensure that the reception needs of asylum seekers also benefit from the experience and leadership that will be developed within the Committee for Refugees and Asylum Seekers.

- Unaccompanied minors

58. Although the issue of unaccompanied foreign minors is reported to have virtually never arisen in practice in Iceland, ECRI notes that there are no specific provisions to safeguard the rights of such minors, including minors seeking asylum. ECRI notes that a working group established in December 2003 under the auspices of the Ministry of Justice has produced a report where

[26] See above, Reception and status of non-citizens – "Quota" refugees

the procedures to follow in case an unaccompanied foreign minor is found and the responsibilities of the different administrations are clearly explained. ECRI understands that the necessary budgetary appropriations as well as the regulations from the relevant administrations to implement the plan recommended in that report are still pending.

***Recommendations* :**

59. ECRI recommends that the Icelandic authorities establish safeguards for the protection of unaccompanied foreign minors.

Access to public services

- ***Access to education***

60. As already noted in ECRI's second report, both the general curriculum for all pupils in compulsory education and legislation for primary education provide for specialised education in Icelandic as a second language to be dispensed to non-Icelandic mother tongue children. ECRI has received consistent reports however, according to which there is not enough teaching of Icelandic as a second language in schools at present to meet the needs. While this applies to all levels of compulsory education, ECRI notes that lack of such teaching is particularly severe at lower secondary level. The Icelandic authorities report that the ongoing reform of the school curriculum guidelines increases the opportunities for non-Icelandic mother tongue pupils to learn Icelandic in schools. For instance, compulsory and upper secondary schools are required by the draft curriculum guidelines for Icelandic as a second language to make special reception plans for non-Icelandic mother tongue pupils. The Icelandic authorities report that, as part of this reform, teaching of pupils' mother tongues other than Icelandic needs to be encouraged. In this respect, they underline that mother tongue education is increasingly being evaluated as credits in upper-secondary schools and as a part of the curriculum in compulsory schools.

61. In light of research which seemed to indicate that children of immigrant background were not performing as well as Icelandic children in schools, with high drop-out rates at secondary level, in its second report ECRI recommended that further research be carried out in this area and that strategies be devised to address any problems found. The Icelandic authorities have confirmed the disproportionately high drop out rates of students of immigrant background in secondary education. ECRI notes with interest that in order to address this problem, the Icelandic authorities have recently initiated a three-year project ("*Take off to the Future*") involving different ministries, organisations and service providers and targeting young people of Vietnamese origin, whose aim is to encourage these youngsters to pursue education but also to provide them with the necessary tools to play an active role in society more generally. While the project has been targeted at this specific community as pilot, the Icelandic authorities have stated their intention, depending on the final assessment of the results, to extend it to other pupils who experience particular situations of disadvantage in education.

62. As already noted in ECRI's second report, pupils in Iceland are required to follow classes in "Christianity, Ethics and Religious Studies", unless their parents ask for them to be exempted. In its second report, ECRI recommended that the Icelandic authorities ensure that children who do not wish to attend these classes are provided with alternative classes and that all children are given the opportunity to learn about different religions and faiths. The Icelandic authorities have reported to ECRI that, since then, they have commissioned

research on the content of this subject and on procedures for exemption. They point out that the conclusion of this research is that the situation in Iceland in these areas is similar to that existing in other Nordic countries. The Icelandic authorities have also underlined that the draft curriculum guidelines for "Christianity, Ethics and Religious Studies" require more teaching in religions other than Christianity to be imparted in schools. However, ECRI notes reports according to which, although teachers of this subject are already at present required to teach about other religions, in practice classes are in many cases of a Christian confessional nature.

Recommendations **:**

63. ECRI recommends that the Icelandic authorities improve the opportunities for non-Icelandic mother tongue pupils to learn Icelandic as a second language in schools at all levels, and particularly at secondary level. In parallel with efforts in this direction, ECRI encourages the Icelandic authorities to improve availability of teaching of pupils' mother tongues other than Icelandic.

64. ECRI encourages the Icelandic authorities in their efforts to address the situation of disadvantage of secondary students of immigrant background, including their disproportionately high drop out rates. It encourages the authorities to monitor the effectiveness of current measures undertaken and to extend good practice developed in this area. ECRI recommends that the Icelandic authorities develop monitoring and research which will enable them to identify challenges facing pupils of immigrant background in education and to assess the effectiveness of measures taken to meet these challenges.

65. ECRI reiterates its recommendation that the Icelandic authorities ensure that children who do not wish to attend classes in "Christianity, Ethics and Religious Studies" are provided with alternative classes and ensure that all children are given genuine opportunities to learn about different religions and faiths. ECRI stresses the need for any initiatives taken to this end to be reflected in the selection and training of teachers as well as in teaching materials.

- ***Access to other services***

66. Civil society organisations report that since ECRI's second report, there have been a number of instances where persons of immigrant background were refused entry to public places such as bars and night clubs. As mentioned above, however, these cases appear not to have been brought to the attention of the criminal justice authorities.

67. In its second report, ECRI encouraged the Icelandic authorities to train officials and providers of services who deal on a daily basis with the needs and requests of immigrants on issues of diversity. Although this type of training is reportedly provided, for instance, to Reykjavik Municipality's civil servants, ECRI notes that many civil servants who are in daily contact with immigrants do not at present receive specific training on issues of diversity.

Recommendations **:**

68. ECRI recommends that the Icelandic authorities take steps to investigate any practices in use in the entertainment industry of refusing entry to persons of immigrant background to certain establishments. It recommends that the Icelandic authorities take swift steps to address any such practices, including the steps recommended above in the field of legislation.

69. ECRI encourages the Icelandic authorities to strengthen their efforts to provide officials and providers of services who deal on a daily basis with the needs and requests of immigrants with the necessary skills to operate professionally in a multicultural society.

Employment

70. ECRI deals with the employment situation of immigrants in Section II of this report

Vulnerable groups

- Immigrant women

71. In its second report, ECRI recommended that the Icelandic authorities strengthen their efforts to reach out to immigrant women, inform them of their rights and provide them with opportunities to learn the Icelandic language and to participate in society. A particular problem, already highlighted in that report and which persist today – at the time of writing as many as 40% of women staying at the women's shelter in Reykjavik are immigrant women – concerns the situation of immigrant women who are victims of domestic violence. In this connection, ECRI notes that at present, if a foreign woman with a residence permit on grounds of marriage or cohabitation leaves her partner within three years of being granted the permit, she loses her residence rights. As a result, many women are reported to have endured violent relationships in order to avoid being deported. The Icelandic authorities have reported that they are aware of this situation and that in practice, they renew the residence permits of foreign women who are victims of domestic violence. It has been reported to ECRI however, that the women concerned are not necessarily aware of this practice and that in any event, the letter of the law has a powerful deterrent effect in terms of leaving a violent relationship. ECRI understands that, since ECRI's last report, amendments to the provisions of the Act on Foreigners which regulate the granting of residence permits in these cases have been considered but have not been adopted.

***Recommendations* :**

72. ECRI encourages the Icelandic authorities to strengthen their efforts to reach out to immigrant women, inform them of their rights and provide them with opportunities to learn the Icelandic language and to participate in society. It strongly recommends that they ensure, including by introducing the necessary changes to legislation, that foreign women who are victims of domestic violence are not forced to stay in violent relationships to avoid deportation.

- Muslims

73. The climate of opinion regarding Muslims in Iceland is reported to have somewhat deteriorated since ECRI's last report, particularly as a result of the association sometimes made between Muslims and fundamentalism or terrorism. Negative stereotypes and generalisations concerning Muslims are reported to be found in the media, notably private television and radio channels, but also in some cases in political and public debate. A few instances of physical or verbal harassment of Muslims have also been reported to ECRI. More generally, ECRI's attention has been drawn to surveys which seem to point to a certain mistrust of the general public towards Muslims.

74. ECRI has furthermore been informed that it has not yet been possible for the Muslim community to build a Mosque and cultural centre in Reykjavik, although an application for land and building permission has been pending since 1999. The Icelandic authorities have reported that the land has been assigned and that the application for building permission is to be examined by the Municipality of Reykjavik.

***Recommendations* :**

75. ECRI recommends that the Icelandic authorities take steps to monitor and address any manifestations of racism and discrimination towards Muslims. In this respect, it draws the attention of the Icelandic authorities to its General Policy Recommendation No. 5[27], which proposes a range of legislative and policy measures governments can take to this end.

76. ECRI recommends that the Icelandic authorities ensure that the application for the building of a Mosque and Muslim cultural centre be examined without further delay. It encourages the Icelandic authorities to ensure, in close consultation with the concerned community, that Muslims enjoy adequate premises to practice their religion.

Antisemitism

77. There are no formally organised Jewish communities in Iceland. The Icelandic authorities have reported to ECRI that they are not aware of any manifestations of antisemitism having occurred since ECRI's second report. It has been reported to ECRI, however, that antisemitic statements were made publicly by a prominent figure in 2005 and that no charges have been brought against their author.

***Recommendations* :**

78. ECRI recommends that the Icelandic authorities monitor the situation as concerns manifestations of antisemitism and react to any manifestations that may occur. It draws the attention of the Icelandic authorities to its General Policy Recommendation No. 9 on the fight against antisemitism[28], which contains practical guidance on measures governments can take to this end.

Media

79. As noted in other parts of this report[29], stereotyping and stigmatising remarks on members of minority groups are reported to be made sometimes on the broadcast private media. On some occasions, material portraying immigrants in a negative or stereotypical way has also appeared in the press. ECRI notes that codes of self-regulation of journalists exist in Iceland and that on a few occasions they have been used to address these instances.

[27] CRI (2000) 21: ECRI General Policy Recommendation n° 5: Combating intolerance and discrimination against Muslims, European Commission against Racism and Intolerance, Council of Europe, April 2000

[28] CRI (2004) 37: ECRI General Policy Recommendation N°9 on the fight against antisemitism, European Commission against Racism and Intolerance, Council of Europe, June 2004

[29] See above, Vulnerable groups – Muslims.

***Recommendations* :**

80. ECRI encourages the Icelandic authorities to impress on the media, without encroaching on their editorial independence, the need to ensure that reporting does not contribute to creating an atmosphere of hostility and rejection towards members of any minority groups, including immigrant, Muslim or Jewish communities. ECRI recommends that the Icelandic authorities engage in a debate with the media and members of other relevant civil society groups on how this could best be achieved.

Conduct of law enforcement officials

81. In its second report, ECRI recommended that law enforcement officials receive adequate training aimed at raising their awareness of human rights, including non-discrimination, and their sensitivity to cultural diversity in dealing with people of different backgrounds. It welcomed the nomination of a police contact person with responsibility for dealing with immigrants and hoped that this initiative would encourage victims to come forward with cases. ECRI furthermore encouraged the Icelandic authorities to make efforts to recruit persons of immigrant background in the police.

82. Since ECRI's second report, the police contact person has been approached by immigrants, including women victims of domestic violence, on a number of occasions. As mentioned above[30] however, such cases never concerned instances of racism or racial discrimination. Civil society organisations have highlighted that the position and role of the contact person is not known well enough. More generally, it has been noted that, while general training on equality and non-discrimination is provided to police officers, specific training aimed at raising their cultural sensitivity in a practical way still needs to be promoted. No consideration appears to have been given by the Icelandic authorities since ECRI's second report to the issue of promoting better representation of persons of immigrant background within the police ranks.

83. As concerns complaints against alleged misconduct of police officers, the Icelandic authorities report that none of the 76 complaints submitted in the period 2002-2004 concerned racism or racial discrimination.

***Recommendations* :**

84. ECRI recommends that the Icelandic authorities strengthen their efforts to provide law enforcement officials with good quality training in human rights and non-discrimination. It recommends in particular that they strengthen provision of specific training to raise their sensitivity to cultural diversity in dealing with people of different backgrounds. ECRI encourages the Icelandic authorities to further publicise the position and role of the police contact person.

85. ECRI invites the Icelandic authorities to consider the establishment of an independent mechanism, separate from police structures, for investigating allegations of police misconduct, including racist or racially discriminatory behaviour.

86. ECRI reiterates its recommendation that the Icelandic authorities take steps to

[30] Criminal law provisions.

promote better representation of persons of immigrant background within the police ranks.

Monitoring the situation

87. In its second report, ECRI recommended that the Icelandic authorities consider collecting data which would enable them to monitor the position of minority groups in areas such as education, employment, etc. There have been no significant developments in this area since ECRI's second report. As was the case at that time, data is collected in Iceland on nationality and religion. The Icelandic authorities have reported that statistical information on the ethnic origin of the immigrant population is also available. However, it does not appear to ECRI that this information is presently being used to monitor the position of minority groups and identify possible patterns of discrimination or disadvantage in certain areas. However, the Icelandic authorities have reported to ECRI that although still at an initial stage, the debate on data collection for monitoring purposes has started within Icelandic public institutions. ECRI also notes that one of the tasks of the newly-established Immigration Council, is to gather statistical information on immigrants in Iceland[31].

Recommendations **:**

88. ECRI recommends that the Icelandic authorities improve their systems for monitoring the situation of minority groups in different areas of life by collecting relevant information broken down according to categories such as religion, language, nationality and national or ethnic origin. It recommends that they ensure that this be done in all cases with due respect to the principles of confidentiality, informed consent and the voluntary self-identification of persons as belonging to a particular group. These systems should be elaborated in close co-operation with civil society organisations and take into consideration the gender dimension, particularly from the point of view of possible double or multiple discrimination.

II. SPECIFIC ISSUES

The situation of immigrants

89. At the time of ECRI's second report, the number of persons coming to work and settle in Iceland had been steadily increasing. ECRI notes that since then, this trend has been confirmed and the proportion of immigrants now stands at around 4.5 % of the total population. Since the vast majority of these persons come to Iceland to work, their representation as part of the Icelandic workforce is even higher (around 7%, although this figure includes people who are working in Iceland on clearly short-term projects). As was the case at the time of ECRI's second report, immigrants come from Central Europe, especially Poland, other Nordic countries, countries in the Balkans, and Asia, especially Thailand and the Philippines. Most of those from outside the European Economic Area (EEA) are employed in low-skilled jobs in fish factories, construction work, the catering and cleaning industries, nursing homes and shops.

90. A work permit is necessary for non-EEA nationals to come and work in Iceland. These permits, however, are not granted to the foreign worker but to the employer for a specific post and usually for a duration of 12 months. These temporary work permits can be extended, and if after three years the foreign

[31] See below, Section II

worker is still in employment he or she is granted a permanent work permit. In its second report, ECRI considered that the system of granting temporary work permits to the employer and not to the employee left the foreign employees in a vulnerable situation. It noted, for instance, that individuals might feel reluctant to complain in cases of unequal treatment or breach of employment contracts for fear of losing residence rights in Iceland. The Icelandic authorities and the trade unions, however, have expressed support for the system of work permits as it was and still is. They have stressed that this system ensures that the foreign worker stays in employment, an aspect which is considered to be primordial to favour integration. They have also underlined that the current system enables them to better ensure that the rights of foreign workers are respected. Furthermore, they have stressed that as a rule, when an employer breaches a work contract, the foreign worker is allowed to change job. However, civil society and immigrant organisations have consistently expressed a negative opinion concerning the current system of temporary work permits, which they continue to find humiliating, but also conducive to protracted situations of exploitation. ECRI notes that in the favourable economic conditions prevailing in Iceland at present, the practice of the Icelandic authorities might allow in most cases the foreign worker who has experienced problems with the employer to stay in Iceland and change job. However, according to the letter of the legislation, a non-EEA worker in Iceland on a temporary work permit loses his or her residence rights if he or she leaves the job, and practice may therefore be different should the economic conditions change. Furthermore, ECRI notes that in spite of efforts made by the authorities, the trade unions and civil society organisations, foreign workers are not always aware of their rights or of the practice concerning work permits, a situation which reportedly results in their enduring situations of exploitation in a number of cases. ECRI understands that the system of granting work permits is currently being reviewed by the Icelandic authorities.

91. Another important element that negatively affects the position of immigrants in Iceland, delays their integration into Icelandic society and increases the risk of discrimination, is lack of knowledge of the Icelandic language. In its second report, ECRI stressed the need for Icelandic language courses to be of good quality, inexpensive, and tailored as much as possible to the individual circumstances of the person concerned. ECRI notes that since that report, developments in this area have been very limited. Language courses are still reported to be available to immigrants only at considerable cost, although ECRI notes that it is possible in some cases to have part of these costs reimbursed and that, in some cases, the employers pay for the courses. Only in a few cases are immigrants allowed to attend language courses during working hours. Furthermore, they often need to travel long distances to attend these courses. In addition, while the quality of language courses is reportedly better in the Reykjavik area, ECRI has received consistent reports according to which in some other areas the quality of teaching is not good enough. ECRI notes that research seems to indicate that only a very limited number of immigrants feel that they are able to express themselves fully in Icelandic, although the vast majority of them declare a keen interest in improving their knowledge of Icelandic. ECRI considers that availability of easily accessible and good quality Icelandic language classes is all the more important in view of the fact that as already noted in ECRI's second report, since 2003 applicants for permanent residence permits have to fulfil language requirements. Command of Icelandic is also all the more desirable in view of the reportedly low tolerance among the general public towards broken Icelandic. The Icelandic authorities have pointed out that in 2004 a curriculum for immigrants in relation to the 2002 Act on

Foreigners was prepared in cooperation with the University of Education and that a draft of this curriculum has been used to organise Icelandic language courses for immigrants.

92. Taking into account the limited command of the Icelandic language among immigrants at present, ECRI considers that availability of good quality interpretation and translation services is particularly important to ensure that these persons can adequately access and exercise their rights in different areas. ECRI notes that persons without command of the Icelandic language have a right to interpretation in certain areas, including healthcare and criminal proceedings. For the rest however, with a few exceptions, there is no obligation for the administration to provide interpretation, but only a general duty to provide information to the persons in question on their rights. ECRI notes that civil society organisations provide interpretation services. However such provision is clearly insufficient to cover the actual needs for these services. ECRI expresses concern at reports according to which lack of understanding of Icelandic has in some cases negatively affected the position of immigrants in administrative or other non-criminal proceedings as well as in other areas. ECRI furthermore notes reports according to which, in areas where provision of interpretation is obligatory, professional interpretation is not always used. ECRI furthermore notes research that seems to indicate that, even when immigrants are entitled to interpretation, they often fail to request it for lack of knowledge of their rights in this respect. ECRI is pleased to note that availability of interpretation services is one of the areas on which the newly-established Immigration Council is expected to focus[32].

93. Unemployment is generally reported not to represent a problem for the immigrant population of Iceland today. In fact, official statistics indicate that immigrants are proportionally less represented than Icelandic citizens amongst the unemployed population. However, non-EEA immigrants are widely reported to be employed in positions that do not reflect their educational attainment or professional experience. In addition to the role played by limited command of the Icelandic language in determining this situation, it has been stressed that the recognition of foreign diplomas and qualifications still poses important barriers in this area. As concerns direct and indirect racial discrimination, ECRI notes that most discrimination cases in the field of employment have concerned gender discrimination. However, civil society organisations have highlighted to ECRI that cases in which racial discrimination plays a role in employment relations do occur, although the general unawareness of this phenomenon and lack of effective legal framework in this area prevent these cases from coming to the forefront.

Recommendations **:**

94. ECRI recommends that the Icelandic authorities grant work permits directly to employees and not to the employers. It encourages them to strengthen their efforts to ensure that clear provision of information is available to foreign workers on their rights.

95. ECRI urges the Icelandic authorities to provide immigrants without sufficient knowledge of the Icelandic language with Icelandic language training that meets their demands. To this end, ECRI recommends that the Icelandic authorities monitor the quality of Icelandic language courses provided in practice and ensure that adequate quality standards are met throughout the country. It also

[32] See below.

recommends that the Icelandic authorities ensure that these courses are tailored as much as possible to the individual circumstances of the person concerned, including their levels of educational attainment and their working schedules. ECRI finally stresses that courses should be available at genuinely affordable costs to all immigrants. ECRI considers that ideally, language courses should be provided without costs for immigrants and during working hours.

96. ECRI recommends that the Icelandic authorities ensure that persons without sufficient command of the Icelandic language have access to good quality interpretation in all circumstances where the exercise of their rights is at stake.

97. ECRI encourages the Icelandic authorities to take steps to ensure that immigrants gain access to professions reflecting their level of educational attainment and professional experience. To this end, it encourages the authorities in particular to take steps to improve recognition of foreign diplomas and qualifications and to raise awareness among employers of racial discrimination and how to avoid it.

98. As already mentioned in ECRI's second report, family reunification in Iceland is possible, provided that support, medical insurance and housing for the family members are secured. However, the 2004 amendments to the Act on Foreigners[33] introduce changes as to the beneficiaries of these provisions, some of which raise serious concern with ECRI.

99. ECRI notes that foreign spouses of non-EEA citizens residing in Iceland can now only be granted a residence permit on family reunification grounds if they are over 24 years of age. The Icelandic authorities have stressed that these provisions have been introduced to counter forced marriages and marriages of convenience. ECRI notes, however, that Section 13 of the amended Act on Foreigners already contains provisions allowing a residence permit to be refused in these cases. The Icelandic authorities have furthermore indicated that in practice, if there is no well-grounded suspicion of a marriage having been contracted for convenience or without the mutual consent of the parties, residence permits are granted to spouses of foreign residents under 24 years of age. However such permits are not issued on grounds of family reunification, but on other grounds, such as education or employment. ECRI considers that the 24-year old rule excessively limits the right of foreigners to family reunification in Iceland.

100. Provided that the requirements concerning support, medical insurance and housing are met, underage children of resident non-citizens are also granted family reunification permits in Iceland. According to the letter of the amended Act on Foreigners however, if these children have not secured permanent residence before turning 18, they have to prove that they can support themselves in order to stay in Iceland. The Icelandic authorities have reported to ECRI that residence permits are generally renewed for these persons if they are in full-time education and live with their parents. However, it has been reported to ECRI that a number of these young people have dropped out of secondary education to secure employment, and thereby avoid deportation. It has also been highlighted that this situation, combined with the already disproportionate drop-out rate of young people of immigrant background from

[33] See above, Reception and status of non-citizens.

higher education[34], may eventually result in the fabrication of an identifiable group of less educated persons of immigrant background.

Recommendations **:**

101. ECRI recommends that the Icelandic authorities ensure that the rights of non-citizens to private and family life and non-discrimination are thoroughly respected. To this end, it recommends that the Icelandic authorities repeal the provisions introducing a 24-year minimum age requirement for spouses of non-EEA residents of Iceland. It also strongly recommends that the Icelandic authorities ensure that the provisions governing the granting of residence permits to persons over 18 allow young people pursuing education to continue to do so without being faced with the risk of deportation.

102. In its second report, ECRI called on the Icelandic authorities to develop a coherent vision of immigration and integration and elaborate long-term overall strategies to favour mutual integration of the immigrant and non-immigrant populations of Iceland. ECRI is pleased to note that in 2005, the Icelandic authorities established an Immigration Council. The Council is composed of representatives from all Ministries with responsibilities in areas of relevance for immigrants, the Union of Local Authorities and immigrant communities. It is required to work in close co-operation with municipalities, social partners and non-governmental organisations. The tasks of the Council are: to make recommendations to the Icelandic government on policies concerning immigrants; to monitor the implementation of such policies; to establish contracts with providers of services for immigrants in different areas. These areas include: initial and on-going provision of relevant information; collection of statistical data; interpretation; local authorities' services; research and pilot projects on the situation of immigrants. ECRI considers that the establishment of the Immigration Council is an important step towards addressing the co-ordination gap on issues of immigration and integration highlighted in ECRI's second report. At the time of writing, however, the Council has only met a few times and has not yet received budgetary allocations. ECRI understands that these allocations should be assigned in the course of 2006.

103. ECRI notes that the role of the Immigration Council can be central to promoting an integrated society in Iceland. It notes that Iceland can count on a relatively long experience in implementing programmes – in a rather successful way, as mentioned above[35] -- targeting "quota" refugees and local communities as a whole in order to promote mutual integration. In this connection, it has been reported to ECRI that in the communities where both "quota" refugees and immigrants are established, mutual integration of majority and minority populations appears to have been more successful as concerns the former group than the latter.

104. More generally, in the current situation characterised by the absence of a specialised body to combat racism and racial discrimination[36], ECRI considers that in the framework of its work to favour integration, the Immigration Council could be central in raising awareness among the general public of racial discrimination and the role this phenomenon plays in preventing mutual integration between majority and minority populations.

[34] See above, Access to public services – Access to education.

[35] Reception and status of non-citizens- "Quota" refugees.

[36] Specialised bodies and other institutions.

***Recommendations* :**

105. ECRI encourages the Icelandic authorities in their efforts to develop long-term overall strategies to favour mutual integration of the immigrant and non-immigrant populations of Iceland. It recommends that they devote all the necessary resources to the Immigration Council to enable it to carry out its tasks effectively. In designing and implementing these strategies, ECRI strongly encourages the Icelandic authorities to draw on successful experiences existing in the country in the field of promoting mutual integration between refugees and local communities. It also recommends that these strategies include a clear focus on discrimination and, as a consequence, measures targeted at the majority population to raise its awareness of this phenomenon and the need to combat it.

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Ireland

Constitution, Article 40, 6, 1°, i.[1]

40. 6. 1°The State guarantees liberty for the exercise of the following rights, subject to public order and morality:-

i. The right of the citizens to express freely their convictions and opinions.

[1] *Corway –v- Independent Newspapers (Ireland) Limited* [1999] 4 IR 484 : the Supreme Court stated that "*… the implications of [the constitutional framework] for the crime of blasphemy would need to be worked out in legislation. It is difficult to see how the common law crime of blasphemy, related as it was to an established church and an established religion could survive in such a constitutional framework…. It would appear that the legislature has not adverted to the problem of adapting the common law crime of blasphemy to the circumstances of a modern state which embraces citizens of many different religions and which guarantees freedom of conscience and a free profession and practice of religion.*" The Supreme Court went on to find that "*[in] this state of the law, and in the absence of any legislative definition of the constitutional offence of blasphemy, it is impossible to say of what the offence of blasphemy consists. As the Law Reform Commission has pointed out neither the* actus reus *nor the* mens rea *is clear. The task of defining the crime is one for the legislature, not for the courts. In the absence of legislation and in the present state of the law the Court could not see its way to authorising the institution of a criminal prosecution of blasphemy against the respondents.*"

The education of public opinion being, however, a matter of such grave import to the common good, the State shall endeavour to ensure that organs of public opinion, such as the radio, the press, the cinema, while preserving their rightful liberty of expression, including criticism of Government policy, shall not be used to undermine public order or morality or the authority of the State.

The publication or utterance of blasphemous, seditious, or indecent matter is an offence which shall be punishable in accordance with law.

Defamation act. 1961, n°40
Penalty for printing or publishing blasphemous or obscene libel.

13.—(1) Every person who composes, prints or publishes any blasphemous or obscene libel shall, on conviction thereof on indictment, be liable to a fine not exceeding five hundred pounds or imprisonment for a term not exceeding two years or to both fine and imprisonment or to penal servitude for a term not exceeding seven years.

(a) In every case in which a person is convicted of composing, printing or publishing a blasphemous libel, the court may make an order for the seizure and carrying away and detaining in safe custody, in such manner as shall be directed in the order, of all copies of the, libel in the possession of such person or of any other person named in the order for his use, evidence upon oath having been previously given to the satisfaction of the court that copies of the said libel are in the possession of such other person for the use of the person convicted.

(b) Upon the making of an order under paragraph (a)of this subsection, any member of the Garda Síochána acting under such order may enter, if necessary by the use of force, and search for any copies of the said libel any building, house or other place belonging to the person convicted or to such other person named in the order and may seize and carry away and detain in the manner directed in such order all copies of the libel found therein.

(c) If, in any such case, the conviction is quashed on appeal, any copies of the libel seized under an order under paragraph (a)of this subsection shall be returned free of charge to the person or persons from whom they were seized.

(d) Where, in any such case, an appeal is not lodged or the conviction is confirmed on appeal, any copies of the libel seized under an order under paragraph (a)of this subsection shall, on the application of a member of the Garda Síochána to the court which made such order, be disposed of in such manner as such court may direct.

Prohibition of Incitement to Hatred Act, 1989, act to prohibit incitement to hatred on account of race, religion, nationality or sexual orientation,

Section 2
It shall be an offence for a person –

- to publish or distribute written material,
- to use words, behave or display written material –
- in any place other than inside a private residence, or

(ii) inside a private residence so that the words, behaviour or material are heard or seen by persons outside the residence,

or to distribute, show or play a recording of visual images or sounds,if the written material, words, behaviour, 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.

In proceedings for an offence under subsection (1), if the accused person is not shown to the have intended to stir up hatred, it shall be a defence for him to prove that he was not aware of the content of the material or recording concerned and did not suspect, and had no reason to suspect, that the material or recording was threatening, abusive or insulting.

In proceedings for an offence under subsection (1)(b), it shall be a defence for the accused person – to prove that he was inside a private residence at the relevant time and had no reason to believe that the words, behaviour or material concerned would be heard or seen by a person outside the residence, or

if he is not shown to have intended to stir up hatred, to prove that he did not intend the words, behaviour or material concerned to be, and was not aware that they might be, threatening, abusive or insulting.

Section 3 (1) If an item involving threatening, abusive or insulting visual images or sounds is broadcast, each of the persons mentioned in *subsection (2)* is guilty of an offence if he intends thereby to stir up hatred or, having regard to all the circumstances, hatred is likely to be stirred up thereby. …

Section 4: (1) It shall be an offence for a person— (*a*) to prepare or be in possession of any written material with a view to its being distributed, displayed, broadcast or otherwise published, in the State or elsewhere, whether by himself or another, or (*b*) to make or be in possession of a recording of sounds or visual images with a view to its being distributed, shown, played, broadcast or otherwise published, in the State or else-where, whether by himself or another, if the material or recording is threatening, abusive or insulting and is intended or, having regard to all the circumstances, including such distribution, display, broadcasting, showing, playing or other publication thereof as the person has, or it may reasonably be inferred that he has, in view, is likely to stir up hatred. …

Section 6: A person guilty of an offence under *section 2, 3* or *4* shall be liable— (*a*) on summary conviction, to a fine not exceeding £1,000 or to imprisonment for a term not exceeding 6 months or to both, or (*b*) on conviction on indictment, to a fine not exceeding £10,000 or to imprisonment for a term not exceeding 2 years or to both. `

Broadcasting Act 2009

Section 71 (…) (6) A content provision contract shall include a condition providing that, where any of the programme material supplied in pursuance of the contract—

(a) contravenes Article 22 or 3b of the Council Directive or the Prohibition of Incitement to Hatred Act 1989 , or

(b) constitutes an incitement to commit an offence,

the Authority may, or, if such a supply of programme material has occurred within 6 months of a previous such supply by the same person having occurred, shall, terminate the contract.

NB The Irish authorities have announced the review of the Prohibition of Incitement to Hatred Act of 1989 in consultation with ethnic minority groups in order to render it more effective is nearly complete. There is no criminal law provision which defines racist offences as specific offences, nor is there one which provides for the racist motivation of a crime to be considered as an aggravating circumstance during the sentencing stage of a trial. (Source: ECRI Report on Ireland, 2007, available at: http://hudoc.ecri.coe.int/XMLEcri/ENGLISH/Cycle_03/03_CbC_eng/IRL-CbC-III-2007-24-ENG.pdf)

Case Law

Ireland

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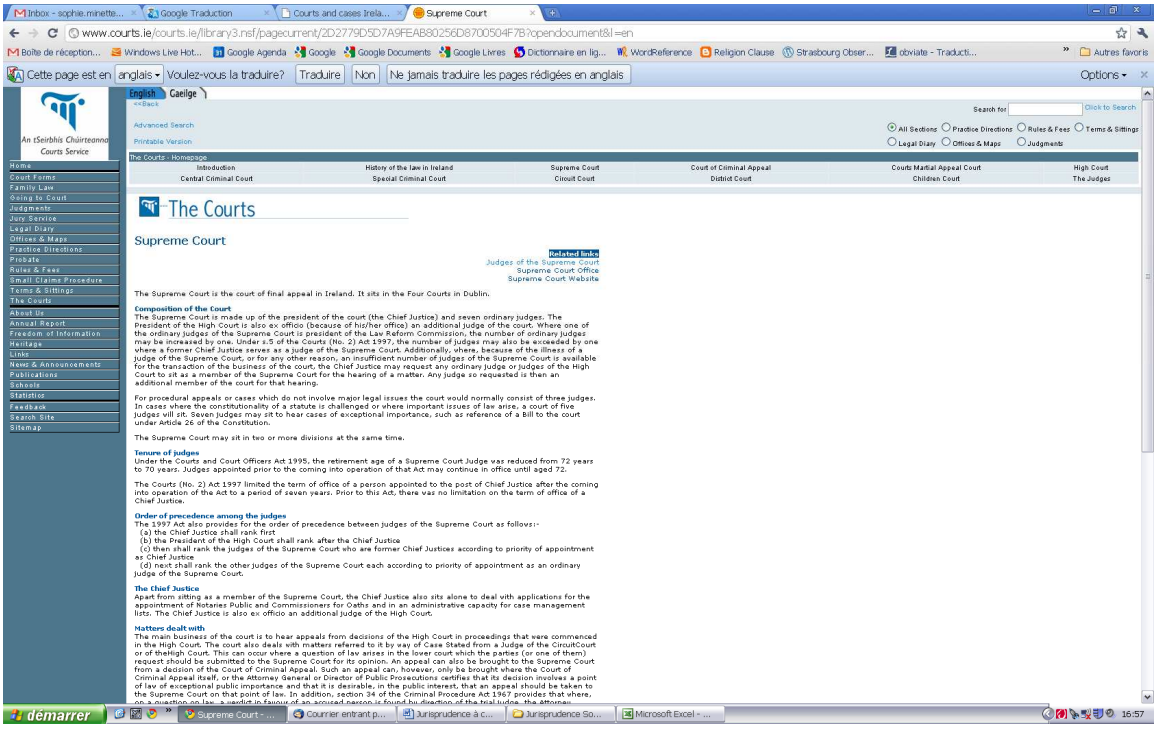

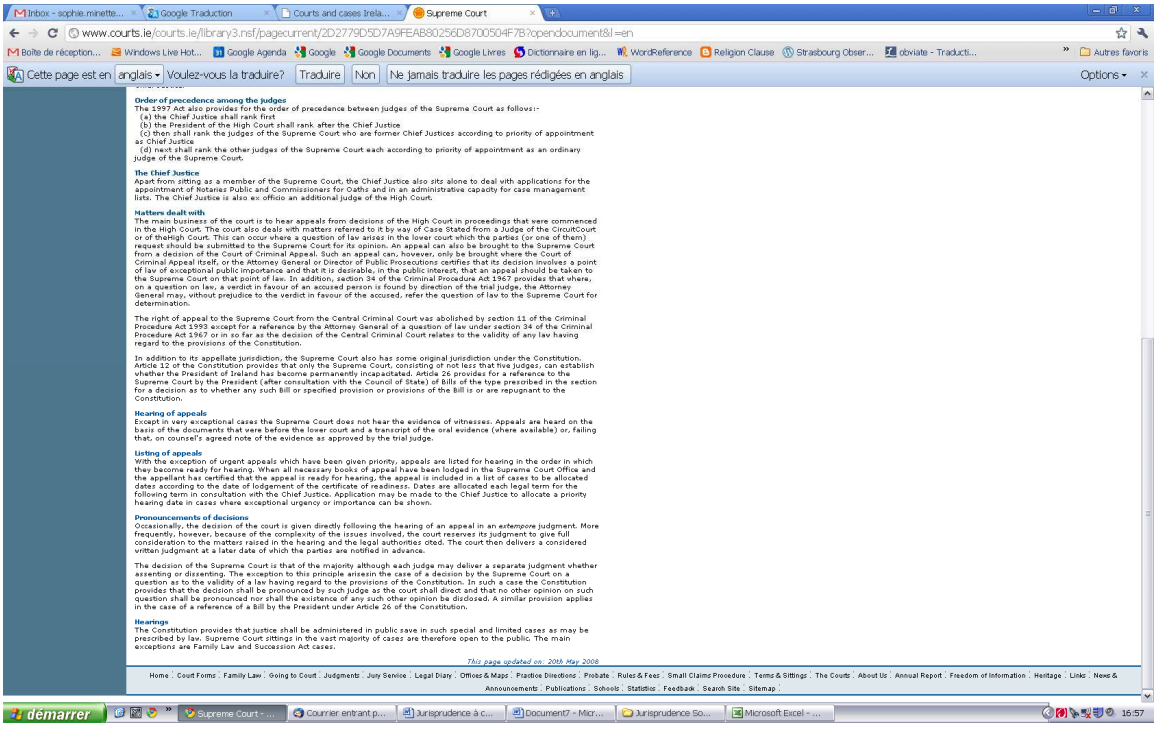

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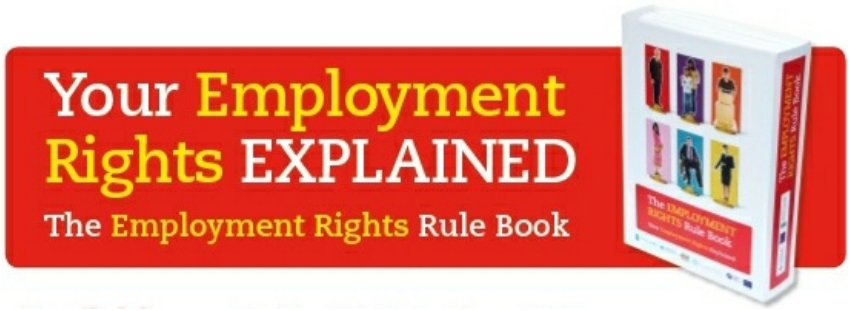


Equality Authority Welcomes Reform Proposals on Family Relationships

Added: 21 Dec 2010

The Equality Authority today welcomed the publication of the Law Reform Commission's recommendations on Legal Aspects of Family Relationships.

The Equality Authority made a substantial submission to the Commission on this matter which can be viewed on http://www.equality.ie/index.asp?docID=851

'The Equality Authority welcomes the progression of extended family rights set out in this report and urges immediate legislative action to implement these improvements, as many families are in need of the recognition of all the circumstances that contribute to good parenting in our modern society' said Chairperson Angela Kerins.

- Read the full Press Release here

Equality news Winter 2010

Added: 21 Dec 2010

The Winter 2010 edition of Equality News is now available.

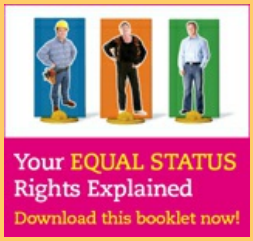
It can be downloaded here.

School principals need to take action to combat homophobic bullying

Added: 23 Nov 2010

From The Equality Authority and Dublin City University

School principals need to take action to combat homophobic bullying, a new report published by the Equality Authority finds. The report also finds that religious views on homosexuality should not be used as obstacle to addressing homophobia in schools.



- Read the press release here
- Download the "Addressing Homophobic Bullying in Second Level Schools" report

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Equality Authority welcomes doubling of compensation to a pregnant worker by the Labour Court on appeal

Added: 18 Nov 2010

The Equality Authority welcomes an important decision on appeal by the Labour Court to double the original compensation awarded to a worker. The Labour Court found that Regina Cruise was discriminated against and was subject to harassment because she was pregnant. In its determination (EDA1023) in Nail Zone Ltd and a Worker, the worker was represented by the Equality Authority.

- Read the press release here

Making Equality Count - Irish and International Research Measuring Equality and Discrimination

Added: 18 Nov 2010

Despite legislation outlawing discrimination across the EU, inequalities between groups appear to be an enduring feature of Irish and European societies. The extent to which inequality is due to discrimination is a matter of continuing debate and controversy. Accurately measuring discrimination is therefore a crucial yet challenging task.

This volume showcases Irish and international research on inequality, and on discrimination as a contributor to that inequality. Drawing on economics, sociology and social psychology, Making Equality Count highlights advances made in the measurement of discrimination, as well as the large body of evidence that has been amassed on this topic. Making Equality Count is based on the papers presented at a conference in Dublin in June 2010.

- Download the Report here

Equality Authority Welcomes Significant Award in Sexual Harassment Case

Added: 15 Nov 2010

The Equality Authority today welcomed a significant award in a case taken by its client Pauline Stone vs I. Moloney and Sons Ltd and the awarding of compensation in excess of 54,000 euros. 'The case is important not only that it awards the maximum compensation allowable to Ms Stone for sexual harassment, but in addition awards the same amount again for victimisation and subsequent victimisatory dismissal' stated the Equality Authority.

- Read the Press Release here

Planning for Equality - Mainstreaming Equality Conference

* Click here to read the full Programme and Booking form

Date: 9th November 2010
Venue: Dublin Castle, Dublin 2
Duration: 9.15 am (registration) to 1.30 pm (followed by lunch)

Aims: The Equality Authority is announcing its sixth annual conference on 'Mainstreaming Equality - Promoting Equality and Accommodating Diversity in Further Education, Training and Labour Market Programmes'. The conference theme this year is "Planning for Equality". It will feature national and international speakers on equality issues in vocational, further education and labour market programmes.

Equality Authority Submission to the Gender Recognition Advisory Group

Sept 2010

The Equality Authority welcomes this opportunity to contribute to proposals relating to the legal position of people who are transsexual. We welcome, in particular, the establishment by the Minister for Social Protection of the interdepartmental Gender Recognition Advisory Group to consider the legislative framework best suited to meeting the needs of transsexual people in Ireland.

- Read the Equality Authority's submission

Conferences to mark the end of the tenth anniversary year of the introduction of equality legislation in Ireland

The Equality Authority, The Equality Tribunal and the Department of Community, Equality and Gaeltacht Affairs invites you to**t wo** one-day conferences to mark the end of the tenth anniversary year of the introduction of equality legislation in Ireland.

Leading Irish and international speakers will gather in**Dublin Castle** on **Wednesday October 20th and Thursday October 21st** to discuss equality legislation and the future agenda to progress a more equal Ireland over the next decade. There is no registration fee and it is possible to attend both one day events.

Day One: **The Employment Equality Acts: A Decade of Impact in Ireland**

Day Two: **Equality In Ireland a 2020 vision**

- Click here for full details and booking forms

Latest News

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School principals need to take action to combat homophobic bullying
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Equality Authority welcomes doubling of compensation to a pregnant worker by the Labour Court on appeal.
Press Release - 18 Nov 2010

Equality Authority Welcomes Significant Award in Sexual Harassment Case
Press Release - 15 Nov 2010

Equality Authority welcomes historic Civil Partnership legislation
Press Release - 19 Jul 2010

European Commission against Racism and Intolerance
Commission européenne contre le racisme et l'intolérance

CRI(2007)24

Troisième rapport sur l'Irlande

Adopté le 15 décembre 2006

Strasbourg, le 24 mai 2007

COUNCIL OF EUROPE CONSEIL DE L'EUROPE

Pour des informations complémentaires sur les travaux de la Commission européenne contre le racisme et l'intolérance (ECRI) et sur d'autres activités du Conseil de l'Europe dans ce domaine, veuillez vous adresser au:

Secrétariat de l'ECRI
Direction Générale des Droits de l'Homme – DG II
Conseil de l'Europe
F - 67075 STRASBOURG Cedex
Tel.: +33 (0) 3 88 41 29 64
Fax: +33 (0) 3 88 41 39 87
E-mail: combat.racism@coe.int

Visitez notre site web : www.coe.int/ecri

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Avant-propos

La Commission européenne contre le racisme et l'intolérance (ECRI), mise en place par le Conseil de l'Europe, est une instance indépendante de monitoring dans le domaine des droits de l'homme. Spécialisée dans les questions de lutte contre le racisme et l'intolérance, elle est composée de membres indépendants et impartiaux, qui sont désignés sur la base de leur autorité morale et de leur expertise reconnue dans le traitement des questions relatives au racisme, à la xénophobie, à l'antisémitisme et à l'intolérance.

Un des volets du programme d'activités de l'ECRI est son analyse pays par pays de la situation du racisme et de l'intolérance dans chacun des Etats membres du Conseil de l'Europe, analyse qui conduit à formuler des suggestions et propositions pour traiter les problèmes identifiés.

L'approche pays par pays de l'ECRI concerne l'ensemble des Etats membres du Conseil de l'Europe, sur un pied d'égalité. Les travaux se déroulent suivant des cycles de 4/5 ans, à raison de 9/10 pays couverts chaque année. Les rapports du premier cycle ont été achevés à la fin de 1998 et ceux du deuxième cycle à la fin de l'année 2002. Les travaux du troisième cycle ont débuté en janvier 2003.

Les rapports pays par pays du troisième cycle sont axés sur la « mise en œuvre » des principales recommandations contenues dans les précédents rapports de l'ECRI. Ils examinent si celles-ci ont été suivies et appliquées, et si oui, avec quelle efficacité. Les rapports du troisième cycle traitent également de « questions spécifiques », choisies en fonction de la situation propre à chaque pays et examinées de manière plus approfondie dans chaque rapport.

Les méthodes de travail pour l'élaboration des rapports comprennent des analyses documentaires, une visite dans le pays concerné, puis un dialogue confidentiel avec les autorités nationales.

Les rapports de l'ECRI ne sont pas le résultat d'enquêtes ou de dépositions de témoins, mais d'analyses basées sur un grand nombre d'informations émanant de sources très variées. Les études documentaires reposent sur un nombre important de sources écrites nationales et internationales. La visite sur place permet de rencontrer les milieux directement concernés (gouvernementaux et non gouvernementaux) et de recueillir des informations détaillées. Le dialogue confidentiel avec les autorités nationales permet à celles-ci de proposer, si elles l'estiment nécessaire, des modifications au projet de rapport en vue de corriger d'éventuelles erreurs factuelles contenues dans le texte. A l'issue de ce dialogue, les autorités nationales peuvent, si elles le souhaitent, demander à ce que leurs points de vue soient reproduits en annexe au rapport définitif de l'ECRI.

Le rapport qui suit a été élaboré par l'ECRI sous sa seule et entière responsabilité. Il rend compte de la situation en date du 15 décembre 2006. Les développements intervenus après cette date ne sont donc pas couverts par l'analyse qui suit, ni pris en compte dans les conclusions et propositions qui y figurent.

Résumé

Depuis la publication du second rapport de l'ECRI sur l'Irlande le 22 juin 2001, des progrès ont été accomplis dans plusieurs domaines abordés dans ce rapport. La loi relative à la Convention européenne des Droits de l'Homme a été adoptée en 2003 afin de permettre aux personnes relevant de la juridiction irlandaise d'invoquer la Convention devant les tribunaux. Les autorités irlandaises ont adopté la loi sur l'égalité de statut en 2004, qui incorpore un certain nombre de dispositions des Directives CE sur l'égalité de traitement. Un plan d'action national de lutte contre le racisme a été lancé en 2005 dans le cadre du suivi de la Conférence mondiale des Nations Unies contre le racisme de 2001. En 2005, une nouvelle Commission de Médiateurs de la police (Garda Ombudsman Commission) a été créée. Elle est notamment habilitée à instruire les plaintes déposées contre des agents de police, y compris celles fondées sur la discrimination raciale. Par ailleurs, un certain nombre de recommandations émises par l'Audit des droits de l'homme sur les forces de police concernant la lutte contre le racisme et la discrimination raciale sont actuellement mises en œuvre. Quelques initiatives ont été prises pour intégrer les Gens du voyage dans la société, par exemple en matière d'éducation et de soins de santé. En octobre 2001, les autorités irlandaises ont lancé le Programme de sensibilisation à la lutte contre le racisme visant à sensibiliser le public à ce phénomène et à combattre le racisme dirigé, entre autres, contre les minorités noires et ethniques ainsi que les communautés immigrées.

Un certain nombre de recommandations figurant dans le second rapport de l'ECRI n'ont toutefois pas été mises en œuvre ou ne l'ont été que partiellement. L'Irlande n'a pas encore ratifié le Protocole n° 12 à la Convention européenne des Droits de l'Homme qui contient une interdiction générale de la discrimination. Bien qu'elle soit actuellement en cours d'examen, la législation pénale n'a pas été amendée de manière à introduire des dispositions suffisamment fermes pour lutter contre les actes à caractère raciste qui visent en particulier les minorités visibles et les Gens du voyage. D'autres mesures sont nécessaires pour sensibiliser les membres des groupes minoritaires aux mécanismes existants pour demander réparation en cas de racisme et de discrimination raciale. La prise de mesures visant à intégrer les demandeurs d'asile et les réfugiés dans la société irlandaise est par ailleurs toujours nécessaire. Il importe en outre de faire face à l'augmentation de la demande d'écoles non-confessionnelles ou multiconfessionnelles. Il est indispensable d'assurer un suivi étroit de la loi de 2006 relative aux permis de travail afin de veiller à ce que sa mise en œuvre s'emploie à résoudre certains des problèmes auxquels se heurtent les travailleurs non-irlandais sur leur lieu de travail, tels que le racisme et la discrimination. Les mesures destinées à l'intégration des Gens du voyage dans la société doivent être renforcées, en particulier dans le domaine de l'emploi. Les organisations nationales des Gens du voyage doivent être associées et intégrées à ces initiatives.

Dans le présent rapport, l'ECRI recommande aux autorités irlandaises de prendre des mesures supplémentaires dans un certain nombre de domaines. L'ECRI recommande à l'Irlande de ratifier le Protocole n° 12 à la Convention européenne des Droi ts de l'Homme. Elle recommande aux autorités irlandaises d'adopter la législation pour lutter contre les actes à caractère raciste et d'élargir le champ d'application de la loi de 2004 sur l'égalité de statut pour inclure des actions gouvernementales. L'ECRI leur recommande également de poursuivre la mise en œuvre du Plan d'action national contre le racisme et d'allouer les fonds nécessaires aux instances mises en place à cette fin. L'ECRI recommande de réexaminer et de modifier la loi de 2002 sur le logement (mesures diverses) si besoin est, pour éviter que les Gens du voyage ne soient encore plus défavorisés en matière d'accès à un logement décent. L'ECRI recommande d'assurer le suivi de la mise en œuvre des lois de 2003 et 2004 relatives à l'immigration et de faire face à tout problème signalé à cet égard, notamment la discrimination au faciès à l'encontre des minorités visibles. L'ECRI recommande aux autorités irlandaises de prendre en considération les propositions des ONG et des organisations de la société civile sur l'ébauche d'un projet de loi sur l'immigration, la résidence et la protection et de poursuivre leur processus de consultation avant l'adoption du projet définitif. L'ECRI souligne également la nécessité d'une stratégie d'intégration pour les minorités noires et ethniques, les réfugiés, les demandeurs d'asile et les travailleurs migrants et recommande d'associer les organisations minoritaires à l'élaboration et à la mise en œuvre de cette stratégie.

I. SUIVI DU SECOND RAPPORT DE L'ECRI SUR L'IRLANDE

Instruments juridiques internationaux

1. Dans son second rapport, l'ECRI a recommandé à l'Irlande de ratifier dès que possible le Protocole n° 12 à la Convention européenne des Droits de l'Homme. L'ECRI notait également que l'Irlande avait l'intention de ratifier la Charte européenne de l'autonomie locale et elle espérait que celle-ci le ferait sans retard.

2. Les autorités irlandaises ont informé l'ECRI que l'Irlande n'a ni signé ni ratifié le Protocole n° 12 à la Convention européenne des Droits de l'Homme et que la question fait actuellement l'objet d'un examen approfondi étant donné que la manière dont cet instrument correspond à la législation en vigueur en matière d'égalité est analysée. L'ECRI se félicite de la ratification par l'Irlande de la Charte européenne de l'autonomie locale le 12 mai 2002. Cet instrument est entré en vigueur le 1er septembre 2002.

3. Dans son second rapport, notant avec satisfaction que toute personne résidant légalement dans le pays pouvait voter et se présenter aux élections locales, l'ECRI encourageait l'Irlande à signer et à ratifier la Convention européenne sur la participation des étrangers à la vie publique au niveau local. L'ECRI a par ailleurs recommandé à l'Irlande de signer et de ratifier dans les meilleurs délais la Convention européenne sur la nationalité.

4. La Convention européenne sur la participation des étrangers à la vie publique au niveau local n'a pas encore été ratifiée. Les autorités irlandaises ont déclaré que la ratification de cet instrument ne leur posait pas de problème dans son principe et que la question était en cours d'examen. L'ECRI note que l'Irlande n'a pas ratifié la Convention européenne sur la nationalité.

5. Dans son second rapport, l'ECRI encourageait l'Irlande à signer et à ratifier la Charte européenne des langues régionales ou minoritaires, la Convention de l'UNESCO concernant la lutte contre la discrimination dans le domaine de l'enseignement et la Convention européenne relative au statut juridique du travailleur migrant.

6. Les autorités irlandaises ont informé l'ECRI que l'Irlande n'a pas ratifié la Charte européenne des langues régionales ou minoritaires et que la Convention européenne relative au statut juridique du travailleur migrant ne sera pas ratifiée dans un avenir proche. L'Irlande n'a en outre pas ratifié la Convention de l'UNESCO concernant la lutte contre la discrimination dans le domaine de l'enseignement.

7. Depuis le second rapport sur l'Irlande, le Protocole additionnel à la Convention sur la cybercriminalité relatif à l'incrimination d'actes de nature raciste et xénophobe commis par le biais de systèmes informatiques est entré en vigueur le 1er mars 2006 et la Convention internationale sur la protection des droits de tous les travailleurs migrants et des membres de leur famille a également pris effet le 1er juillet 2003. L'Irlande n'a pas encore ratifié ces instruments.

Recommandations:

8. L'ECRI réitère sa recommandation à l'Irlande de ratifier dès que possible le Protocole n° 12 à la Convention européenne des Droi ts de l'Homme. Elle réitère également sa recommandation de ratifier la Convention européenne sur la participation des étrangers à la vie publique au niveau local, la Convention européenne sur la nationalité, la Charte européenne des langues régionales ou minoritaires, la Convention européenne relative au statut juridique du travailleur migrant, et la Convention de l'UNESCO concernant la lutte contre la discrimination dans le domaine de l'enseignement.

9. L'ECRI recommande à l'Irlande de ratifier la Convention internationale sur la protection des droits de tous les travailleurs migrants et des membres de leur famille et le Protocole additionnel à la Convention sur la cybercriminalité relatif à l'incrimination d'actes de nature raciste et xénophobe commis par le biais de systèmes informatiques.

10. Dans son second rapport, l'ECRI notait que le projet de loi 2001 sur la Convention européenne des Droits de l'Homme visait à permettre à toute personne de se prévaloir devant les tribunaux irlandais des droits garantis par la Convention et elle espérait que le parlement irlandais adopterait cette loi dès que possible.

11. L'ECRI se félicite de l'entrée en vigueur, le 31 décembre 2003, de la loi 2003 sur la Convention européenne des Droits de l'Homme. L'article 2 de cette loi dispose que les tribunaux irlandais doivent interpréter la loi d'une manière qui soit compatible avec les obligations de l'Etat découlant de la Convention, tandis que l'article 3 impose aux organes de l'Etat l'obligation d'exercer leurs fonctions conformément à la Convention. L'article 5 permet en outre au Tribunal de grande instance ou à la Cour suprême de déclarer de son propre chef ou à la demande d'un tiers, dès lors qu'aucun autre recours juridique n'est approprié ou ne s'applique, l'incompatibilité d'une disposition statutaire ou d'une règle de droit avec les obligations de l'Etat découlant de la Convention. Les articles 6 et 7 confèrent à la Commission irlandaise des droits de l'homme[1] l'autorité de faire office d'avocat concernant cette loi. Le 23 octobre 2006, la *Law Society* d'Irlande a publié une évaluation préliminaire de l'impact de la loi depuis son entrée en vigueur. Le rapport note, entre autres, que la majorité des demandes de réexamen judiciaire enregistrées au titre de cette loi porte sur les questions d'immigration et d'asile.[2] Il conclut également que la Commission des droits de l'homme « n'a pas bénéficié des ressources nécessaires pour réaliser pleinement le potentiel de son rôle statutaire d'avocat ».[3]

[1] Pour de plus amples informations sur la Commission des droits de l'homme, voir « Organes spécialisés et autres institutions » ci-dessous.

[2] ECHR Act 2003: *A Preliminary Assessment of Impact, Donncha O'Connell, Siobhan Cummiskey and Emmer Meeneghan with Paul O'Connell, Dublin Solicitors Bar Association and Law Society of Ireland*, 2006, p 77-78.

[3] Ibid., p. 120.

Recommandations:

12. L'ECRI recommande aux autorités irlandaises de veiller à ce que les membres du corps judiciaire et les praticiens reçoivent une formation initiale et continue sur la loi de 2003 relative à la Convention européenne des Droits de l'Homme ainsi que sur la jurisprudence de la Cour européenne des Droits de l'Homme, en particulier celle touchant au racisme et à la discrimination raciale. L'ECRI recommande en outre aux autorités irlandaises d'examiner et de prendre en considération les recommandations émises par la *Law Society* sur les conséquences de cette loi.

Dispositions constitutionnelles et autres dispositions fondamentales

- La Constitution

13. Dans son second rapport sur l'Irlande, l'ECRI notait que l'article 40 1) de la Constitution garantit l'égalité devant la loi à tous les citoyens. L'ECRI réitérait donc la recommandation qu'elle avait faite initialement dans son premier rapport d'amender expressément la Constitution pour garantir l'égalité et protéger les droits fondamentaux de tous les individus relevant de la juridiction irlandaise.

14. Concernant la question d'assurer la protection des droits fondamentaux de toutes les personnes relevant de la juridiction irlandaise, la Constitution demeure inchangée. Les autorités irlandaises ont informé l'ECRI que dans certains cas la Cour suprême a appliqué la Constitution à chaque individu relevant de la juridiction irlandaise et que dans d'autres elle l'a fait uniquement pour les citoyens (par exemple dans des affaires d'immigration). Bien que les autorités aient assuré à l'ECRI que le droit législatif s'applique à toute personne en Irlande, l'inclusion d'une disposition consacrant le principe de l'égalité de traitement dans la Constitution mérite toujours d'être examinée.

Recommandations:

15. L'ECRI appelle à nouveau les autorités irlandaises à veiller à ce que, conformément à sa Recommandation de politique générale n°7 sur la législation nationale pour lutter contre le racisme et la discrimination raciale, la Constitution prévoit :1) le principe de l'égalité de traitement ; 2) l'engagement de l'Etat à promouvoir l'égalité et 3) le droit des individus de ne pas être victime d'une discrimination fondée sur la race, la couleur, la langue, la religion, la nationalité ou l'origine nationale ou ethnique. L'ECRI recommande par ailleurs aux autorités de s'assurer que toute exception au principe de l'égalité de traitement soit prévue par la loi et qu'elle ne constitue pas une discrimination.

- Législation relative à la nationalité

16. Dans son second rapport, l'ECRI notait avec intérêt que l'Irlande était l'un des rares pays européens à accorder la citoyenneté automatiquement à tout enfant né sur son territoire, quelle que soit la nationalité des parents. Elle était d'avis qu'une telle disposition pouvait jouer un rôle positif pour faciliter l'intégration des populations immigrées dans la société irlandaise.

17. Le 11 juin 2004, un référendum a été organisé pour modifier la Constitution de manière à ce que les enfants nés en Irlande n'aient plus automatiquement le droit à la nationalité irlandaise. Les amendements proposés ont été approuvés

par près de 80% de la population. La loi de 2004 sur la nationalité et la citoyenneté, qui contient ces modifications est entrée en vigueur le 1e janvier 2005. L'article 6 A) (1) de cette loi dispose ainsi que : « Une personne née sur le territoire de l'île d'Irlande n'aura droit à la citoyenneté irlandaise que si l'un de ses parents a, au cours des 4 années précédant immédiatement la naissance de la personne, résidé […] en Irlande pendant au moins 3 ans ou pendant une durée totale au moins égale à 3 ans ».

18. En outre, une décision de la Cour suprême prise en 2003[4] dispose que les parents non-ressortissants d'enfants irlandais ne bénéficient pas nécessairement du droit de résidence comme cela était le cas auparavant lorsque le ministère de la Justice, de l'Egalité et de la Réforme législative accordait presque systématiquement le droit de séjour dans ce genre de situation. Les autorités irlandaises ont informé l'ECRI que, à la suite de cette décision, le 1er janvier 2005, un programme[5] a été lancé pour examiner la situation des parents non-irlandais d'enfants irlandais nés avant le 1er janvier 2005. L'ECRI note avec satisfaction que d'après les statistiques du gouvernement, sur les quelque 18 000 personnes qui ont introduit une requête dans le cadre de ce programme, près de 17 000 se sont vues accorder une autorisation de séjour. Les affaires restantes sont actuellement examinées en appel.

19. Cependant, des ONG et la société civile ont exprimé certaines inquiétudes au sujet de ces réformes, notamment sur le ton du débat sur le referendum qui était souvent caractérisé par des propos hostiles à l'encontre des demandeurs d'asile, des immigrés et des réfugiés, utilisé par certains secteurs des médias[6] et certains responsables politiques. En outre, ces nouvelles réformes donnent lieu à une situation où le droit de résidence d'enfants irlandais nés de parents non-irlandais peut être rendu inopérant dans la mesure où le droit de résidence n'est pas nécessairement reconnu aux parents. L'ECRI est également très préoccupée par des informations, confirmées par les autorités, indiquant que certains parents non-irlandais d'enfants irlandais ont été expulsés du pays.

Recommandations:

20. L'ECRI recommande aux autorités irlandaises de veiller à ce que certains enfants irlandais de parents non-ressortissants ne soient pas empêchés de jouir pleinement du droit de résider en Irlande. En outre, l'ECRI recommande vivement de faire primer le meilleur intérêt de l'enfant dans les demandes d'autorisation de séjour en instance introduites par des parents non-irlandais d'enfants irlandais.

Dispositions en matière de droit pénal

21. Dans son second rapport, l'ECRI notait avec intérêt que le gouvernement avait annoncé son intention de réviser la loi de 1989 sur l'interdiction de l'incitation à la haine en consultation avec les groupes ethniques minoritaires pour en renforcer l'efficacité. L'ECRI exhortait donc de procéder à cette révision à titre prioritaire et d'effectuer une telle révision en examinant tout particulièrement la manière de faciliter les poursuites avec succès.

[4] Voir, *Lobe and Osayande v. Minister for Justice, Equality and Law Reform, [2003] IESC 1 (23 January 2003)*.

[5] Programme IBC/O5.

[6] Pour de plus amples informations sur les médias, voir « Médias » ci-dessous.

22. Les autorités irlandaises ont informé l'ECRI que la révision de la loi de 1989 sur l'interdiction de l'incitation à la haine était presque achevée. Les deux points suivants demeurent : 1) le résultat des discussions sur le projet de la décision cadre de l'Union européenne sur la lutte contre le racisme et la xénophobie et 2) l'achèvement d'une recherche actuellement menée sur le racisme et la criminalité. L'objectif de la révision est d'évaluer l'efficacité de la loi de 1989 sur l'interdiction de l'incitation à la haine raciale et les autorités ont informé l'ECRI qu'un séminaire réunissant des ONG et des personnes travaillant dans le système de justice pénale se tiendra le 21 mars 2007 (pour coïncider avec la semaine interculturelle et la Journée des Nations Unies contre le Racisme) pour examiner les conclusions de cette révision censée prendre fin peu de temps après. L'ECRI se félicite des progrès réalisés dans la révision de la loi de 1989 sur l'interdiction de l'incitation à la haine et des assurances des autorités irlandaises selon lesquelles elle sera terminée peu après. La durée de cette révision mérite qu'elle soit conclue rapidement puisque cette loi (de même que tout autre législation pénale pertinente) doit être renforcée afin de prévoir des sanctions efficaces, proportionnées et dissuasives.

23. L'ECRI note avec satisfaction que la police irlandaise consigne le nombre d'infractions à caractère raciste signalées[7]. D'après ses statistiques, 85 infractions à caractère raciste ont été enregistrées en 2005, 66 en 2004, 81 en 2003 et 102 en 2002. Ces statistiques indiquent en outre que les types les plus courants d'infractions sont des actes de vandalisme, de trouble de l'ordre public et des agressions. Depuis 2000, la justice a été saisie de 18 affaires en application de la loi de 1989 sur l'incitation à la haine et 7 ont donné lieu à une condamnation. Il convient de mentionner la condamnation d'un individu à 20 mois d'emprisonnement pour avoir peint des croix gammées sur des synagogues à Dublin. Les autorités irlandaises ont informé l'ECRI qu'étant donné les problèmes rencontrés dans l'application de la loi de 1989 sur l'interdiction de l'incitation à la haine, une série de sanctions sont utilisées pour des crimes tels que l'intimidation, les coups et blessures volontaires et le harcèlement. Cependant, peu de poursuites ont été engagées en application de cette législation.

Recommandations:

24. L'ECRI recommande aux autorités irlandaises d'achever dans les meilleurs délais leur révision actuelle de la loi de 1989 sur l'interdiction de l'incitation à la haine. Elle recommande à cet égard aux autorités de s'inspirer du paragraphe 18 de sa Recommandation de politique générale n°7. Elle recommande en outre aux autorités de veiller à ce que la réalisation de cette révision ne dépende pas d'un futur accord sur le projet de décision cadre de l'Union européenne sur la lutte contre le racisme et la xénophobie.

25. L'ECRI recommande aux autorités irlandaises, en attendant la révision de la loi sur l'incitation à la haine, de veiller à ce que les dispositions du droit pénal en vigueur soient plus souvent mises en œuvre à l'égard des auteurs d'infractions à caractère raciste.

26. Dans son second rapport sur l'Irlande, l'ECRI notait qu'à l'époque le droit pénal irlandais ne contenait pas de dispositions définissant des infractions de nature raciste ou xénophobe en tant qu'infractions spécifiques. Elle a donc encouragé

[7] Pour de plus amples informations sur les travaux de la police, voir « Comportement des représentants des forces de l'ordre » ci-dessous.

les autorités irlandaises à introduire des dispositions qualifiant spécifiquement les infractions à caractère raciste ou xénophobe d'actes racistes et à donner aux tribunaux la possibilité de faire de la motivation raciste une circonstance aggravante lors de la détermination de la peine.

27. Les autorités irlandaises ont informé l'ECRI que le droit pénal ne contient pas de dispositions définissant les infractions de nature raciste comme des infractions spécifiques. Ce droit ne permet pas non plus de faire de la motivation raciste une circonstance aggravante lors de la détermination de la peine. Bien que les tribunaux aient le pouvoir de prendre tout élément en considération, y compris la motivation raciste de l'auteur de l'infraction, le fait que ce pouvoir soit discrétionnaire a été reconnu par les autorités elles-mêmes comme posant problème. Elles ont par ailleurs informé l'ECRI qu'une évaluation est actuellement en cours pour déterminer si les agressions de nature raciste posent problème avant de modifier la loi. Cette évaluation fait partie de la recherche au sujet du racisme et de la discrimination raciale susmentionnée[8]. L'ECRI se félicite de la décision des autorités irlandaises d'entreprendre cette évaluation et espère qu'elle sera terminée prochainement et qu'elle donnera lieu aux modifications législatives mentionnées plus haut.

Recommandations:

28. L'ECRI réitère sa recommandation aux autorités irlandaises d'intégrer dans la législation pénale des dispositions permettant de faire de la motivation raciste une circonstance aggravante lors de la détermination de la peine et de prévoir que des infractions de nature raciste ou xénophobe soient définies en tant qu'infractions spécifiques. Elle leur recommande de s'inspirer de sa Recommandation de politique générale n°7 au moment de procéder à ces modifications.

Dispositions en matière de droit civil et administratif

29. Dans son second rapport sur l'Irlande, compte tenu de la révision à venir de la loi de 1998 sur l'égalité en matière d'emploi et la loi de 2000 sur l'égalité de statut, l'ECRI encourageait les autorités irlandaises à tenir compte des diverses observations formulées par les parties intéressées quant aux domaines possibles d'amélioration de la législation. L'attention était attirée sur la possibilité d'utiliser cette procédure pour mettre la législation en conformité avec la Directive de l'UE sur l'égalité de traitement entre les personnes indépendamment de leur origine raciale ou ethnique.

30. L'ECRI se félicite de l'adoption par les autorités irlandaises de la loi de 2004 sur l'égalité qui renforce la loi de 1998 sur l'égalité en matière d'emploi et la loi de 2000 sur l'égalité de statut et assure l'application des directives de l'UE[9] sur l'égalité de traitement. Cette loi contient un certain nombre de dispositions qui marquent une évolution significative dans la législation irlandaise sur l'égalité raciale. Elle prévoit le partage de la charge de la preuve dans les affaires de discrimination raciale et permet aux requérants et aux défendeurs de se faire représenter par toute personne, y compris une organisation, devant le Tribunal pour l'égalité (*Equality Tribunal*)[10]. La loi sur l'égalité prévoit également le

[8] Voir le paragraphe 22 ci-dessus.

[9] Directives du Conseil 2000/43/CE et 2000/78/CE.

[10] Pour de plus amples informations sur le Tribunal pour l'égalité, voir « Organes spécialisés et autres institutions » ci-dessous.

transfert des affaires de discrimination en matière d'emploi du conseil des prud'hommes au Tribunal pour l'égalité et introduit de nouvelles définitions de la discrimination indirecte, du harcèlement et de la victimisation. Elle élargit également la définition des employés pour inclure le personnel de maison. Subsiste toutefois un certain nombre de lacunes que les autorités irlandaises pourraient envisager de combler en vue de renforcer davantage cette loi. Bien que la loi sur l'égalité couvre la fourniture de biens et de services, son champ d'application ne s'applique pas aux fonctions et activités publiques dans des domaines tels que les stratégies en matière de politique nationale, les mesures départementales et les décisions en matière d'allocation des crédits dans le domaine, par exemple, de la santé, de l'éducation et du logement. Il est à noter cependant que l'on peut demander un réexamen judiciaire des actes discriminatoires commis par les autorités publiques, et, si besoin est, on peut demander des dommages et intérêts en application de la loi relative à la Convention européenne des droits de l'homme. Par ailleurs, l'article 3, consacré aux employés de maison, prévoit une protection dans tous les domaines hormis celui du recrutement. Des ONG ont également fait part de leur inquiétude à l'ECRI signalant que le montant maximum de l'indemnisation accordée aux requérants concernant la fourniture de biens et de services en application de cette loi (environ €6 000) n'était pas approprié ni suffisamment dissuasif. L'ECRI se félicite donc des dispositions de l'article 14 de la loi 2002 relative aux tribunaux et aux greffiers qui, lorsqu'elle est appliquée, pourrait augmenter jusqu'à €20 000 l'indemnisation maximale disponible au titre de la loi 2004 sur l'égalité du statut.

31. S'agissant de la mise en œuvre des lois sur l'égalité en matière d'emploi (1998) et de la loi sur l'égalité de statut (2000) telles que consolidées par la loi sur l'égalité de statut (2004), elle relève toujours du domaine de l'Autorité chargée de veiller au respect de l'égalité et du Tribunal pour l'égalité, comme cela sera examiné plus loin.[11]

32. Selon les données recueillies par le Bureau central des statistiques[12], un grand nombre de membres de groupes minoritaires ethniques ont été victimes de discrimination raciale, mais seuls quelques-uns ont engagé une action et un fort pourcentage (42,1%) ont signalé qu'ils ne comprenaient pas les droits conférés par la législation irlandaise sur l'égalité.[13]

Recommandations:

33. L'ECRI recommande aux autorités irlandaises d'élargir le champ d'application de la loi sur l'égalité afin d'y inclure les actions gouvernementales telles que des stratégies politiques nationales, des mesures départementales et des décisions relatives à l'allocation des crédits dans des domaines comme la santé, l'éducation et le logement. L'ECRI recommande également aux autorités irlandaises d'envisager d'élargir la disposition anti-discriminatoire concernant les employés de maison au processus de recrutement. A cet égard, elle recommande aux autorités de s'inspirer des paragraphes 4 à 17 de sa Recommandation de politique générale n°7.

34. L'ECRI recommande vivement aux autorités irlandaises de prendre des mesures pour sensibiliser les groupes ethniques minoritaires à la législation

[11] Voir, « Organes spécialisés et autres institutions » ci-dessous.

[12] Voir *Quarterly National Household Survey, Equality, Quarter 4 2004, 4 August 2004*.

[13] Ibid., pp. 1 & 3.

contre la discrimination et aux mécanismes servant à l'invoquer. Elle recommande aux autorités irlandaises d'associer à ce processus des ONG, des avocats et toutes les autres parties intéressées, telles que des employeurs et des agences pour l'emploi.

35. L'ECRI recommande aux autorités irlandaises de veiller à ce que les recours prévus par la législation en matière d'égalité soient effectifs et suffisamment dissuasifs. Elle recommande à cet égard que l'indemnisation maximale accordée par les lois sur l'égalité de statut soit considérablement revue à la hausse.

- Plan d'action national contre le racisme

36. En janvier 2005, les autorités irlandaises ont lancé un Plan d'action national contre le racisme comme suivi à la Conférence mondiale des Nations Unies contre le racisme tenue en 2001 en Afrique du Sud. Le Plan d'action, initiative à saluer dans la lutte contre le racisme et qui prendra fin en 2008, s'articule autour des cinq objectifs suivants : 1) la protection, 2) l'inclusion, 3) l'offre, 4) la reconnaissance et 5) la participation. La dimension inclusion du plan couvre des questions telles que les droits et devoirs du travailleur, la politique sur le lieu de travail ainsi que la modernisation du service public. Le Plan d'action bénéficie du soutien du ministère de la Justice, de l'Egalité et des Réformes législatives et un comité directeur a été mis en place pour superviser sa mise en œuvre. Certaines ONG ont indiqué à l'ECRI que des mesures positives ont été prises pour sa mise en application. Par exemple, dans le domaine de la santé, une stratégie interculturelle est actuellement menée et les minorités ethniques ont fait l'objet d'une consultation. Des ONG ont également fait part de leur satisfaction quant aux objectifs définis dans le plan, mais elles souhaiteraient une mise en œuvre plus active. Elles ont en outre indiqué qu'un financement plus important devrait être assuré pour les organes chargés de la mise en œuvre et qu'un système de contrôle devait être mis en place.

Recommandations:

37. L'ECRI encourage les autorités irlandaises à poursuivre la mise en œuvre du Plan d'action national contre le racisme. Elle leur recommande à cet égard de fournir des fonds suffisants aux organes chargés de réaliser les objectifs fixés et de veiller à ce qu'un système de contrôle et d'évaluation soit mis en place.

Organes spécialisés et autres institutions

- Autorité chargée de veiller au respect de l'égalité

38. Dans son second rapport sur l'Irlande, l'ECRI se félicitait de la création de l'Autorité chargée de veiller au respect de l'égalité et des nombreuses initiatives prises par cette instance pour sensibiliser aux problèmes du racisme et de la discrimination. Elle notait que le nombre de demandes adressées à l'Autorité avait rapidement augmenté depuis sa création, ce qui semblait indiquer une prise de conscience accrue des possibilités de recours.

39. L'ECRI note avec satisfaction que l'Autorité chargée de veiller au respect de l'égalité demeure un acteur clé dans la mise en œuvre et la diffusion des informations relatives à la législation en matière d'égalité. L'une de ses fonctions principales est d'aider les requérants à saisir le Tribunal pour l'égalité. Dans son rapport annuel 2005, l'Autorité indique qu'elle a traité 359 dossiers en application des lois sur l'égalité en matière d'emploi, la race restant

le motif le plus souvent invoqué (32%).[14] L'Autorité chargée de veiller au respect de l'égalité a informé l'ECRI que beaucoup de ces affaires concernaient des travailleurs migrants victimes d'une grave discrimination dans des domaines tels que l'accès à l'emploi, le licenciement, l'égalité de salaire, le harcèlement, etc.[15] Concernant les dossiers instruits en application des lois sur l'égalité de statut, l'Autorité chargée de veiller au respect de l'égalité a noté que l'appartenance à la communauté des Gens du voyage[16] restait le motif le plus récurrent dans ces dossiers, avec 104 affaires enregistrées.[17] Elle a informé l'ECRI que ces affaires portaient essentiellement sur des questions telles que l'éducation, le logement et l'accès aux magasins. L'Autorité a noté un renforcement de la sensibilisation et de la confiance dans le dépôt des requêtes. Cependant, il ressort de l'enquête menée par le Bureau central des statistiques susmentionnée[18], que des efforts supplémentaires doivent être fournis dans ce domaine.

40. Un centre téléphonique d'information du public, mis en place par l'Autorité chargée de veiller au respect de l'égalité, diffuse des informations par l'intermédiaire de bibliothèques locales et de centres d'information pour les citoyens. Il apparaît cependant qu'un financement et du personnel supplémentaire soient de plus en plus nécessaires pour lui permettre d'établir une présence dans les autorités locales et de développer ses activités. En outre, le futur transfert de l'Autorité, de Dublin à Roscrea, prévu dans le cadre du programme gouvernemental de décentralisation, risque de poser problème en termes d'accès des minorités et de fidélisation des employés. La plupart des groupes ethniques minoritaires vivent à Dublin et ceux-ci pourraient ne pas avoir de moyen de transport privé. Il est également à craindre qu'en décidant de la délocaliser, l'Autorité ne perde ses principaux partenaires, tels que les ONG, les syndicats, les organes gouvernementaux et le secteur des entreprises.

Recommandations:

41. L'ECRI recommande aux autorités irlandaises de continuer à soutenir les travaux de l'Autorité chargée de veiller au respect de l'égalité en mettant à sa disposition les ressources humaines et financières nécessaires pour s'acquitter de sa charge de travail actuelle, d'informer les membres des groupes ethniques minoritaires sur ses activités et d'étendre son champ de travail si besoin est.

42. L'ECRI recommande en outre aux autorités irlandaises de veiller à ce que la décision de délocaliser l'Autorité chargée de veiller au respect de l'égalité hors de Dublin n'entrave pas l'accès des membres des groupes minoritaires à cette instance ni ne résulte en la perte de connaissances institutionnelles précieuses. L'ECRI recommande par ailleurs aux autorités d'envisager d'ouvrir des bureaux locaux afin que le plus grand nombre possible de membres de groupes minoritaires ait accès à l'Autorité.

[14] Voir, *The Equality Authority Annual Report 2005*, p.20.

[15] Pour de plus amples informations sur la question, voir « Emploi » ci-dessous.

[16] Pour de plus amples informations sur la situation de la communauté des Gens du voyage, voir « Groupes vulnérables » ci-dessous.

[17] *The Equality Authority Annual Report 2005*, p.37.

[18] Voir « Dispositions en matière de droit civil et administratif » ci-dessus.

- *Tribunal pour l'égalité*

43. Dans son second rapport, l'ECRI se félicitait de la création de ce que l'on appelait alors le Bureau du directeur chargé des enquêtes en matière d'égalité, et elle estimait qu'un tel processus de recours pouvait être moins intimidant et donc plus accessible que le système judiciaire traditionnel.

44. En application de la loi de 2004 sur l'égalité, le Bureau du directeur chargé des enquêtes est devenu le Tribunal pour l'égalité. Les pouvoirs du Tribunal n'ont toutefois pas fondamentalement changé puisqu'il s'agit toujours d'un organe quasi-judiciaire et indépendant. En outre, les fonctionnaires chargés des affaires en matière d'égalité sont toujours habilités à rendre des décisions ou à engager des procédures de médiation qui sont juridiquement contraignantes. L'une des innovations positives qu'il convient de noter dans les travaux du Tribunal est l'élargissement de sa compétence en application de la loi de 2004 sur l'égalité et de la loi de 2004 sur les retraites pour inclure les licenciements discriminatoires (qui relevaient auparavant de la compétence du tribunal du travail) ainsi que la discrimination fondée sur, notamment, la race, l'appartenance à la communauté des Gens du voyage et la religion, en ce qui concerne les retraites versées par l'employeur (auparavant sa compétence se limitait à la discrimination fondée sur le sexe et était partagée avec le Conseil des retraites).

45. Le défi majeur auquel fait à présent face le Tribunal pour l'égalité est le nombre de dossiers en suspend dû essentiellement au manque de personnel. Les affaires soumises conformément aux lois sur l'égalité de statut accusent un retard de deux ans ; celles étant rendues au titre des lois sur l'égalité en matière d'emploi ayant 18 mois de retard. Le Tribunal a informé l'ECRI qu'il avait demandé davantage de fonctionnaires chargés de veiller au respect de l'égalité et de personnel administratif. Il ressort des statistiques couvrant la période 2005 - juin 2006 que le motif de la race est le plus cité au titre des lois sur l'égalité en matière d'emploi et que l'appartenance à la communauté des Gens du voyage est le motif le plus souvent invoqué au titre des lois sur l'égalité de statut. Par ailleurs, la majorité des affaires examinées par le Tribunal en application des lois sur l'égalité de statut concerne des questions telles que l'éducation, le logement et la santé. Le fait que la plupart des affaires portées devant Tribunal pour l'égalité invoquent les motifs de la race et de l'appartenance à la communauté des Gens du voyage semble révélateur d'un problème de discrimination raciale qui mérite d'être examiné plus avant. Par conséquent, un système de collecte de données ethniques semble nécessaire.[19] Il est également prévu que le Tribunal soit transféré à Portarlington, ce qui suscite les mêmes craintes que celles évoquées plus haut concernant l'Autorité chargée de veiller au respect de l'égalité.

46. Le Tribunal pour l'égalité a indiqué qu'en application de la loi de 2003 sur la vente d'alcool[20], sa compétence en matière d'instruction des plaintes pour discrimination déposées contre des débits de boissons a été transférée au tribunal de première instance. Auparavant, la plupart des affaires soumises par des Gens du voyage devant le Tribunal pour l'égalité des chances alléguaient une discrimination dans l'accès aux pubs. Le nombre de plaintes pour

[19] Pour de plus amples informations sur la collecte de données ethniques, voir « Suivi de la situation » ci-dessous.

[20] Voir, article 19 (2) de la loi.

discrimination déposées contre des débits de boissons a diminué à la suite de ce transfert de compétence, étant donné que les procédures engagées actuellement devant le tribunal de première instance sont relativement compliquées, que les auditions sont contradictoires et publiques et que l'on risque d'encourir des frais.[21]

Recommandations:

47. L'ECRI exhorte les autorités irlandaises à s'assurer que le Tribunal pour l'égalité dispose de suffisamment de personnel pour pouvoir résorber l'arriéré actuel d'affaires et rendre des décisions ou engager des procédures de médiation dans des délais appropriés. L'ECRI recommande en outre aux autorités de s'assurer que les membres des groupes minoritaires sont représentés parmi les agents du Tribunal.

48. L'ECRI recommande aux autorités irlandaises de veiller à ce que la décision de délocaliser le Tribunal pour l'égalité à Portarlington n'entrave pas l'accès à cette instance pour les membres des groupes minoritaires. Elle recommande en outre de prendre des mesures pour veiller à ce que la délocalisation n'engendre pas la perte d'une mémoire institutionnelle précieuse et recommande aux autorités d'envisager de proposer des mesures d'incitation spéciales à cet effet. Elle recommande également aux autorités d'examiner la possibilité de maintenir une présence opérante à Dublin afin de faciliter l'accès au Tribunal pour l'égalité aux groupes minoritaires qui y vivent.

- ***Commission des Droits de l'Homme***

49. Dans son second rapport sur l'Irlande, l'ECRI espérait que la Commission jouerait un rôle de premier plan contre les manifestations de racisme et d'intolérance et elle encourageait les autorités à veiller à ce que la Commission des droits de l'homme bénéficie, de manière continue, des ressources nécessaires pour développer pleinement et en toute indépendance son action.

50. L'ECRI note avec satisfaction que la Commission des Droits de l'Homme continue de consacrer une part importante de son activité aux questions relatives au racisme et à la discrimination raciale. En novembre 2001, une commission mixte, constituée de représentants de la Commission des Droits de l'Homme et de la Commission des Droits de l'Homme d'Irlande du Nord, a été mise en place pour permettre à ces deux instances d'examiner des questions transfrontalières comme le racisme et les migrations. En avril 2004, la Commission a publié, en association avec le Comité national consultatif sur le racisme et l'interculturalisme (NCCRI)[22], un document intitulé « *Safeguarding the rights of the migrant workers and their families* » visant à évaluer la politique en matière d'immigration et à servir de point d'appui pour l'élaboration des orientations futures en la matière. En septembre 2006, le gouvernement a envoyé à la Commission des Droits de l'Homme, pour ses commentaires, une ébauche d'un projet de loi sur l'immigration, la résidence et la protection.[23] La Commission a également été autorisée à comparaître en qualité d'*amicus curiae* devant le tribunal de grande instance dans une affaire[24] impliquant l'examen des dispositions de la loi de 2002 sur le logement (mesures

[21] Voir, *The Equality Authority Annual Report 2005*, pp.44-45.

[22] Les activités du NCCRI seront examinées plus loin.

[23] Pour un examen approfondi de ce projet de loi, voir "Questions spécifiques" ci-dessous.

[24] *Lawrence and others v. Ballina Town Council and others.*

diverses)[25]. L'affaire soulève des questions importantes concernant l'accès des Gens du voyage au logement. Concernant la question des ressources dont dispose la Commission, l'ECRI a reçu des informations selon lesquelles l'absence de ressources suffisantes est le problème majeur auquel la Commission est actuellement confrontée.

Recommandations:

51. L'ECRI recommande aux autorités irlandaises de doter la Commission des Droits de l'Homme de suffisamment de ressources humaines et financières pour lui permettre, entre autres, de continuer à apporter sa contribution sur des questions liées au racisme et à la discrimination raciale. L'ECRI recommande également aux autorités de veiller à ce que des membres des groupes minoritaires soient représentés au sein du personnel de cette instance.

- ***Comité national consultatif sur le racisme et l'interculturalisme (NCCRI)***

52. Dans son second rapport sur l'Irlande, l'ECRI notait la création du NCCRI et elle estimait que l'une des priorités des autorités irlandaises devait être de faire en sorte que le grand public soit informé de l'existence de cet organe et de la législation qui sous-tend ses travaux.

53. L'ECRI salue le fait que le NCCRI ait récemment ouvert un bureau régional, étant donné qu'il s'agit d'un pas important vers une diffusion plus large de ses travaux. Cet organe, qui a informé l'ECRI de sa volonté de créer des bureaux supplémentaires dans des zones locales, a pris part à un certain nombre d'activités qui ont contribué à mieux le faire connaître. Il a, par exemple, contribué au Plan d'action national contre le racisme[26] et mis en place un système de notification informelle et volontaire des incidents à caractère raciste. Le NCCRI a informé l'ECRI qu'il recevait, par an, entre 80 et 100 notifications relatives à des incidents racistes. Le NCCRI a également organisé des réunions avec des représentants de la communauté musulmane et des Gens du voyage pour examiner les suites à donner à la manière dont certains médias fournissent des informations concernant leurs communautés et à les assister dans ce domaine[27]. Le NCCRI a également soumis une proposition au gouvernement au sujet de l'ébauche d'un projet de loi sur l'immigration, la résidence et la protection. L'ECRI se félicite des assurances du NCCRI selon lesquelles le gouvernement tient généralement compte de ses recommandations concernant les questions relatives à l'intégration et à la lutte contre le racisme. Cependant, il semblerait que sa proposition concernant cette ébauche de projet de loi n'ait pas été prise en compte.[28]

Recommandations:

54. L'ECRI recommande aux autorités irlandaises de fournir d'avantage de ressources au NCCRI pour lui permettre notamment d'ouvrir d'autres bureaux locaux. L'ECRI encourage également les autorités irlandaises à continuer de prendre en compte les recommandations du NCCRI sur les questions relatives au racisme et à la discrimination raciale, et leur recommande de prendre en

[25] Pour de plus amples informations sur cette loi, voir « Groupes vulnérables » ci-dessous.

[26] Voir « Dispositions en matière de droit civil et administratif » ci-dessus.

[27] Pour plus d'informations à ce sujet, voir « Médias » ci-dessous.

[28] Pour un examen plus approfondi de cette ébauche, voir « Questions spécifiques » ci-dessous.

considération sa proposition concernant l'ébauche d'un projet de loi sur 'l'immigration, la résidence et la protection.

Education et sensibilisation

55. Dans son second rapport sur l'Irlande, l'ECRI encourageait les autorités irlandaises à s'assurer que tous les enseignants bénéficient d'une formation sérieuse et continue à l'enseignement des droits de l'homme. L'ECRI a en outre recommandé de davantage veiller à ce que la culture et l'origine des enfants issus de groupes minoritaires se reflètent dans les matériels pédagogiques de l'ensemble du programme scolaire.

56. Les autorités irlandaises ont informé l'ECRI que la formation de base que reçoivent les enseignants comporte un module consacré à l'enseignement des droits de l'homme et dans un environnement multiculturel. Elles ont par ailleurs fait savoir que dans les écoles fréquentées par un grand nombre de minorités ethniques, les enseignants reçoivent une formation continue sur ces questions. Elles ont cependant indiqué que la dimension interculturelle n'était pas obligatoire dans la formation des enseignants pour les établissements secondaires. Un certain nombre de mesures ont été prises pour répondre au besoin d'inclure des questions portant sur les minorités ethniques dans le mode de fonctionnement de l'enseignement. Le Plan d'action national contre le racisme contient des objectifs visant notamment à mettre sur pied une stratégie éducative interculturelle et à donner une place à la diversité scolaire dans le programme scolaire. En 2005, le gouvernement a publié un document intitulé *Intercultural Education in the Primary School – Guidelines for School*. Des ONG ont toutefois souligné la nécessité de soutenir les établissements scolaires dans leur formation à ces lignes directrices et dans leur mise en œuvre de celles-ci et elles ont noté que ces lignes n'étaient ni obligatoires ni intégrées dans le programme scolaire officiel. La question de la diversité religieuse n'y est par ailleurs pas évoquée[29].

Recommandations:

57. L'ECRI recommande aux autorités de veiller à ce que le programme de formation des enseignants comporte à tous les niveaux les questions relatives aux droits de l'homme et à la lutte contre le racisme. L'ECRI leur recommande en outre d'assurer la mise en œuvre du volet éducation du Plan national d'action contre le racisme ainsi que des lignes directrices sur l'éducation interculturelle. L'ECRI encourage par ailleurs les autorités dans leur mise en place d'une stratégie nationale interculturelle sur l'éducation et leur recommande d'intégrer les propositions des ONG et des autres parties intéressées dans les objectifs définis à ce sujet.

Accueil et statut des non-ressortissants

- Immigration

58. Lors du second rapport de l'ECRI sur l'Irlande, un projet de loi sur l'immigration et la résidence était en cours de préparation et l'ECRI s'était félicitée d'apprendre que les autorités irlandaises comptaient y consacrer le principe de non-discrimination. Elle exhortait également les autorités irlandaises à examiner et à répondre aux préoccupations soulevées au sujet de la législation proposée

[29] Pour de plus amples informations sur cette question, voir « Accès aux services publics » ci-dessous.

sur la responsabilité des transporteurs ainsi que sur la pratique par laquelle des agents de l'immigration montaient à bord de navires.

59. Depuis le second rapport de l'ECRI, une nouvelle législation en matière d'immigration (lois de 2003 et 2004 relatives à l'immigration) a été adoptée. Comme mentionné plus haut, une ébauche d'un projet de loi sur l'immigration, la résidence et la protection, qui remplacera ces deux lois, est actuellement en cours d'élaboration.[30] Entre-temps, les lois précitées continueront de s'appliquer, et des inquiétudes ont été soulevées au sujet de certaines dispositions dont les autorités devraient tenir compte, notamment à la lumière du nouveau projet de loi. La loi de 2003 relative à l'immigration prévoyait une amende de € 3 000 pour la responsabilité des transporteurs et la loi de 2004 relative à l'immigration habilite un agent de l'immigration ou un médecin inspecteur de santé à monter à bord de tout navire et à placer en détention et à examiner des non-ressortissants. La loi impose aux non-ressortissants de s'enregistrer auprès de la police et autorise les membres de la Gardaí (police) à les obliger à présenter leurs papiers d'identité personnels sur demande. L'ECRI n'a connaissance d'aucune recherche qui aurait été menée sur les effets, sur les minorités noires et ethniques, de la mise en œuvre de ces lois, mais des ONG ont fait part de leur inquiétude au sujet de la discrimination au faciès notamment à certains points d'entrée dans le pays.

60. L'Irlande a connu de rapides changements démographiques depuis le second rapport de l'ECRI. L'immigration en provenance de pays non membres de l'UE, et depuis mai 2004, en provenance des 10 nouveaux Etats membres de l'UE, a augmenté, essentiellement en réponse à la pénurie de main d'oeuvre.[31] Des données récentes montrent que le pays compte actuellement environ 200 000 travailleurs en provenance des nouveaux Etats de l'Union européenne, la plupart étant originaires de la Pologne, de la Lituanie et de la Lettonie. Les ressortissants des nouveaux Etats de l'UE représentent environ 31% de la main d'œuvre étrangère en Irlande. Les membres de ces communautés font face à un certain nombre de problèmes, dont les plus importants seront examinés ci-dessous[32]. La loi relative au bien être social (dispositions diverses) de 2004 qui a instauré la condition de résidence habituelle en mai 2004 dans le cadre de l'élargissement de l'Union européenne, est l'une des sources de préoccupation. Les autorités irlandaises ont informé l'ECRI que cette loi prévoit qu'une personne doit résider habituellement en Irlande afin d'avoir droit à certaines prestations sociales et que lorsqu'un individu a été présent en Irlande ou dans une autre partie de l'Espace de voyage commun (*Common Travel Area*) pour moins de deux ans, il sera présumé, faute de preuve contraire, que celui-ci ne rempli pas cette condition. Des ONG ont noté que ce système avait des répercussions négatives sur un grand nombre de migrants, y compris ceux provenant des nouveaux Etats membres de l'UE. Les travailleurs migrants qui perdent leur emploi sans qu'il y ait eu faute de leur part (par exemple après avoir été licenciés de manière abusive) avant la période de deux ans exigée, se retrouvent par conséquent dans une situation difficile. Il a également été noté que le système n'est pas toujours appliqué de manière cohérente, les prestataires de services disposant d'une importante marge d'appréciation. L'ECRI note à cet égard que certains aménagements ont été réalisés dans la mise en œuvre de ce système pour faire face à certains de ses problèmes.

[30] Voir, « Questions spécifiques » ci-dessous.

[31] Pour de plus amples informations sur la situation des travailleurs migrants voir « Emploi » ci-dessous.

[32] Voir, « Emploi » et « Questions spécifiques » ci-dessous.

Ainsi, depuis novembre 2005, les ressortissants de l'UE travaillant en Irlande depuis trois mois ont accès aux logements d'urgence. Les autorités irlandaises ont indiqué que la condition de résidence habituelle n'est pas appliquée aux demandes de prestations, pour les familles monoparentales, les tuteurs ou pour des allocations familiales, effectuées par des ressortissants de l'EEE qui travaillent ou exercent une activité indépendante en Irlande et sont soumis au système d'assurance irlandais lié au salaire. Les ressortissants de l'EEE qui travaillent ou travaillaient en Irlande ont accès à l'allocation sociale complémentaire dans les mêmes conditions que les Irlandais. Le NCCRI mène actuellement des recherches sur la condition de résidence habituelle et celles-ci devraient permettre aux autorités irlandaises de mesurer son impact sur l'ensemble des communautés migrantes et de s'employer à résoudre les problèmes qu'elles rencontrent à cet égard.

Recommandations:

61. L'ECRI recommande vivement aux autorités irlandaises de contrôler la mise en œuvre des lois de 2003 et 2004 sur l'immigration afin d'établir s'il existe des problèmes de violations des droits de l'homme, y compris de discrimination au faciès. Elle recommande à cet égard de prendre les mesures nécessaires pour faire face à tout problème existant et de prendre en considération les résultats de ce contrôle lors de l'élaboration du projet de loi sur l'immigration, la résidence et la protection.

62. L'ECRI recommande aux autorités irlandaises d'analyser les conséquences de la condition de résidence habituelle sur tous les groupes de migrants et d'envisager d'introduire les modifications nécessaires pour s'assurer que celles-ci ne placent pas les membres de ces communautés dans une situation précaire.

- ***Réfugiés et demandeurs d'asile***

63. Dans son second rapport, l'ECRI soulignait l'importance de veiller à ce que toutes les personnes traitant les demandes d'asile bénéficient d'une formation approfondie aux droits de l'homme, à la sensibilité culturelle et aux questions de racisme et de discrimination. L'ECRI a recommandé de prendre des mesures pour s'assurer qu'il soit dûment tenu compte de la diversité des cultures et des expériences des demandeurs d'asile.

64. Des initiatives louables ont été prises par les autorités irlandaises pour dispenser une formation aux fonctionnaires et avocats travaillant avec les demandeurs d'asile. Par exemple, tout au long de 2003 et 2004, les agents du Bureau du Commissaire chargé des demandes d'asile (qui examine les demandes de reconnaissance du statut de réfugié en première instance), l'Instance de recours des réfugiés (l'organe qui agit en deuxième instance) et les avocats du Service juridique pour les réfugiés (lequel fourni gratuitement des conseils juridiques aux demandeurs d'asile) ont bénéficié d'une formation individualisée dispensée par un consultant en formation sur le droit des réfugiés, et financée par le ministère de la Justice, de l'Egalité et des Réformes législatives. Il a été observé que la formation avait amélioré la qualité du service fourni par ces organes. Les autorités pourraient donc envisager de faire en sorte que cette mesure devienne permanente.

Recommandations:

65. L'ECRI encourage les autorités irlandaises à continuer de dispenser une formation aux personnes travaillant avec les demandeurs d'asile. Elle recommande à cet égard de mettre en place un mécanisme permanent proposant une formation initiale et continue sur le droit des réfugiés et les questions portant sur le racisme, la discrimination raciale, la diversité culturelle et la sensibilité aux questions concernant les femmes.

66. Dans son second rapport sur l'Irlande, ECRI encourageait les autorités à suivre de près les procédures et l'application pratique du processus d'expulsion des demandeurs d'asile déboutés et à considérer l'opportunité d'instaurer une formation spéciale pour les fonctionnaires de police travaillant dans ce domaine.

67. Entre 2002 et la fin du mois de mars 2006, 28 808 demandes d'asile ont été déposées en Irlande. La plupart des demandes d'asile ont été soumises par des ressortissants nigérians (21%), roumains (8%) et soudanais (8%). Concernant la question de la procédure de demande d'asile, des préoccupations ont été soulevées au sujet de la transparence et de la responsabilité relatives à la procédure en appel engagée par les réfugiés. Le tribunal de grande instance a conclu à cet égard que l'Instance de recours des réfugiés devrait transmettre ses décisions aux parties. Des inquiétudes ont également été exprimées au sujet du fait qu'en application de la loi de 2000 relative à (la traite) des immigrés clandestins, le délai accordé aux demandeurs d'asile pour solliciter le réexamen judiciaire d'une décision négative rendue par l'Instance de recours des réfugiés est passé de six mois à 14 jours. A ce titre, les demandeurs d'asile à qui l'autorisation de rester sur le territoire a été refusée peuvent déposer une demande aux fins d'obtenir le statut humanitaire.

68. L'ECRI se félicite de la décision des autorités irlandaises de réduire la durée du processus de demande d'asile, qui est en moyenne de quatre ans. Il convient toutefois de veiller à ce que toutes les garanties juridiques demeurent en place. S'agissant des expulsions, les autorités irlandaises conservent des statistiques sur le nombre d'arrêtés d'expulsion prononcés et le nombre de personnes expulsées.[33] Certaines ONG ont demandé le réexamen et le contrôle indépendant du processus d'expulsion ou de transfèrement ainsi que l'élaboration de codes de conduite pour renforcer les normes en matière de traitement.

69. Bien que l'ébauche d'un projet de loi sur l'immigration, la résidence et la protection susmentionnée comporte un certain nombre de points positifs comme l'instauration d'une procédure unique pour l'examen des demandes d'asile, l'ECRI note avec une grande inquiétude que certains titres de l'ébauche[34] relatifs à la procédure de demande d'asile proposent, entre autres,

[33] En 2002, 2195 arrêtés d'expulsion ont été signés et 542 personnes ont été expulsées, ont quitté le pays de leur plein gré ou ont été transférées vers une autre juridiction. En 2003, 2250 arrêtés d'expulsion ont été signés et 498 personnes ont été expulsées, ont quitté l'Irlande ou ont été transférées vers une autre juridiction. En 2004, 2723 arrêtés ont été prononcés et 384 personnes ont été expulsées, ont quitté le pays ou ont été transférées vers une autre juridiction. En 2005, ces chiffres sont tombés à 967 arrêtés d'expulsion et à 92 personnes qui ont expulsées, ont quitté le pays ou ont été transférées vers une autre juridiction. Voir, *Comptroller and Auditor General, Annual Report 2004*, pp. 42-43.

[34] Ces titres expliquent les propositions d'article pour le futur projet de loi.

de durcir les mesures de rétention et que l'appel d'une décision négative rendue à la suite d'une demande d'asile ne soit pas suspensif. Ces titres prévoient également davantage de motifs de retrait du statut de réfugié, par exemple, lorsqu'une personne a commis un crime.

Recommandations:

70. L'ECRI recommande vivement aux autorités irlandaises de réduire la durée de la procédure relative à l'asile et de s'assurer que toutes les garanties procédurales existantes continuent d'être appliquées. L'ECRI recommande également de réformer la procédure en appel concernant les demandes d'asile afin de lui assurer une plus grande transparence et responsabilité.

71. L'ECRI réitère sa recommandation aux autorités irlandaises de mettre en place un système de contrôle des procédures d'expulsion des demandeurs d'asile déboutés. Elle recommande en outre que les agents prenant part à la procédure reçoivent une formation initiale et continue aux questions liées au racisme et à la discrimination raciale.

72. L'ECRI recommande également vivement aux autorités irlandaises de veiller à ce que les propositions émises par les ONG et la société civile sur l'ébauche d'un projet de loi sur l'immigration, la résidence et la protection concernant les demandeurs d'asile et les réfugiés soient prises en considération.

73. Dans son second rapport sur l'Irlande, ECRI notait qu'il fallait davantage coordonner et contrôler l'offre de logements aux demandeurs d'asile et reconsidérer globalement les stratégies à long terme d'aide aux demandeurs d'asile. Elle demandait en outre aux autorités irlandaises de reconsidérer l'interdiction de travailler faite aux demandeurs d'asile et d'introduire des stratégies d'intégration en leur faveur.

74. L'Agence pour l'accueil et l'intégration a été créée pour gérer le système de l'aide directe fournie aux demandeurs d'asile et relatif à leur répartition dans le pays. Dans le cadre de ce système, environ 6 000 demandeurs d'asile vivent actuellement dans 41 centres d'hébergement répartis dans 24 comtés. Un certain nombre d'inquiétudes ont été exprimées au sujet du système d'aide directe et de répartition, en particulier concernant le fait que les demandeurs d'asile ne sont pas autorisés à avoir un emploi rémunéré. Par ailleurs, la somme de 19,10 euros versée aux demandeurs d'asile chaque semaine pour des dépenses personnelles est demeurée inchangée depuis 2001. Des disparités ont en outre été observées dans la manière dont les divers centres d'hébergement sont gérés par des sociétés privées recrutées par l'Agence pour l'accueil et l'intégration, et des défaillances du mécanisme de traitement des réclamations ont été alléguées. L'ECRI se félicite donc de la décision de l'Agence pour l'accueil et l'intégration d'harmoniser la gestion de ces centres d'hébergement et de réviser la procédure de réclamations.

75. L'ECRI note avec appréciation que les enfants des demandeurs d'asile fréquentent des écoles normales et que des formations sont proposées aux adultes, par exemple dans le domaine de l'informatique. L'Agence pour l'accueil et l'intégration met en œuvre des mesures pour les réfugiés reconnus et l'ECRI se félicite de l'engagement pris par le gouvernement en novembre 2005

d'allouer 5 millions d'euros pour l'intégration[35], entre autres, des réfugiés. Il convient toutefois de tenir compte des préoccupations émises au sujet de la nécessité de veiller à une meilleure coordination des mesures en faveur de l'intégration des réfugiés et de la prise d'initiatives pour l'intégration des demandeurs d'asile.

Recommandations:

76. L'ECRI réitère sa recommandation aux autorités irlandaises d'envisager d'autoriser les demandeurs d'asile à exercer un emploi rémunéré et elle recommande que l'allocation versée aux demandeurs d'asile tienne compte des principes de l'égalité et de la lutte contre la pauvreté. L'ECRI encourage également les autorités dans leurs efforts pour harmoniser la gestion du système d'aide directe et pour réviser le mécanisme de réclamations. Elle recommande de veiller à ce que la procédure tienne compte des préoccupations émises au sujet de son fonctionnement actuel et que des solutions de remplacement pour le système d'aide directe soient envisagées. L'ECRI recommande en outre qu'une formation à la lutte contre le racisme et aux questions interculturelles soit dispensée aux agents travaillant dans les centres d'hébergements pour demandeurs d'asile.

77. L'ECRI recommande aux autorités irlandaises de prévoir des mesures d'intégration en faveur des demandeurs d'asile afin de les préparer à leur éventuelle nouvelle vie en Irlande. Elle recommande à cet égard aux autorités d'envisager de confier cette tâche à l'Unité pour l'intégration de l'immigration.

Emploi

78. Dans son second rapport sur l'Irlande, l'ECRI estimait que le nombre croissant de travailleurs non irlandais dans tous les secteurs économiques exigeait que l'on soit particulièrement attentif au racisme et à la discrimination au travail. L'ECRI estimait également qu'il était essentiel de sensibiliser à la contribution apportée par les travailleurs non irlandais à l'économie et à la société irlandaises.

79. Comme cela a été mentionné plus haut[36], la main d'œuvre irlandaise se diversifie de plus en plus. On estime que 165 nationalités y sont représentées, en provenance de pays aussi divers et variés que les Philippines, l'Inde, l'Afrique du Sud, le Brésil, les Etats-Unis, la Roumanie et la Malaisie[37]. Les autorités irlandaises ont pris un certain nombre d'initiatives importantes pour sensibiliser à la nécessité d'instaurer des lieux de travail plus inclusifs et de lutter contre le racisme et la discrimination raciale dans ce domaine. La semaine de lutte contre le racisme sur les lieux de travail, organisée chaque année en novembre depuis 1999, en fait partie. Les syndicats irlandais, les associations d'entreprises ainsi que le plan d'action national contre le racisme prennent part à cette initiative. En 2004, le ministère de la Justice, de l'Egalité et des Réformes législatives a élaboré une publication intitulée « *Promoting Equality in Intercultural Workplaces* » qui définit un cadre d'action que devront appliquer les entreprises et aux organisations dans des domaines tels que la

[35] Pour de plus amples informations sur la question de l'intégration voir « Questions spécifiques » ci-dessous.

[36] Voir « Accueil et statut des non-ressortissants » ci-dessus.

[37] En 2002, 40 321 permis de travail ont été délivrés contre 47 551 en 2003. En 2004, ce chiffre s'élevait à 34 067 et à 27 000 en 2005.

formation à la diversité et aux mesures et procédures pour lutter, entre autres, contre la discrimination raciale. Certains syndicats, tels que SIPTU (*Services, Industrial and Technical Union*), ont également lancé des initiatives dans ce domaine.

80. Un certain nombre de problèmes demeurent cependant, notamment en ce qui concerne les conditions de travail des travailleurs migrants peu qualifiés. Il est signalé que les travailleurs migrants se heurtent à un certain nombre de problèmes qui contribuent à leur isolation et à leur marginalisation, tels que le manque d'informations, un accès insuffisant aux mesures juridiques, la ségrégation sociale et la différence de traitement dans certains services publics[38]. Les syndicats irlandais prennent de plus en plus conscience de ces problèmes et encouragent la prise de mesures pour aider les travailleurs migrants et pour sensibiliser le public. La loi de 2006 sur les permis de travail répond dans une certaine mesure aux préoccupations exprimées concernant la situation des travailleurs migrants et en particulier le système de permis de travail qui fait l'objet de critiques pour avoir dans une certaine mesure favorisé l'exploitation des travailleurs migrants par des employeurs peu scrupuleux. La loi prévoit donc que les permis de travail seront délivrés aux employés (alors qu'il était auparavant remis à l'employeur) à la demande soit de l'employé, soit de l'employeur. Le permis contiendra une déclaration des droits de l'employé, y compris sa rémunération et le droit de changer d'employeur. Il est toutefois nécessaire de clarifier quelque peu la manière dont le nouveau système modifiera la pratique actuelle car il est pour l'heure admis que les employés ne seront autorisés à solliciter leur propre permis que lorsqu'ils auront besoin de changer d'employeur. Il a également été demandé que davantage d'inspecteurs du travail soient mis en place et l'ECRI se félicite que les autorités se soient engagées à augmenter progressivement leurs effectifs pour les faire passer de 31 à 90 d'ici fin 2007. Il est par ailleurs nécessaire de disposer de données ventilées sur la situation des minorités ethniques et des travailleurs migrants, en particulier parce que les inspecteurs du travail ne recueillent pas ce type de données sur les plaintes déposées.

Recommandations:

81. L'ECRI encourage les autorités irlandaises à poursuivre la sensibilisation à la nécessité de lutter contre le racisme et la discrimination raciale sur le lieu de travail. Elle recommande à cet égard que les travailleurs migrants et les minorités ethniques soient informés de leurs droits et des voies de recours à leur disposition, tels que le Tribunal pour l'égalité, le conseil des prud'hommes et la Commission de recours en matière d'emploi. L'ECRI recommande également de s'assurer que les organisations de minorités et de migrants soient consultées et associées à toute initiative de sensibilisation.

82. L'ECRI recommande de contrôler la mise en œuvre de la nouvelle loi sur les permis de travail afin de veiller au respect de la mobilité des employés et pour lutter contre tous abus et/ou discrimination à l'égard des travailleurs migrants et des travailleurs issus des minorités ethniques. A ce titre, l'ECRI encourage les autorités dans leurs efforts pour augmenter le nombre d'inspecteurs du travail et elle recommande de leur assurer la formation et le soutien logistique nécessaires pour leur permettre de s'acquitter de leurs fonctions et d'appliquer

[38] Voir, *CISC Working Paper N° 222, December 2005, Labour Relations and Migrant Workers in Ireland, Maria-Alejandra Gonzalez-Perez, Terrence McDonough, Tony Dundon, Centre for Innovation and Structural Change*, p. 8.

les sanctions qui s'imposent contre les employeurs peu scrupuleux. L'ECRI recommande par ailleurs aux inspecteurs du travail de recueillir des données ventilées en fonction, entre autres, de l'appartenance ethnique, de la nationalité et du statut du permis de travail, concernant les plaintes reçues.

83. L'ECRI recommande de prendre des mesures pour fournir les outils nécessaires permettant d'aider les migrants dans leur intégration sur le marché du travail et dans la société, en veillant par exemple à ce qu'ils bénéficient de cours de langue gratuits et à ce que leurs qualifications, compétences et expériences soient prises en compte par les employeurs.

Accès aux services publics

- ***Accès à l'éducation***

84. Dans son second rapport, l'ECRI était d'avis qu'il convenait d'examiner la possibilité de dispenser un enseignement religieux alternatif ou une forme d'enseignement religieux qui englobe toutes les confessions. Elle encourageait en outre les autorités irlandaises à envisager des moyens de développer l'enseignement de la langue maternelle pour les enfants issus d'autres groupes minoritaires et à recruter des enseignants ou des maîtres auxiliaires parmi ces communautés.

85. La majorité des écoles primaires en Irlande (98%) sont principalement catholiques. Les familles peuvent demander à ce que leurs enfants ne prennent part aux rites religieux mais cette pratique a fait l'objet de critiques comme pouvant conduire les enfants à se sentir exclus. Les autorités irlandaises ont indiqué à l'ECRI qu'elles étudiaient actuellement de nouveaux modèles d'enseignement. Cette décision est la bienvenue, étant donné que la diversité grandissante de la société irlandaise a conduit à une augmentation de la demande d'écoles multiconfessionnelles ou non confessionnelles à laquelle le cadre pratique et législatif n'est pas capable de répondre, les écoles ayant en particulier le pouvoir de refuser l'admission pour préserver leurs « valeurs ».

86. Les autorités irlandaises ont fait savoir à l'ECRI qu'une école du dimanche pilote a été ouverte à l'Ambassade de Lettonie et qu'elle propose un enseignement en langue maternelle. L'Ambassade de Pologne a également créé une école du dimanche à Dublin. Les autorités ont indiqué à l'ECRI qu'elles examinaient actuellement s'il convenait de poursuivre ces initiatives. S'agissant de l'enseignement général dispensé aux élèves issus des minorités, il est nécessaire d'assurer une collecte systématique de données dans ce domaine de manière à pouvoir dresser un tableau précis de leurs performances. Comme indiqué précédemment, le Plan d'action national contre le racisme[39] s'est fixé des objectifs dans ce domaine. Il convient par ailleurs d'envisager de recruter activement des enseignants appartenant aux communautés minoritaires, les autorités ayant indiqué qu'aucune mesure spéciale n'est actuellement prise en la matière. A ce sujet, il se pourrait que l'accès des minorités à la profession d'enseignant soit entravé par l'obligation faite aux personnes en cours de formation d'obtenir leur diplôme supérieur en Irlande.

[39] Voir, « Education et sensibilisation » ci-dessus.

Recommandations:

87. L'ECRI exhorte les autorités irlandaises à promouvoir la création d'écoles multiconfessionnelles ou non confessionnelles et à adopter la législation nécessaire à cet effet. Les autorités devraient également s'assurer que le système actuel de dérogation des écoles confessionnelles est appliqué de manière à ne pas favoriser un sentiment d'exclusion chez les élèves.

88. L'ECRI recommande aux autorités de mettre en place un système cohérent de collecte de données pour évaluer les performances des élèves issus des minorités en matière d'éducation et d'élaborer les mesures nécessaires dans ce domaine. Elle réitère par ailleurs sa recommandation aux autorités de prendre des mesures pour encourager les membres des groupes minoritaires à accéder à la profession d'enseignant.

Groupes vulnérables

- Gens du voyage

89. Dans son second rapport sur l'Irlande, ECRI encourageait les autorités irlandaises à continuer de consacrer une attention particulière et des moyens adéquats à l'éducation des enfants issus de la communauté des Gens du voyage, en étroite collaboration avec les représentants de cette communauté. Elle estimait en outre qu'il fallait redoubler d'efforts pour inclure dans les manuels scolaires et autres matériels pédagogiques des informations sur les Gens du voyage comme faisant partie intégrante de la société irlandaise. L'ECRI exhortait également les autorités irlandaises à rechercher des moyens de promouvoir l'accès des Gens du voyage au corps enseignant et à envisager, comme solution à court terme, la possibilité de recruter des membres de cette communauté en tant que maîtres auxiliaires.

90. L'ECRI note avec satisfaction que les autorités ont pris un certain nombre de mesures importantes pour faire face aux problèmes auxquels les Gens du voyage continuent de se heurter dans le système éducatif. Début 2006, l'Inspection du ministère de l'Education et de la Science a publié une enquête sur l'éducation dispensée aux Gens du voyage, qui contient un certain nombre de conclusions et de recommandations.[40] Une autre mesure importante prise par les autorités irlandaises en matière de l'éducation des Gens du voyage est la publication, le 21 novembre 2006, d'une Stratégie pour l'éducation des Gens du voyage. Elle vise à garantir aux Gens du Voyage l'égalité en termes d'accès, de participation et de résultats. Les organisations de Gens du voyage ont également informé l'ECRI que dans le cadre du Plan d'action pour l'égalité d'accès à l'enseignement supérieur, certains établissements d'éducation ont pris des mesures pour améliorer l'accès des Gens du voyage à l'enseignement supérieur. Elles se sont outre dites satisfaites de la consultation et participation concernant le groupe de travail mixte par rapport à la Stratégie et au Plan d'action. Les organisations de Gens du voyage ont toutefois indiqué à l'ECRI leur volonté de jouer un rôle plus important dans la mise en œuvre de la Stratégie pour l'éducation des Gens du voyage.

[40] Voir, *Survey of Traveller Education Provision in Irish Schools, Inspectorate of the Department of Education and Science, © Department of Education and Science, 2005*, pp. 78-84

91. Bien que des progrès réels aient certes été accomplis dans le nombre d'inscriptions scolaires d'enfants appartenant à la communauté des Gens du voyage, des difficultés majeures subsistent. Les autorités irlandaises ont informé l'ECRI que 58% des enfants issus de la communauté des Gens du voyage fréquentent des établissements post-primaires, mais que leurs résultats en ce qui concerne leur taux d'accès à l'école secondaire et leur réussite à ce niveau sont largement inférieurs à la moyenne nationale. Le NCCRI a recensé plusieurs facteurs déterminants entravant la réussite scolaire au sein de la communauté des Gens du voyage, dont l'incapacité à reconnaître et accepter la culture des Gens du voyage et dans certains cas, la discrimination institutionnelle.[41] Les organisations de Gens du Voyage ont reconnu que l'objectif visant à assurer l'interculturalisme dans les écoles faisait l'objet d'un certain degré d'engagement, mais souhaiteraient que les mesures prises pour inclure les questions touchant les Gens du voyage dans les manuels scolaires et autres matériels pédagogiques soient mises en œuvre au niveau national. Les organisations de Gens du voyage ont en outre indiqué que 2 femmes appartenant à la communauté des Gens du voyage participaient actuellement à des programmes visant des populations marginalisées et que la Stratégie pour l'éducation des Gens du voyage prévoyait le recrutement d'enseignants issus de cette communauté. Elles ont toutefois noté que les progrès réalisés dans l'éducation des Gens du voyage n'étaient pas suivis d'une meilleure intégration sur le marché du travail.[42]

Recommandations:

92. L'ECRI encourage les autorités irlandaises dans la publication de la Stratégie pour l'éducation des Gens du voyage et recommande de mettre en œuvre les objectifs qui y sont contenus en associant pleinement les organisations nationales de Gens du voyage. L'ECRI recommande en outre de poursuivre et renforcer les mesures actuellement mises en œuvre pour améliorer l'intégration et les performances des Gens du voyage dans le système éducatif et de fournir les ressources humaines et financières nécessaires à cette fin.

93. Dans son second rapport sur l'Irlande, l'ECRI exhortait les autorités irlandaises à s'employer à mettre en œuvre sans tarder des mesures dans le domaine de l'emploi des Gens du voyage et à prendre des mesures positives pour favoriser l'emploi et la création de revenus au sein de la communauté des Gens du Voyage. L'ECRI a également recommandé de mettre en place un système de collecte d'informations et de recherche pour analyser le problème du chômage au sein de cette communauté.

94. Le recensement réalisé en 2002 indique que 73% des hommes issus de la communauté des Gens du voyage sont au chômage et que ce chiffre est de 60% pour les femmes. L'ECRI note donc avec satisfaction que 1 million d'euros ont été alloués pour apporter aux Gens du voyage les compétences nécessaires à leur entrée sur le marché du travail. Le ministère de l'Entreprise, du Commerce et de l'Emploi a par ailleurs indiqué à l'ECRI qu'un groupe spécial au sein de ce ministère et comprenant des représentants d'autres ministères et des agences nationales pour l'emploi s'attachait au problème des Gens du voyage sur le marché du travail. Des mesures pilote ont été prises

[41] Voir, « *Education Disadvantage Committee* » pour aider à l'élaboration d'une stratégie d'éducation pour les Gens du voyage, Stratégie pour l'éducation des Gens du voyage – dans le cadre d'une stratégie d'éducation interculturelle en Irlande, janvier 2004, p. 3.

[42] Pour de plus amples informations sur cette question, voir ci-dessous.

dans quatre zones locales où vivent un grand nombre de Gens du voyage et même si le ministère a noté que les progrès n'étaient pas important sur le plan des chiffres, les comportements ont connu d'importants changements. Les organisations de Gens du voyage ont toutefois indiqué à l'ECRI que l'emploi est l'un des domaines où des efforts supplémentaires sont nécessaires. Elles ont mentionné les initiatives ad hoc, telles que celle prise dans le Comté de Dublin sud où l'autorité locale travaille avec la communauté locale de Gens du Voyage pour promouvoir l'emploi au sein de ce groupe. Elles ont souligné qu'il était nécessaire d'appliquer au niveau national des mesures dans le domaine de l'emploi et qu'il importait d'adopter une approche intégrée, qui tienne compte du contexte plus large des désavantages subis dans d'autres domaines tels que l'éducation, la santé et le logement.

Recommandations:

95. L'ECRI recommande aux autorités irlandaises de continuer à mettre en œuvre les mesures actuelles pour inclure les Gens du voyage dans le secteur de l'emploi et de prendre de nouvelles initiatives à cet égard en concertation avec les organisations de Gens du voyage. L'ECRI recommande par ailleurs que toute politique visant à améliorer l'accès des Gens du voyage au secteur de l'emploi comporte des mesures contre la discrimination, un contrôle de l'égalité homme-femme et qu'elle tienne compte du contexte plus large des désavantages auxquels sont confrontés les membres de cette communauté dans d'autres domaines.

96. Dans son second rapport sur l'Irlande, ECRI a recommandé que la mise à disposition de logements pour les Gens du Voyage soit suivie de près et que des mesures soient prises si nécessaire pour améliorer la mise en œuvre de la loi de 1998 sur le logement (logement des Gens du Voyage). L'ECRI soulignait que les pouvoirs conférés aux autorités locales en matière d'expulsion des campements autorisés devraient faire l'objet d'une étroite supervision afin de s'assurer qu'il n'en est pas fait un usage abusif.

97. Concernant la mise en œuvre de la loi de 1998 sur le logement (logement des Gens du Voyage), l'ECRI note avec satisfaction que les autorités locales sont tenues d'élaborer et d'adopter des programmes pour fournir un logement aux Gens du Voyage. Le premier de ces programmes a été adopté pour la période 2000-2004 et le second couvre la période 2005-2008. Ces programmes ont donné lieu à d'importantes améliorations puisque, selon les autorités irlandaises, au terme du premier programme, le nombre de Gens du voyage vivant sur des emplacements non autorisés avait diminué de 1 207 à 601. Certains craignent toutefois que ces programmes ne soient pas mis en œuvre de manière appropriée dans certaines zones locales. A ce sujet, un rapport publié par le Comité consultatif national pour le logement des Gens du voyage a émis un certain nombre de recommandations concernant l'accueil des Gens du voyage et la mise au point de modules de consultation avec eux. L'ECRI se félicite que le ministre chargé de ces questions ait approuvé ces recommandations. Cependant, les autorités devraient mener une politique plus active dans ce domaine. A ce sujet, l'ECRI note les informations des autorités irlandaises selon lesquelles les programmes de logement pour les Gens du voyage qui couvrent la période 2005-2008 sont contrôlés au travers d'un système modifié visant à en mesurer les résultats. Ce système cherche à mesurer l'octroi de logements par le biais des autorités locales, des particuliers et des logements spécifiquement désignés pour les Gens du voyage. Les autorités irlandaises ont également informé l'ECRI que ce système de contrôle

a été établi par le deuxième Comité consultatif national pour le logement des Gens du voyage (NTAAC) et qu'il est prévu qu'au début de ses travaux, le troisième NTAAC, qui a commencé son travail en janvier 2007, terminera ses préparatifs pour des séminaires visant à, entre autres, améliorer le fonctionnement des Comités consultatifs locaux pour le logement des Gens du voyage.

98. Depuis le second rapport de l'ECRI, la loi de 2002 sur le logement (mesures diverses) a été adoptée. Cette loi fait de l'intrusion sur des terrains publics et privés - auparavant considérée comme une infraction civile – une infraction pénale et confère à la police de vastes pouvoirs. L'ECRI note avec préoccupation que la mise en œuvre de cette loi a, par exemple perturbé la scolarité de certains enfants issus de la communauté des Gens du voyage. La priorité principale devrait donc être d'examiner toutes les possibilités permettant de proposer un logement de substitution adéquat aux Gens du voyage.

Recommandations:

99. L'ECRI recommande aux autorités irlandaises de continuer à améliorer l'accès des Gens du voyage à un logement décent. A cet effet, elle appelle les autorités à mettre en œuvre les recommandations émises par le Comité consultatif national pour le logement des Gens du voyage concernant les questions touchant le logement des Gens du voyage.

100. L'ECRI recommande vivement d'assurer un contrôle étroit de la mise en œuvre de la loi de 2002 sur le logement (mesures diverses) pour veiller à ce que les Gens du voyage, et plus particulièrement les membres vulnérables de ce groupe, tels que les femmes et les enfants, ne se retrouvent pas dans une situation difficile. Elle recommande en outre de prendre des mesures pour veiller à ce que cette loi soit révisée et amendée si besoin est afin d'en assurer la conformité avec les normes internationales de droits de l'homme.

101. Dans son second rapport sur l'Irlande, ECRI encourageait les autorités à publier et mettre en œuvre dans les meilleurs délais, dans le domaine de la santé, une stratégie pour les Gens du voyage, en étroite coopération avec des représentants de cette communauté. Elle a également recommandé de mettre au point un système de collecte et de recherche de données sur les difficultés rencontrées par les Gens du Voyage dans le domaine de la santé.

102. L'ECRI note avec satisfaction que les services de santé s'efforcent de recruter des Gens du voyage pour prodiguer des soins et des conseils de santé primaires et qu'un certain nombre d'entre eux terminent actuellement la première phase de leur formation. Une stratégie sanitaire nationale pour les Gens du voyage pour 2002-2005 a également été mise sur pied et les autorités ont indiqué à l'ECRI qu'environ 11 millions d'euros avaient été affectés à cette Stratégie pour 2005/2006 et que des fonds étaient alloués régulièrement aux unités et projets des Gens du voyage en matière de santé. Les organisations de Gens du voyage ont indiqué à l'ECRI que certaines mesures relevant de la Stratégie nationale en matière de santé pour les Gens du voyage avaient été mises en œuvre et d'autres non. Elles ont déclaré souhaiter qu'une collecte de données ethniques soit entreprise sur les questions de santé au sein de la communauté des Gens du voyage dans l'ensemble du pays. A cet égard, deux programmes pilotes sont actuellement menés et l'ECRI espère que cette mesure sera élargie au reste du pays. Une étude sur la situation sanitaire des Gens du voyage devrait débuter et les autorités estiment qu'elle durera environ

deux ans. Elles ont également indiqué que les informations recueillies à cette occasion seraient exploitées pour mesurer les performances futures.

103. Dans son second rapport sur l'Irlande, l'ECRI a recommandé aux autorités irlandaises de prendre des mesures pour améliorer la participation des Gens du voyage à la vie publique et de contrôler l'efficacité de ces mesures.

104. Les organisations de Gens du voyage ont indiqué qu'elles avaient investi beaucoup d'efforts dans le renforcement des capacités et la participation des Gens du voyage et qu'elles avaient noué le dialogue avec l'Etat avec quelques succès. Toutefois, aucun membre de la communauté des Gens du voyage ne siège actuellement au Parlement et leur nombre n'est que d'un ou deux au sein des autorités locales. Le Groupe de haut niveau chargé des questions relatives aux Gens du voyage, dont la fonction principale est de promouvoir les politiques des pouvoirs publics concernant les questions relatives aux Gens du voyage, est constitué de fonctionnaires. Il est cependant regrettable que ce groupe ne compte aucun membre de la communauté des Gens du voyage et que la participation de ces derniers dans les travaux du groupe soit limitée. Sur un autre point, les autorités irlandaises ont informé l'ECRI qu'une personne indépendante a été nommée à la tête du Comité national consultatif de contrôle chargé des questions relatives aux Gens du voyage[43] et que cela est la première fois que ce comité est doté d'un président indépendant. Elles ont en outre indiqué que la composition de ce comité a été élargie. L'ECRI n'a cependant pas d'informations concernant le niveau de participation des Gens du voyage à ces nouveaux changements.

Recommandations:

105. L'ECRI recommande de réaliser une évaluation préliminaire de l'impact exercé par la Stratégie nationale en matière de santé pour les Gens du voyage et de prendre en compte les conclusions qui en découleront lors de l'Etude nationale sur la santé en Irlande (*All-Ireland National Health Study*). L'ECRI recommande en outre aux autorités de veiller à ce que l'étude concernant les besoins des Gens du voyage en matière de santé associe étroitement les organisations de Gens du voyage et intègre la dimension de genre.

106. L'ECRI recommande vivement aux autorités irlandaises de s'assurer que les organisations de Gens du voyage jouent un rôle clé dans tous les aspects des travaux du Groupe de haut niveau chargé des questions relatives aux Gens du voyage et que les membres de la communauté des Gens du voyage soient représentés dans ce Groupe.

- ***Minorités visibles***

107. Dans son second rapport sur l'Irlande, ECRI a recommandé que la législation en vigueur soit utilisée pour lutter contre la discrimination et le racisme dont sont victimes les minorités visibles. Elle a également recommandé de lancer de nouvelles campagnes de sensibilisation du grand public.

[43] Ce comité a remplacé le Comité de contrôle chargé des questions relatives aux Gens du voyage, qui a été fermé en décembre 2005. Le Comité de contrôle chargé des questions relatives aux Gens du voyage a été créé en 1998 et il était présidé par, entre autres, des fonctionnaires du ministère de la Justice, de l'Egalité et des Réformes législatives, des représentants des organisations nationales créées par des Gens du voyage et des départements gouvernementaux intéressés.

108. Comme indiqué dans d'autres parties du rapport, certaines mesures ont été prises pour lutter contre le racisme et la discrimination à l'égard des minorités ethniques. Certaines inquiétudes demeurent néanmoins, au sujet par exemple de l'image que véhiculent les médias notamment des Africains, des Musulmans et des Gens du voyage[44]. Des cas où la nationalité d'une personne accusée d'une infraction est mentionnée ou des généralisations sur les Musulmans ont été faites, ont été observés dans certains secteurs des médias[45]. En 2004, le programme national de sensibilisation à la lutte contre le racisme (également appelé Programme « Connaître le racisme ») a publié les conclusions de son étude sur les opinions et les comportements à l'égard des groupes minoritaires en Irlande. Cette enquête a dégagé un certain nombre de points préoccupants, mais aussi des tendances positives. Il ressort, par exemple qu'une personne sur cinq a été témoin d'un incident raciste et que 67% des personnes interrogées étaient disposées à nouer des relations avec une personne appartenant à un groupe ethnique minoritaire. L'enquête révèle également qu'il existe un lien étroit entre la perception négative des minorités et l'absence d'interaction avec celles-ci. Ces résultats identifient donc les domaines dans lesquels les autorités devraient, par l'intermédiaire notamment du programme national de sensibilisation à la lutte contre le racisme, poursuivre et renforcer leur action concernant, entre autres, la lutte contre les infractions à caractère raciste[46] et la sensibilisation à la contribution qu'apportent les minorités visibles à la société irlandaise. Ces mesures spécifiquement ciblées devraient être mises en œuvre conjointement avec les organisations créées par les groupes minoritaires.

Recommandations:

109. L'ECRI encourage les autorités irlandaises à poursuivre leurs mesures de sensibilisation à la lutte contre le racisme et recommande que les organisations minoritaires soient systématiquement associées à ces initiatives leur conception à leur mise en œuvre.

Médias

110. Dans son second rapport, l'ECRI a recommandé aux professionnels des médias d'appliquer des codes d'autorégulation.

111. Le NCCRI a indiqué à l'ECRI qu'il contrôlait la manière dont les médias présentaient des informations sur les minorités ethniques et qu'il a publié sur son site Internet des lignes directrices à l'attention des journalistes. L'ECRI note avec satisfaction que ces lignes directrices ont été approuvées par l'Union des journalistes. Ces mesures sont importantes dans la mesure où il a été porté à l'attention de l'ECRI que certains médias présentaient les demandeurs d'asile, les réfugiés, les travailleurs migrants et les Gens du voyage, ainsi que les minorités noires et ethniques sous un jour négatif[47]. L'ECRI a toutefois été également informée que certains médias jouaient véritablement un rôle positif en attirant l'attention sur les problèmes inhérents au système d'asile. Les

[44] Le recensement de 2002 indique que l'Irlande comptait 30 000 Africains et 19 147 Musulmans ; la majorité des membres de ces communautés vivent à Dublin. Les résultats du recensement de 2006 donneront des chiffres plus récents.

[45] Pour de plus amples informations sur les médias, voir « Médias » ci-dessous.

[46] Pour de plus amples informations sur les infractions à caractère raciste, voir « Comportement des représentants des forces de l'ordre » ci-dessous.

[47] Voir, « Minorités visibles » ci-dessus.

médias devraient donc être encouragés à aborder plus souvent les aspects relatifs aux communautés minoritaires d'une manière objective et constructive. A ce titre, elle note avec satisfaction que les autorités s'efforcent actuellement de définir le rôle du Conseil de la presse tout en tenant compte des questions touchant aux minorités.

Recommandations:

112. L'ECRI recommande aux autorités d'encourager, tout en respectant pleinement le principe de la liberté d'expression et d'indépendance éditoriale, l'objectivité lorsque les questions relatives aux minorités ethniques, aux demandeurs d'asile, aux réfugiés et aux communautés immigrées sont abordées par les médias.

Comportement des représentants des forces de l'ordre

113. Dans son second rapport sur l'Irlande, ECRI a recommandé la mise en place d'un mécanisme d'enquête entièrement indépendant de la Garda Síochána (police) et elle notait qu'au moment de la rédaction de ce rapport, une série de propositions à ce sujet étaient examinées.

114. L'ECRI se félicite de l'adoption de la loi de 2005 relative à la Garda Síochána, qui prévoit la création d'une nouvelle Commission de médiateurs de la police (Garda Ombudsman Commission). Cette Commission, créée le 10 février 2006, sera habilitée à instruire directement et indépendamment des plaintes déposées à l'encontre d'agents de police et de mener des enquêtes *proprio motu*. La Commission est composée à l'heure actuelle d'agents détachés du ministère de la Justice en attendant que sa propre équipe soit constituée. Les autorités ont indiqué à l'ECRI qu'en 2006, €10 million avaient été débloqués pour cette Commission et qu'elle devrait être pleinement opérationnelle début 2007.

115. Dans son second rapport sur l'Irlande, l'ECRI considérait, qu'étant donné que les membres de la police nationale étaient également chargés des contrôles aux frontières et des expulsions, ceux-ci devraient bénéficier d'une formation supplémentaire portant sur les domaines de leurs responsabilités. L'ECRI encourageait en outre le recrutement de fonctionnaires de police parmi les groupes minoritaires et elle notait que la question de la suppression des éventuels obstacles discriminatoires dans les conditions d'accès à la profession était à l'étude.

116. Un Audit des droits de l'homme sur les forces de police irlandaises lancé en mars 2005 a recensé des problèmes de racisme et de discrimination raciale au sein des forces de police. L'ECRI note donc avec satisfaction que les autorités ont commencé à faire face à certains de ces problèmes. En janvier 2006, le commissaire de police a diffusé une directive à l'attention de tous les membres de la police concernant l'élaboration de plusieurs stratégies pour répondre aux besoins d'une société plus diversifiée. Celles-ci incluent d'intervenir auprès des victimes d'incidents à caractère raciste, de mener des consultations avec les communautés des minorités ethniques et de consigner les incidents à caractère raciste sur un registre. S'agissant des relations entre la police et les groupes minoritaires, les membres de la communauté des Gens du voyage ont indiqué que la situation avait quelque peu évolué au niveau de la police locale, mais qu'ils souhaitaient continuer à développer de meilleures relations. En février 2001, le Bureau racial et interculturel de la Garda a été créé pour améliorer la communication et la consultation avec les minorités ethniques. Des ONG

signalent que les effectifs de cet organe n'ont été portés qu'à quatre personnes. Les autorités ont par ailleurs indiqué à l'ECRI que 145 officiers de liaison avec les minorités ethniques ont été nommés afin d'améliorer la communication avec les minorités ethniques et qu'une nouvelle directive interne de la police entendait retirer aux agents de police leur fonction d'officiers de liaison avec les minorités ethniques en raison du risque de conflit. Elles ont indiqué que des officiers de police ont été nommés comme officiers de liaison avec les minorités ethniques.

117. L'ECRI se félicite de la décision des autorités irlandaises de modifier les critères de recrutement des agents de police. Les forces de police sont désormais ouvertes aux ressortissants de l'UE et de l'EEE et de la Suisse ainsi qu'aux ressortissants de tout autre Etat qui résident légalement sur le territoire irlandais depuis cinq ans. Par ailleurs, l'obligation de justifier d'un diplôme à la fois en langue irlandaise et anglaise a été remplacée par l'obligation de maîtriser deux langues, dont l'une devra être l'anglais ou l'irlandais. Les agents de police suivront en outre des cours de langue irlandaise au cours de leur formation. Bien que les forces de police ne comptent actuellement que deux personnes appartenant à la communauté des Gens du voyage, des représentants de cette communauté et de la police ont fait savoir à l'ECRI que des mesures étaient prises pour encourager les Gens du voyage, ainsi que les membres d'autres groupes minoritaires, à rejoindre les rangs de la police dans le cadre de la campagne gouvernementale actuelle pour recruter des agents de police supplémentaires. Il s'agit d'une initiative importante d'autant que le rapport indique que les relations sont tendues entre la police et certains groupes minoritaires, dont par exemple les Gens du voyage et les Nigérians.

Recommandations:

118. L'ECRI encourage les autorités irlandaises dans leur création d'une Commission de médiateurs de la police et leur recommande de continuer à mettre à sa disposition les ressources financières nécessaires pour lui permettre de fonctionner pleinement. L'ECRI recommande en outre aux autorités de veiller à ce que le personnel de la Commission reçoive une formation aux questions relatives au racisme et à la discrimination raciale.

119. L'ECRI encourage les autorités irlandaises à poursuivre leurs efforts pour mettre en œuvre des recommandations contenues dans l'Audit des droits de l'homme de la Garda et recommande à ce titre de consulter et d'associer les représentants des groupes minoritaires à ce processus.

120. L'ECRI recommande aux autorités de continuer à soutenir les travaux du Bureau racial et interculturel de la Garda en mettant à sa disposition les ressources nécessaires pour remplir ses fonctions. L'ECRI recommande en outre de recruter des officiers de liaison avec les minorités ethniques qui soient extérieurs aux services de police et d'immigration et de consentir des efforts pour recruter des membres des groupes minoritaires à ces postes.

Suivi de la situation

121. Dans son second rapport sur l'Irlande, l'ECRI encourageait les autorités irlandaises à créer un système fiable et complet de collecte de données concernant la situation des groupes minoritaires dans tous les domaines, y compris l'éducation, l'emploi, le logement et la santé.

122. Comme indiqué dans d'autres parties du rapport, la collecte de données ventilées en fonction, notamment, de la race, de la nationalité et de l'appartenance ethnique dans des domaines tels que l'emploi, l'éducation et la santé n'est pas encore une pratique courante. La loi de 2003 relative à la protection des données prévoit le traitement des données ethniques avec l'accord de la personne concernée. Un commissaire à la protection des données a été mis en place pour assurer l'application des dispositions de cette loi. Il a indiqué à l'ECRI que son bureau n'avait été saisi d'aucune plainte concernant la collecte de données ethniques. Le commissaire met également en œuvre des mesures de sensibilisation, mais elles ne sont pas pour le moment spécifiquement destinées aux groupes ethniques minoritaires ou aux communautés immigrées. L'ECRI note que le Bureau de protection des données compte produire, dans les langues les plus fréquemment parlées par les minorités, des versions d'un guide élémentaire sur les droits contenus dans la loi sur la protection des données, qui sera disponible sous forme de brochure et sur internet.

123. Le recensement réalisé en septembre 2006 comportait des questions sur la nationalité, l'appartenance ethnique, la religion et la maîtrise ou non par la personne de l'irlandais. L'ECRI note avec satisfaction que le texte principal du formulaire destiné aux ménages était disponible en arabe, français, polonais, russe, tchèque, letton, portugais, espagnol, chinois, lituanien et roumain.

Recommandations:

124. L'ECRI réitère sa recommandation aux autorités irlandaises de créer et mettre en œuvre un système de collecte de données ethniques pour prendre la dimension de la discrimination raciale potentielle dans le pays et y remédier, qui soit pleinement conforme à toutes les lois nationales pertinentes et aux réglementations et recommandations européennes et internationales sur la protection des données et de la vie privée, tel qu'énoncé dans la Recommandation de politique générale n°1 de l'ECRI sur la lutte contre le racisme, la xénophobie, l'antisémitisme et l'intolérance.

125. Les autorités irlandaises devraient s'assurer que la collecte de données soit réalisée en pleine conformité avec la loi de 2003 sur la protection des données. A cet égard, l'ECRI recommande aux autorités irlandaises de continuer à prendre des mesures pour que les groupes minoritaires prennent conscience de l'existence et des activités du Commissaire à la protection des données. En outre, le système de collecte de données sur le racisme et la discrimination raciale devrait prendre en considération la dimension de genre, plus particulièrement dans la perspective d'une éventuelle discrimination double ou multiple.

126. L'ECRI recommande aux autorités irlandaises d'utiliser les données recueillies lors du recensement de 2006 pour rassembler des informations sur la situation des minorités ethniques et des non-ressortissants dans divers domaines et recenser les problèmes éventuels de discrimination qui mériteraient d'être examinés plus avant.

II. QUESTIONS SPÉCIFIQUES

Ebauche d'un projet de loi sur l'immigration, la résidence et la protection

127. Comme indiqué précédemment, l'ébauche d'un projet de loi sur l'immigration, la résidence et la protection, qui contient une série d'instructions au Parlement pour l'élaboration du texte du projet de loi en question, a été publiée en septembre 2006. Il couvre des questions telles que les visas, l'entrée en Irlande, les permis de séjour et les conditions relatives à l'immatriculation, l'expulsion du territoire et la protection. Comme indiqué plus haut également, 125 propositions ont été émises par des ONG et des organisations de la société civile qui se sont dites préoccupées par le fait que ces propositions n'aient pas été rendues publiques comme cela était le cas, par exemple, pour le Plan national d'action contre le racisme. Leurs suggestions contiennent de nombreuses observations et idées qui méritent d'être sérieusement prises en considération au moment de l'adoption définitive du projet de loi, étant donné qu'elles soulèvent des questions importantes. L'ECRI se félicite donc des assurances des autorités irlandaises selon lesquelles elles en tiendraient compte. S'agissant de l'ébauche en général, il convient de veiller à ne pas trop insister sur les questions telles que le contrôle, la sécurité, le maintien de l'ordre public ou le renvoi de non-ressortissants. Il faudrait également veiller à élaborer une politique d'intégration pour les minorités noires et ethniques et les non-ressortissants.[48]

128. L'ébauche propose d'intéressants changements tels que l'instauration d'une procédure unique pour l'examen des demandes d'asile. Certains des titres méritent cependant d'être examinés plus avant pour renforcer la dimension relative à la protection du projet de loi et pour introduire un élément contre la discrimination. Par exemple, le titre n° 4 qui impose à un ressortissant étranger de prouver qu'il ou elle n'est pas irlandais soulève des inquiétudes au sujet de la discrimination au faciès. La décision des autorités d'aborder la question des permis de séjour sous l'angle législatif au titre n° 25 a été accueillie favorablement. Ce titre prévoit que le permis permet notamment à son détenteur de contracter un emploi, de mener des activités économiques, commerciales ou professionnelles et d'avoir accès à l'éducation, à la formation, aux soins de santé et à la protection sociale. Les autorités pourraient cependant examiner la possibilité d'accorder la résidence permanente dans ce projet de loi. Certaines des conditions d'éligibilité énoncées pour l'obtention d'un permis de séjour, telles que celle exigeant de consentir des efforts raisonnables pour s'intégrer dans la société irlandaise méritent également d'être examinées plus avant. A cet égard, il convient d'avoir à l'esprit que l'intégration[49] est un processus qui concerne l'ensemble de la société. Le titre n° 39 dote la police de vastes pouvoirs, y compris celui de renvoyer sans préavis un non-ressortissant qui réside illégalement sur le territoire. Le titre n° 67 contient également des dispositions sur lesquelles il conviendrait de s'attarder. Il prévoit qu'un non-ressortissant doit notifier au ministère de la Justice, de l'Egalité et des Réformes législatives, son intention de contracter un mariage en Irlande. Par ailleurs, le mariage entre un(e) ressortissant(e) étranger(e) et un(e) citoyen(ne) irlandais(e) ne donne pas nécessairement le droit d'entrer ou de résider en Irlande.

[48] Voir, « La nécessité d'une stratégie d'intégration » ci-dessous.

[49] Pour de plus amples informations sur les questions d'intégration, voir « La nécessité d'une stratégie d'intégration » ci-dessous.

129. Les propositions émises par les ONG soulèvent d'autres inquiétudes méritant d'être prises en considération. A cet égard, l'ébauche mentionne à maintes reprises les déclarations sur la politique d'immigration qui confèrent au ministère de la Justice, de l'Egalité et des Réformes législatives de vastes pouvoirs dans certains cas pour élaborer ou modifier des politiques en matière d'immigration en Irlande. Les ONG estiment que ces pouvoirs devraient être limités. L'introduction du droit au regroupement familial pour des personnes autres que les réfugiés devrait également être envisagée, étant donné que l'ébauche propose uniquement que le regroupement familial fasse l'objet d'une législation secondaire ou qu'il soit accordé par d'autres moyens.[50] Le droit à un interprète peut aussi être renforcé en veillant à mentionner systématiquement « le cas échéant » plutôt que le « cas échéant et dans la mesure du possible » comme indiqué dans certains titres.

Recommandations:

130. L'ECRI recommande aux autorités irlandaises de tenir compte des différentes observations et propositions émises par les ONG et les organisations de la société civile concernant l'ébauche d'un projet de loi sur l'immigration, la résidence et la protection et de poursuivre le processus de consultation sur ce projet de loi.

131. En outre, elle leur recommande vivement de veiller à ce que celui-ci tienne compte des normes internationales en vigueur et introduise des dispositions contre la discrimination fondée, entre autres, sur la race, la couleur, la langue, la religion, la nationalité et l'origine ethnique ou nationale.

Nécessité d'une stratégie d'intégration

132. Comme indiqué précédemment, l'Irlande se caractérise ces dernières années par une diversité grandissante due à l'expansion économique du pays. Cette évolution s'est accompagnée d'un certain nombre de défis et d'opportunités et les autorités prennent de plus en plus conscience de la nécessité d'y faire face. Cette prise de conscience se reflète dans le plan d'action national contre le racisme mentionné plus haut, l'engagement du ministère de la Justice d'affecter € 5 millions d'euros à l'intégration des réfugiés et des parents non-ressortissants d'enfants irlandais ainsi que dans la création d'une unité pour l'intégration de l'immigration dépendant du département de l'immigration et de la naturalisation du ministère de la Justice. L'ECRI considère à cet égard qu'une stratégie d'intégration pourrait, par exemple être adoptée dans le futur projet de loi sur l'immigration, la résidence et la protection. La collecte de données sur la situation des communautés minoritaires dans des domaines tels que l'emploi, l'éducation, la santé et le logement est un point de départ essentiel pour évaluer leurs besoins et concevoir des politiques d'intégration.[51]

133. Le plan d'action national contre le racisme comporte des objectifs importants, qui pourraient inspirer une stratégie d'intégration à long terme. L'objectif deux (inclusion) et l'objectif trois (offre) portent sur des domaines clés qui sont sources de problèmes pour les minorités noires et ethniques, y compris les

[50] Pour un examen plus détaillé de la question, voir « La nécessité d'une stratégie d'intégration » ci-dessous.

[51] Pour de plus amples informations sur la collecte de données ethniques, voir « Suivi de la situation » ci-dessus.

Gens du voyage[52], ainsi que les travailleurs migrants, les réfugiés et les demandeurs d'asile. L'application du critère pour le regroupement familial devrait être plus souple, les travailleurs migrants en général et les personnes ayant un emploi peu rémunérateur en particulier, se heurtant à des difficultés à cet égard. Un autre domaine qui mérite que l'on s'y attarde concerne la reconnaissance des qualifications professionnelles des réfugiés. Il a été observé que les réfugiés étaient souvent incapables de trouver un emploi qui soit à la mesure de leurs qualifications et de leur expérience. Ils ne peuvent donc s'intégrer pleinement et leurs compétences et expérience précieuses qui pourraient contribuer à l'économie irlandaise sont inexploitées ou mal utilisées. Il a également été observé que la diversité culturelle était nécessaire à la fourniture de services. Il s'agit là d'une question qui mérite d'être examinée plus avant par les autorités. Le plan d'action national contre la pauvreté, dont la mise en œuvre est prévue pour 2007-2009, est une initiative permettant d'évaluer les besoins des différents groupes en Irlande et d'y répondre. Il convient de s'inspirer du précédent plan d'action national contre la pauvreté et l'exclusion sociale de 2003-2005, qui propose des méthodes pour développer des services inclusives pour les groupes minoritaires et prendre des mesures positives.[53]

134. La participation des minorités dans la prise de décisions est un autre aspect essentiel de leur intégration dans la société. Sur ce point, les ONG établies par les minorités ont fait savoir qu'il était nécessaire de leur assurer un financement approprié pour leur permettre de fonctionner pleinement et qu'elles souhaitaient être plus étroitement associées dans l'élaboration et la mise en œuvre des mesures destinées à leurs communautés. L'ECRI se félicite donc que les ONG assurent que le ministère de la Justice s'efforce de mettre à leur disposition un financement plus important. Il convient à ce titre d'accorder une attention particulière à la dimension d'égalité entre les sexes afin de veiller à ce que les femmes appartenant aux groupes minoritaires soient aussi pleinement associées. Dans une perspective plus large, les groupes minoritaires devraient être mieux représentés dans le processus politique. Le plan d'action national contre le racisme comporte des engagements importants à ce titre qui, s'ils sont pleinement respectés, permettraient d'accroître considérablement la participation des minorités à tous les niveaux de la vie politique.

135. La lutte contre le racisme et la discrimination raciale est un aspect essentiel de toute stratégie d'intégration, et en élaborant le Plan d'action national contre le racisme, les autorités irlandaises ont montré qu'elles avaient pris conscience de la nécessité de faire face à ce problème. Le plan recense les différents groupes qui sont les victimes potentielles de ce phénomène, y compris les Gens du voyage, les migrants récents, les groupes minoritaires visibles, les musulmans et les juifs et propose des mesures pour lutter contre le racisme et la discrimination raciale. L'interdépendance des différentes facettes de l'intégration suppose que l'Agence pour l'intégration de l'immigration récemment créée, joue un rôle de premier plan en la matière. L'Agence a été mis en place pour promouvoir et coordonner des mesures sociales et organisationnelles dans l'ensemble du gouvernement pour l'accueil des immigrés légaux dans la vie économique et culturelle irlandaise. Outre assurer la supervision et la coordination des futures stratégies d'intégration avec tous

[52] Pour de plus amples informations sur la situation des Gens du voyage, voir « Groupes vulnérables » ci-dessus.

[53] Pour de plus amples informations sur cette question, voir « Accès aux services publics » ci-dessus.

les départements gouvernementaux concernés, l'Agence pour l'intégration de l'immigration devrait travailler en étroite collaboration avec des ONG et notamment des organisations créées par les minorités ainsi que les instances mises en place pour mettre en œuvre les plans nationaux d'action contre le racisme et la pauvreté. Il apparaît qu'à l'heure actuelle, le rôle premier de cette unité soit d'assurer en priorité la sécurité et un contrôle de l'immigration. Il importe par conséquent que les questions relatives à l'intégration de ses activités soit plus activement encouragée et dissociée de ses autres tâches.

Recommandations:

136. L'ECRI exhorte les autorités irlandaises à élaborer et mettre en œuvre une stratégie d'intégration visant à assurer la pleine participation, et ce sur un pied d'égalité, des différentes communautés minoritaires vivant en Irlande dans tous les domaines de la vie irlandaise, notamment l'éducation, l'emploi, l'accès aux services publics et à la vie politique. La lutte contre le racisme et la discrimination raciale devrait être le fondement de cette stratégie et l'ECRI recommande aux autorités de fournir les fonds nécessaires à cet effet. Les objectifs énoncés dans les plans d'action nationaux contre le racisme et la pauvreté devraient également être intégrés à cette stratégie et être plus activement mis en œuvre.

137. L'ECRI recommande vivement d'associer les groupes minoritaires à l'ensemble du processus conduisant à l'élaboration et à la mise en œuvre de toute future stratégie d'intégration. A cet effet, des fonds suffisants devraient être mis à leur disposition afin de leur permettre de participer activement à ce processus. L'Agence pour l'intégration de l'immigration qui pourrait servir de point central à la mise en œuvre et à la coordination de la stratégie devraient bénéficier de suffisamment de ressources humaines et financières pour ce faire. Une formation devrait en outre être dispensée aux agents de l'Agence sur les questions relatives au racisme et à la discrimination raciale ainsi que sur l'interculturalisme. L'ECRI recommande également de déployer des efforts pour recruter des membres des groupes minoritaires dans ses effectifs.

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Italy

Law 645/1952 (implementing the Constitutional norm on the prohibition of reorganization of the fascist party)

Article 1: For the purposes of the twelfth transitory and final (first paragraph) of the Constitution, it was reorganizing the dissolved fascist party when an association, a movement or at least a group of at least five people pursue their undemocratic goals of the fascist party, enhancing, or threatening using violence as a method of political struggle or advocating the suppression of the freedoms guaranteed by the Constitution or denigrating democracy, its institutions and values of strength, or acting racist propaganda, which addresses its activities to the exaltation of leaders, principles, facts and methods of that party or its outward manifestations of character turns fascist.

Article 2: Anyone who promotes, organizes or directs associations, movements or groups indicated in Art. 1, shall be punished with imprisonment from five to twelve years and a fine ranging from two to twenty million dollars. Anyone participating in such associations, movements or groups shall be punished with imprisonment from two to five years and a fine ranging from 1,000,000 to 10,000,000 lire. If the association, movement or group takes in all or part of the character of armed or

paramilitary organization, which makes use of violence, the penalties mentioned in the preceding paragraphs shall be doubled. The organization is considered armed if the promoters and participants, however, the availability of weapons or explosives are stored anywhere. Without prejudice to art. 29, first paragraph, of the Criminal Code, the conviction of the promoters, organizers or leaders of the matter in any case, the deprivation of rights and of the offices specified in art. 28, second paragraph, points 1 and 2 of the Criminal Code for a period of five years. The condemnation of the participants matter for the same period of five years deprivation of rights under Art. 28, second paragraph, no 1, Penal Code

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NB The 2006 amendment opted for detention or the payment of a fee as alternative punishments for the below mentioned offences; the offences addressed by the norm are now the "instigation" to commit actions of discrimination (in place of the "incitement" previously included), and the "propaganda" of racist ideas (instead of the mere "circulation").

> ***« (1993) Article 3. 1.*** *Sauf si l'infraction constitue un délit plus grave et aux fins de la mise en oeuvre de l'article 4 de la convention, est punie:*
> *a) de trois ans d'emprisonnement maximum toute personne qui de quelque façon que ce soit, diffuse des idées fondées sur la supériorité ou la haine raciale ou ethnique, ou incite à commettre ou commet des actes de discrimination pour motifs raciaux, ethniques, nationaux ou religieux;*
> *b) d'un emprisonnement de six mois à quatre ans toute personne qui, de quelque façon que ce soit, incite à commettre ou commet des actes de violence ou de provocation à la violence pour des motifs racistes, ethniques, nationaux ou religieux;*
>
> ***«(2006) Art. 3. - 1.*** *Salvo che il fatto costituisca piu' grave reato, anche ai fini dell'attuazione della disposizionedell'art. 4 della convenzione, e' punito:*
> *a) con la reclusione fino ad un anno e sei mesi o con la multa fino a 6.000 euro chi propaganda idee fondate sulla superiorita' o sull'odio razziale o etnico, ovvero istiga a commettere o commette atti di discriminazione per motivi razziali, etnici, nazionali o religiosi;*
> *b) con la reclusione da sei mesi a quattro anni chi, in qualsiasi modo, istiga a commettere o commette violenzao atti di provocazione alla violenza per motivi razziali, etnici, nazionali o religiosi;».*

Décret-loi n° 122 du 26 avril 1993 converti en loi n° 205 du 25 juin 1993 portant «Mesures urgentes en matière de discrimination raciale, ethnique et religieuse»

3. Toute organisation, association, mouvement ou groupe ayant notamment pour finalités l'incitation à la discrimination ou à la violence pour motifs raciaux, ethniques, nationaux ou religieux est interdite. Toute personne qui participe à de telles organisations, associations, mouvements ou groupes, ou prête assistance à leur activité, est punie, du seul fait de sa participation ou de son assistance, d'un emprisonnement de six mois à quatre ans. Les personnes qui encouragent ou dirigent de telles organisations, associations, mouvements ou groupes sont punies, de ce seul fait, d'un emprisonnement d'un an à six ans.

***Article 3** (Circonstance aggravante) - Pour les délits punis avec une peine autre que la condamnation à perpétuité qui ont été commis à des fins de discrimination ou haine ethnique, nationale, raciale ou religieuse, ou dans le but de faciliter l'activité d'organisations, associations, mouvements ou groupes qui poursuivent les mêmes finalités, la peine est augmentée de moitié. »*

***Additional penalties** : a/ unpaid community service b/ temporary prohibition from taking part in election campaigns c/ ban on attending sports events : The amending Act enabled courts to apply a number of additional penalties to anyone guilty of one of the offences covered by Acts Nos. 654 of 1975 or 962 of 1967. These penalties include:*

the obligation to periorm unpaid community service for a period of up to 12 weeks, after the prison sentence has been served. The details must be determined by the court in such a way as not to interiere with the work, studies or social reintegration of the convicted person. This obligation may consist in:
the restoration of buildings defaced by racist inscriptions, emblems or symbols;
assistance to social welfare and voluntary organisations (e.g. those assisting the disabled, drug addicts, the elderly or immigrants from non-Community countries);
work for the purposes of civil defence, environmental protection, conservation of the cultural heritage, etc.;
This work may be carried out for the benefit of public bodies or private organisations;
the temporary obligation to return to or leave one's ordinary residence at a fixed time for a period of no more than one year;
suspension of the offender's driving licence, passport or other documents permitting travel abroad, for a period of no more than one year;
d) prohibition from possessing weapons of any kind;
prohibition from participating in any way in election campaigns for the political or administrative elections following conviction and, at all events, for a minimum period of three years.

Article 2. External or ostentatious displaying of symbols of racist organisations ; gaining access to sports events with such symbols : imprionment of up to 3 years

Article 3 General aggravating circumstance for all offences committed with a view to discrimination ffor reasons of ethnic racial or religious hatred or in order to help

organisations with such purposes : sentence may be increased by up to half of the main penalty

Act n° 962-1967 (implementation of the 1948 Genocide Convention)
Sections 1-5, 6(2) *: Acts conducive to committing genocide : imprisonment of up to 30 years*
Section 8: Whoever publicly incites to commit any crimes predicted in articles 1 to 5, shall be punished, simply because of the instigation, with imprisonment from three to twelve years. The same penalty applies to anyone who publicly advocates any of the crimes provision in the preceding paragraph.

Code pénal, Article 403 (mod. L. 85/2006)
« (Offese a una confessione religiosa mediante vilipendio di persone). - Chiunque pubblicamente offende una confessione religiosa, mediante vilipendio di chi la professa, e' punito con la multa da euro 1.000 a euro 5.000. Si applica la multa da euro 2.000 a euro 6.000 a chi offende una confessione religiosa, mediante vilipendio di un ministro del culto».

Case Law

Organo giudicante: Corte Costituzionale **Deposito in Cancelleria:** 6/12/1958	

SENTENZA N. 74

ANNO 1958

REPUBBLICA ITALIANA

IN NOME DEL POPOLO ITALIANO

LA CORTE COSTITUZIONALE

composta dai signori Giudici:

Dott. Gaetano AZZARITI, Presidente

Avv. Giuseppe CAPPI

Prof. Tomaso PERASSI

Prof. Gaspare AMBROSINI

Prof. Ernesto BATTAGLINI

Dott. Mario COSATTI

Prof. Francesco PANTALEO GABRIELI

Prof. Giuseppe CASTELLI AVOLIO

Prof. Antonino PAPALDO

Prof. Nicola JAEGER

Prof. Giovanni CASSANDRO

Prof. Biagio PETROCELLI

Dott. Antonio MANCA

Prof. Aldo SANDULLI,

ha pronunciato la seguente

SENTENZA

nei giudizi riuniti di legittimità costituzionale della norma contenuta nell'art. 5 della legge 20 giugno 1952, n. 645, promossi con le seguenti ordinanze:

1) ordinanza 29 aprile 1957 emessa dal Pretore di Como nel procedimento penale a carico di Maccarrone Giovanni, pubblicata nella Gazzetta Ufficiale della Repubblica n. 161 del 28 giugno 1957 ed iscritta al n. 60 del Registro ordinanze 1957;

2) ordinanza 7 dicembre 1957 emessa dal Pretore di Forlì nel procedimento penale a carico di Fratesi Luigi, pubblicata nella Gazzetta Ufficiale della Repubblica n. 21 del 25 gennaio 1958 ed iscritta al n. 2 del Registro ordinanze 1958;

3) ordinanza 7 dicembre 1957 emessa dal Pretore di Forlì nel procedimento penale a carico di Monti Alberto, pubblicata nella Gazzetta Ufficiale della Repubblica n. 21 del 25 gennaio 1958 ed iscritta al n. 3 del Registro ordinanze 1958.

Viste le dichiarazioni di intervento del Presidente del Consiglio dei Ministri;

udita nell'udienza pubblica del 5 novembre 1958 la relazione del Giudice Giuseppe Cappi;

udito il vice avvocato generale dello Stato Cesare Arias per il Presidente del Consiglio dei Ministri.

Ritenuto in fatto

Su denuncia 26 marzo 1956 dell'Autorità di P. S. di Como, il Pretore di Como, con decreto penale l settembre 1956 condannava alla pena di L. 10.000 di ammenda il giovane Maccarrone Giovanni quale responsabile di contravvenzione all'art. 5 legge 20 giugno 1952, n. 645, per avere il 25 marzo 1956, in occasione di un comizio del M.S.I. tenuto dall'on. Almirante in Como nel Cinema Araldo, compiuto pubblicamente manifestazione usuale del disciolto partito fascista, tendendo il braccio nel saluto fascista-romano al momento del congedo del predetto deputato. Avendo il Maccarrone proposto opposizione, veniva rinviato a giudizio all'udienza del 29 aprile 1957. Al dibattimento il difensore preliminarmente eccepiva l'incostituzionalità dell'art. 5 della legge 20 giugno 1952, n. 645, e chiedeva il rinvio degli atti alla Corte costituzionale e ciò in riferimento all'art. 21, primo comma, della Costituzione. Il Pretore, sentito il P. M., pronunciava la seguente ordinanza: "Dato atto della richiesta del difensore perché sia sospeso il giudizio e siano inviati gli atti alla Corte costituzionale per l'esame della legittimità costituzionale dell'art. 5 legge 20 giugno 1952, n. 645, in relazione all'art. 21 della Costituzione. Ritenuto che la questione sollevata non appare manifestamente infondata e che il presente giudizio non può essere definito indipendentemente dalla risoluzione della questione di legittimità costituzionale. Visto l'art. 23 legge 11 marzo 1953, n. 87, sospende il giudizio in corso e ordina l'immediata trasmissione degli atti alla Corte costituzionale".

Dietro denuncia dell'Autorità di p. s. il Pretore di Forlì rinviava a giudizio il giovane Fratesi Luigi quale imputato della contravvenzione di cui all'art. 5 legge 20 giugno 1952, n. 645, "per avere in Forlì il 22 settembre 1957 salutato romanamente una comitiva di persone che su un'autocorriera si stava recando a Predappio a visitare la tomba del defunto Benito Mussolini". All'udienza del 7 dicembre 1957 la difesa dell'imputato eccepì in via preliminare la incostituzionalità dell'art. 5 legge 20 giugno 1952, n. 645, e perché in urto ed in contrasto con l'art. 21, primo comma, della Costituzione che garantisce la libertà di pensiero e di manifestazione, e perché il detto articolo 5 non può considerarsi norma di attuazione della XII disposizione transitoria e finale della Costituzione. Il Pretore pronunciava la seguente ordinanza: " Omissis .... ritenuto che la questione di incostituzionalità dell'art. 5 legge 20 giugno 1952, n. 645, non é manifestamente infondata in quanto detto articolo é in contrasto con la XII disposizione transitoria della Costituzione, la quale vieta la riorganizzazione del

disciolto partito fascista e nulla dispone nel caso vengano compiute manifestazioni usuali al disciolto partito, come nel caso in esame; ritenuto altresì, stante la sentenza 16 gennaio 1957 della Corte costituzionale con la quale veniva dichiarata la incostituzionalità dell'art. 4 legge 20 giugno 1952, n. 645, che appare opportuno che la Corte si pronunci anche sulla costituzionalità o meno dell'art. 5 stessa legge; P. q. m. ordina trasmettersi gli atti alla cancelleria della Corte costituzionale disponendo la sospensione del procedimento".

A seguito di denuncia dei carabinieri della stazione di Predappio, il Pretore di Forlì rinviava a giudizio il giovane Monti Alberto quale imputato della contravvenzione di cui all'art. 5 della legge 20 giugno 1952, n. 645, "per aver in Predappio il 22 settembre 1957 indossato la camicia nera mentre si accingeva a visitare la tomba del defunto Benito Mussolini". All'udienza del 7 dicembre 1957 la difesa del Monti sollevava l'identica eccezione di incostituzionalità già sollevata per l'imputato Fratesi e il Pretore pronunciava ordinanza identica a quella già sopra trascritta per il predetto Fratesi.

Le surriferite ordinanze venivano regolarmente notificate e pubblicate.

Nel giudizio avanti questa Corte non si costituivano le parti private; proponeva intervento il Presidente del Consiglio dei Ministri rappresentato e difeso dall'Avvocatura generale dello Stato.

In tutte e tre le cause l'Avvocatura dello Stato concludeva perché venisse respinta l'eccezione di illegittimità costituzionale sollevata dalla difesa degli imputati. Al riguardo faceva le seguenti osservazioni e deduzioni.

L'art. 5 della legge 20 giugno 1952, n. 645, non può che essere considerato una ulteriore specificazione della stessa ipotesi già prevista nel precedente art. 1 della legge, la quale ha inteso ricollegarsi al divieto contenuto nella XII disposizione transitoria della Costituzione concernente la riorganizzazione del disciolto partito fascista. Pertanto, continua l'Avvocatura, la legge 20 giugno 1952, n. 645, non può essere definita anticostituzionale perché attua una norma della Costituzione. L'esigenza poi di dare attuazione al divieto di riorganizzare il disciolto partito fascista non può, sempre secondo l'Avvocatura, ritenersi limitata alla repressione dell'associazione o del movimento già sorto, ma deve intendersi logicamente estesa a tutti quegli atti o fatti che in qualunque modo possano favorire la riorganizzazione di cui trattasi. Al riguardo l'Avvocatura, come già le ordinanze di rinvio, cita la sentenza n. 1 del 16 gennaio 1957 di questa Corte. In proposito non é inopportuno specificare che detta sentenza si occupava dell'art. 4 della legge 20 giugno 1952, n. 645, e affermò che l'apologia del fascismo prevista da tale articolo é stata legittimamente vietata costituendo una istigazione indiretta alla riorganizzazione del disciolto partito fascista e ciò in relazione alla XII disposizione transitoria della Costituzione.

L'Avvocatura ricorda poi che, anteriormente all'entrata in funzione della Corte costituzionale, la Cassazione aveva ritenuto legittima la legge 3 dicembre 1947, n. 1546, e in particolare l'art. 7 che costituisce l'antecedente della disposizione in esame. Secondo la Cassazione la figura di reato prevista da tale articolo fu dalla legge 20 giugno 1952 scissa in una ipotesi delittuosa per quanto attiene alla previsione della esaltazione delle persone e delle ideologie del fascismo ed in una ipotesi contravvenzionale per quanto attiene alla previsione delle manifestazioni di carattere fascista, specificando queste ultime anche in semplici parole o gesti usuali al partito fascista.

L'Avvocatura conclude per la legittimità costituzionale in quanto le manifestazioni fasciste, quando siano compiute pubblicamente, hanno la capacità di suscitare sentimenti nostalgici che potrebbero incoraggiare e favorire il risorgere di movimenti totalitari antidemocratici la cui organizzazione é stata, invece, vietata dalla Costituzione.

Considerato in diritto

La Corte ha ravvisato l'opportunità della riunione delle tre cause per la loro decisione con un'unica sentenza, trattandosi sostanzialmente di una stessa questione di legittimità costituzionale.

La norma, della cui legittimità si discute, é infatti in tutte quella contenuta nell'art. 5 della legge 20 giugno 1952, n. 645, anche se nella ordinanza del Pretore di Como la incostituzionalità é prospettata solo con riferimento all'art. 21, primo comma, della Costituzione, mentre nelle due ordinanze del Pretore di Forlì si aggiunge che detta norma é in contrasto con la XII disposizione transitoria della Costituzione e si fa inoltre richiamo, seppure non esattamente, alla sentenza 16 gennaio 1957, n. 1, di questa Corte.

In tale sentenza, nella quale, contrariamente a quanto é affermato nell'ordinanza del Pretore di Forlì, fu dichiarata infondata la questione di legittimità costituzionale dell'art. 4 della legge 20 giugno 1952, n. 645, si osserva che: "Come risulta dal contesto stesso della legge 1952... l'apologia del fascismo, per assumere carattere di reato, deve consistere non in una difesa elogiativa, ma in una esaltazione tale da poter condurre alla riorganizzazione del partito fascista. Ciò significa che deve essere considerata non già in sé e per sé, ma in rapporto a quella riorganizzazione, che è vietata dalla XII disposizione".

Questa disposizione pone sì un divieto, ma ciò non deve indurre nell'errore di farla considerare quasi come un divieto penale, costretto, nella interpretazione, entro i limiti della sua formulazione espressa. Le norme penali sono venute successivamente, con le leggi del 1947 e del 1952, sia nella parte sanzionatoria sia in quella precettiva. La XII disposizione transitoria va pertanto interpretata per quella che é, cioè quale norma costituzionale che enuncia un principio o indirizzo generale, la cui portata non può stabilirsi se non nel quadro integrale delle esigenze politiche e sociali da cui fu ispirata.

Riconosciuta, in quel particolare momento storico, la necessità di impedire, nell'interesse del regime democratico che si andava ricostituendo, che si riorganizzasse in qualsiasi forma il partito fascista, era evidente che la tutela di una siffatta esigenza non potesse limitarsi a considerare soltanto gli atti finali e conclusivi della riorganizzazione, del tutto avulsi da ogni loro antecedente causale; ma dovesse necessariamente riferirsi ad ogni comportamento che, pur non rivestendo i caratteri di un vero e proprio atto di riorganizzazione, fosse tuttavia tale da contenere in sé sufficiente idoneità a produrre gli atti stessi. Non é infatti concepibile che, mirando al fine di impedire la riorganizzazione, il legislatore costituente intendesse consentire atti che costituissero un apprezzabile pericolo del prodursi di un tale evento. Ciò risulta non soltanto dalla logica interpretazione dei motivi, e quindi dei limiti, della norma, ma dal testo medesimo della XII disposizione. Nel primo comma l'inciso "in qualsiasi forma" sta appunto a significare la preoccupazione del costituente di non irrigidire il precetto entro limiti formali e di mirare al di là degli atti di riorganizzazione strettamente intesi. Ciò si desume anche dal secondo comma della disposizione, il quale, conferendo al legislatore ordinario la potestà di fissare, per i capi responsabili del regime fascista, limitazioni temporanee al diritto di voto ed alla eleggibilità, mostrava di dare piena rilevanza ad una situazione che era appunto di mero pericolo. Ne deriva che il legislatore ordinario, nel dare con le sue norme concreta attuazione ai criteri espressi dalla norma costituzionale, era autorizzato a spingere i suoi divieti al di là degli atti veri e propri di riorganizzazione strettamente intesi, comprendendovi anche quelli idonei a creare un effettivo pericolo. Posto un tale principio é irrilevante che trattisi di delitto o di contravvenzione, perché, richiedendosi la obbiettività degli atti, può essere legittimamente oggetto di divieto penale ogni atto nel quale, sia pure in diverse proporzioni, quella idoneità si manifesti. Per le ipotesi previste dalla impugnata norma dell'art. 5 della legge del 1952, é noto che, trattandosi di fatti contravvenzionali, basta la volontarietà dell'azione, e - ben si intende - non dell'azione soltanto materialmente intesa, ma dell'azione in quanto costituisca manifestazione usuale del disciolto partito fascista. Sulla base dei limiti della volontarietà così intesa, non é escluso che anche siffatte minori manifestazioni possano in taluni casi essere tali da costituire, obbiettivamente, quel pericolo che, secondo lo spirito della norma costituzionale, si é inteso prevenire.

Chi esamini il testo dell'art. 5 della legge isolatamente dalle altre disposizioni, e si limiti a darne una interpretazione letterale, può essere indotto, come é accaduto alle autorità giudiziarie che hanno proposto la questione di legittimità costituzionale, a supporre che la norma denunziata preveda come fatto punibile qualunque parola o gesto, anche il più innocuo, che ricordi comunque il regime fascista e gli uomini che lo impersonarono ed esprima semplicemente il pensiero o il sentimento, eventualmente occasionale o transeunte, di un individuo, il quale indossi una camicia nera o intoni un canto o lanci un grido. Ma una simile interpretazione della norma non si può ritenere conforme alla intenzione del legislatore, il quale, dichiarando espressamente di voler impedire la riorganizzazione del disciolto partito fascista, ha inteso vietare e punire non già una qualunque manifestazione del pensiero, tutelata dall'art. 21 della Costituzione, bensì quelle manifestazioni usuali del disciolto partito che, come si é detto prima, possono determinare il pericolo che si é voluto evitare.

La denominazione di "manifestazioni fasciste" adottata dalla legge del 1952 e l'uso dell'avverbio "pubblicamente" fanno chiaramente intendere che, seppure il fatto può essere commesso da una sola persona, esso deve trovare nel momento e nell'ambiente in cui é compiuto circostanze tali, da renderlo idoneo a provocare

adesioni e consensi ed a concorrere alla diffusione di concezioni favorevoli alla ricostituzione di organizzazioni fasciste.

La ratio della norma non é concepibile altrimenti, nel sistema di una legge dichiaratamente diretta ad attuare la disposizione XII della Costituzione. Il legislatore ha compreso che la riorganizzazione del partito fascista può anche essere stimolata da manifestazioni pubbliche capaci di impressionare le folle; ed ha voluto colpire le manifestazioni stesse, precisamente in quanto idonee a costituire il pericolo di tale ricostituzione.

Con questa interpretazione, coerente a quella che la Corte costituzionale ha dato nella ricordata sentenza all'art. 4 della stessa legge, la norma denunziata si inquadra perfettamente nel sistema delle sanzioni dirette a garantire il divieto posto dalla XII disposizione transitoria, né contravviene al principio dell'art. 21, primo comma, della Costituzione.

In tal senso la norma dell'art. 5 é stata interpretata anche dalla Corte di cassazione, che in una recente decisione (Sez. III, 16 gennaio 1958), in applicazione del principio fissato dalla Corte costituzionale, ha testualmente detto: "Si comprende che una volta dichiarata dalla Corte costituzionale la legittimità costituzionale di una legge, il giudice dovrà applicarla secondo lo spirito della Costituzione per una adeguata applicazione al caso concreto. Non crede questo Supremo Collegio che il criterio interpretativo di così ampia portata adottato dalla Corte costituzionale sia suscettibile di modificazioni e che esso non conservi la sua validità anche quando non trattasi di atti che integrino vera e propria apologia del fascismo ma si esauriscono in manifestazioni come il canto degli inni fascisti, poiché si ha ragione di ritenere anche che queste manifestazioni di carattere apologetico debbano essere sostenute, per ciò che concerne il rapporto di causalità fisica e psichica, dai due elementi della idoneità ed efficacia dei mezzi rispetto al pericolo della ricostituzione del partito fascista e che, quando questi requisiti sussistono, l'ipotesi di cui all'art. 5 legge citata é costituzionalmente legittima. Questo principio é fondato sulla stessa ratio legis, che é quella di evitare, attraverso l'apologia e le manifestazioni proprie del disciolto partito, il ritorno a qualsiasi forma di regime in contrasto con i principi e l'assetto dello Stato: esso non può non investire ogni singola disposizione di cui si compone la legge 20 giugno 1952".

PER QUESTI MOTIVI

LA CORTE COSTITUZIONALE

pronunciando con un'unica sentenza sui tre procedimenti riuniti indicati in epigrafe:

dichiara infondata, nei sensi di cui in motivazione, la questione di legittimità costituzionale della norma contenuta nell'art. 5 della legge 20 giugno 1952, n. 645, in riferimento alle norme contenute nella XII delle disposizioni transitorie e finali e nell'art. 21, primo comma, della Costituzione.

Così deciso in Roma, nella sede della Corte costituzionale, Palazzo della Consulta, il 25 novembre 1958.

Gaetano AZZARITI - Giuseppe CAPPI - Tomaso PERASSI - Gaspare AMBROSINI - Ernesto BATTAGLINI - Mario COSATTI - Francesco PANTALEO GABRIELI - Giuseppe CASTELLI AVOLIO - Antonino PAPALDO - Nicola JAEGER - Giovanni CASSANDRO - Biagio PETROCELLI - Antonio MANCA - Aldo SANDULLI

Depositata in cancelleria il 6 dicembre 1958.

Italie

En décembre 2004, le Tribunal de première instance de Vérone a déclaré six membres de la Ligue du Nord coupables d'incitation à la haine raciale suite à une campagne visant à chasser un groupe de Sintis de son campement local provisoire. Ces membres ont été condamnés à six mois d'emprisonnement, à payer une somme de 45 000 euros pour préjudice moral et à l'interdiction avec sursis de participer à des campagnes et de se porter candidat à des scrutins locaux ou nationaux pendant trois ans.
[ECRI, Troisième rapport sur l'Italie adopté le 16 décembre 2005, CRI(2006)19, § 87]

In December 2004, the first instance Court of Verona found six local members of the Northern league guilty of incitement to racial hatred in connection with a campaign organised in order to send a group of Sinti away from a local temporary settlement. These persons were sentenced to six month jail terms, the payment of 45 000 Euros for moral damages and a three-year suspended ban from participating in campaigns and running for national and local elections.
[ECRI, Third report on Italy, adopted on 16 December 2005, CRI(2006)19, § 87]

In the case brought in front of the first instance Court of Verona concerning six local members of the "Lega Nord" found guilty of incitement to racial hatred in connection with a campaign organised in order to send a group of Sinti away from a local temporary settlement, these persons were sentenced to six month jail terms, the payment of 45 000 Euros for moral damages in favour of Opera Nomadi and individual victims – including costs for a sum of 4,000 Euros for each counsel - and a three-year suspended ban from participating in campaigns and running for national and local elections.
[ECRI, Third report on Italy, adopted on 16 December 2005, CRI(2006)19, "Italian remarks on the draft third report of the European Commission against Racism and Intolerance on Italy", p. 70]

An important case regards F. Tosi, current mayor of the municipality of Verona (member of the city council at the time of the described events), and other five members of his political party. The offences stemmed from a political campaign, entitled "Via gli zingari da Verona!", with the purpose to exclude the Sinti minority from the local community. The first instance judge convicted the six persons accused for the crime set out in Art. 3, par. 1 L. 654/75: spread of racist ideas and incitement to commit racial discrimination acts (Tribunal of Verona, dec. 2203/2004). The second instance judge confirmed the sentence with regard to the offence of "spreading", but discharged the defendants from "instigation", according to Art. 3.1 as reframed by the 2006 amendment (Court of Appeal of Venice, dec. 2.4.2007). The Supreme Court of Cassation issued a judgement on the case, stating the inconsistency of the Court of Appeal's reasoning (Cass. 13234/2008): the Court of Appeal restructured the argumentation but confirmed the sentence to two months imprisonment exclusively for "propaganda" of racist ideas (C. Appeal Venice 20.10.2008, finally corroborated by Cass. 41819/2009).

ITALIA - Cassazione condanna Flavio Tosi, sindaco di Verona, per propaganda razzista
La Corte di Cassazione ha confermato la sentenza di condanna a due mesi, con sospensione condizionale della pena, nei confronti di Flavio Tosi, sindaco di Verona, per propaganda di idee razziste. La vicenda risale al 2001, quando Tosi era consigliere regionale e organizzo' una raccolta di firme per sgombrare un campo nomadi abusivo nel capoluogo scaligero. Tosi era stato querelato da sette nomadi sinti e dall'Opera nazionale nomadi.

La sentenza della corte d'appello di Venezia e' stata pronunciata il 20 ottobre dello scorso anno. Gia' in primo grado, nel dicembre 2004 Tosi e altri cinque esponenti della Lega nord erano stati condannati per discriminazione razziale a sei mesi. Il 30 gennaio del 2007 la corte d'Appello di Venezia aveva ridotto le pene a due mesi, assolvendoli dall'accusa di odio razziale. Il verdetto era stato poi parzialmente annullato dalla Cassazione - con il mantenimento pero' dell'assoluzione per l'ipotesi di odio razziale - e rinviato a nuovo esame, sempre a Venezia.
GB: INCITAMENTO A ODIO RAZZIALE SU INTERNET, DUE IN CARCERE - Le due prime persone condannate in Gran Bretagna per incitamento all'odio razziale su Internet, due uomini di 51 e 42 anni, sono stati incarcerati oggi dopo essere stati rimpatriati dagli Stati Uniti dove erano riusciti a fuggire subito dopo la decisione del tribunale. Lo scrive la Bbc on line.
L'anno scorso un tribunale britannico aveva condannato Simon Sheppard, di Selby, a quattro anni e dieci mesi di carcere, e Stephen Whittle, di Preston, a due anni e quattro mesi. I due pero' erano in liberta' provvisoria ed erano riusciti a prendere un aereo per Los Angeles. Qui giunti, avevano chiesto asilo politico agli Stati Uniti, rivendicando il loro diritto alla liberta' di espressione. Dopo quasi un anno, l'ufficio immigrazione statunitense ha deciso che i due non avevano i requisiti per ottenere l'asilo politico e li ha rispediti in Gran Bretagna. Dove stati incarcerati.
Secondo il tribunale britannico che li ha condannati, i due hanno messo in circolazione su Internet materiale 'scottante' che incita all'odio razziale: Sheppard ha scritto gli articoli, Whittle li ha messi in rete. Tra l'altro hanno pubblicato articoli che mettono in ridicolo gruppi etnici. Secondo il giudice britannico, si tratta di materiale 'offensivo', che puo' potenzialmente causare gravi turbative sociali.
[Immigrazione, Diritti degli stranieri in Italia, Notizia del 11 luglio 2009, immigrazione.aduc.it (http://immigrazione.aduc.it/notizia/cassazione+condanna+flavio+tosi+sindaco+verona_111000.php)]

Italy / Sinti - Opera Nomadi *vs* 5 militants of the Northern League in Verona

Subtitle	Sentence nr. 2203/04, date of deposit: 24/02/2005.
Inventory No.	CASE 82 1
Deciding body	Tribunale di Verona - Sezione Penale [Court of Justice of Verona - Criminal Section]
Date	Date of decision: 02.12.2004
Deciding Body	National court / tribunal
Topic	Hate speech
Keywords	Political party, legal finding, court decision, Italy, Anti-Roma racism, Promotion of racial discrimination and hatred
Abstract	Key facts of the case: In 2001, a local branch of the Northern League Party launched a public campaign in Verona 'to drive away Gypsies' from a camp in the town. Militants of the League (including a regional councillor, two provincial councillors and three presidents of the administrative districts) were accused by a group of anti-racist associations. Main reasoning/argumentation: The six defendants were sentenced to a six-months jail term each for incitement to racial hatred, to moral damages of EUR 35,000 to five members of the local Sinti community, of EUR 10,000 to Opera Nomadi, and to pay EUR 4000 as legal fees to each of the four lawyers representing the various associations. In addition, the court banned the defendants from participating in political campaigns during political and administrative elections for a period of three years. The latter was an additional sanction, not requested by the public prosecutor and was suspended conditionally for five years as the main sanction. Key issues (concepts, interpretations) clarified by the case: The ruling upheld that the association Opera Nomadi had a legitimate interest in the case and assigned it redress for moral damages, even though its members are predominantly non-Roma/Sinti. The ruling reiterated interpretations of the Court of Cassation that incitement to racial hatred and racist propaganda cannot be considered as legitimate manifestations of freedom of opinion and speech because they violate the constitutionally protected principle of the dignity of the person. Results and most important consequences, implications of the case: The sentence provoked fierce attacks not only against the chief public prosecutor in particular and the judiciary as a whole, but also against the criminal law provision that punishes incitement to racial hatred and which made the prosecution possible. This law was modified early in January 2006, making it more lenient. The reduction of the original penal sanctions against racist propaganda and the spreading of ideas based on racial superiority is based on the consideration that these are crimes of opinion. This case is innovative because it rejected the claim by the defence that the campaign to drive the Sinti away from Verona was a legitimate political activity of a legal political party. The sentence does not make any reference to the equal treatment directive. It draws entirely from criminal law provisions and other international instruments against racial discrimination and no references to it have emerged so far in other proceedings. Moreover, the sentence contains ample legal, sociological, cultural, political and historical analysis of racism, xenophobia, nationalism etc. with direct bibliographical references to prominent studies on racism at national and international levels.

[FRA database]

Italy / Suprema Corte di Cassazione- Sentence nr. n.9381/2006

Inventory No.	CASE 88 1
Deciding body	[Supreme Court of Cassation]
Date	Date of decision: 20.01.2006
Deciding Body	National court / tribunal
Topic	Hate speech
Keywords	Legal finding, court decision, Italy, Racism and xenophobia, Racial hatred
Abstract	Key facts of the case: Appeal against the aggravating circumstance in a decision of the Court of Appeal of Trieste, which upheld a previous ruling in a case involving a man who insulted a 6-year old child in public by shouting at her: 'Go away from here, dirty nigger'. The defendant claimed that there was no discriminatory intent nor racial hatred behind the insult. Rather it was due to the unfair treatment he received from the residents of the district, including the little girl's father. Main reasoning/argumentation: The court confirmed discriminatory intent or racial hatred as an aggravating circumstance in the case, arguing that not only is the word 'nigger' considered as negative racial qualification, but also that the adjective 'dirty' only reinforces the intent to induce sense of inferiority in the little girl. In support of the shared sense of negativity of the expression 'dirty nigger', the sentence cites the fact that same expression is used frequently by football fans to offend black players from rival club sides. Key issues (concepts, interpretations) clarified by the case: In refusing the respondent's claim that he had no discriminatory intent, the sentence makes reference to the definition of racial discrimination contained in article 1 of the New York Convention of 7th March 1996, highlighting the alternative between 'intent' or 'effect' contained in the definition. It upholds the previous decisions, saying that the expression is always a racist insult, contrary to a ruling by another section of the same court (sentence nr. 44295/2005) which stated that the incriminated expression does not always constitute an aggravating circumstance as it is not always an expression of hate. Results and most important consequences, implications of the case: The court confirmed the sentence issued by the Court of Appeal, that had condemned the man to pay EUR 1200 and to compensate the plaintiff for moral damages. It reverses a previous ruling on same topic in a different case which did not consider racial hatred as an aggravating circumstance. The sentence deals with a very common form of racism: racial insults which, as clearly pointed out in the sentence, are quite common in sport events, particularly in football matches where there are black players. The ruling a few months before this, which claimed that 'dirty nigger' is not always an expression of hate but rather 'a generic manifestation of exclusion' was widely criticised. No reference is made to the Racial Equality Directive nor to the transposition decree.

[FRA Database]

Italy
Criminal law

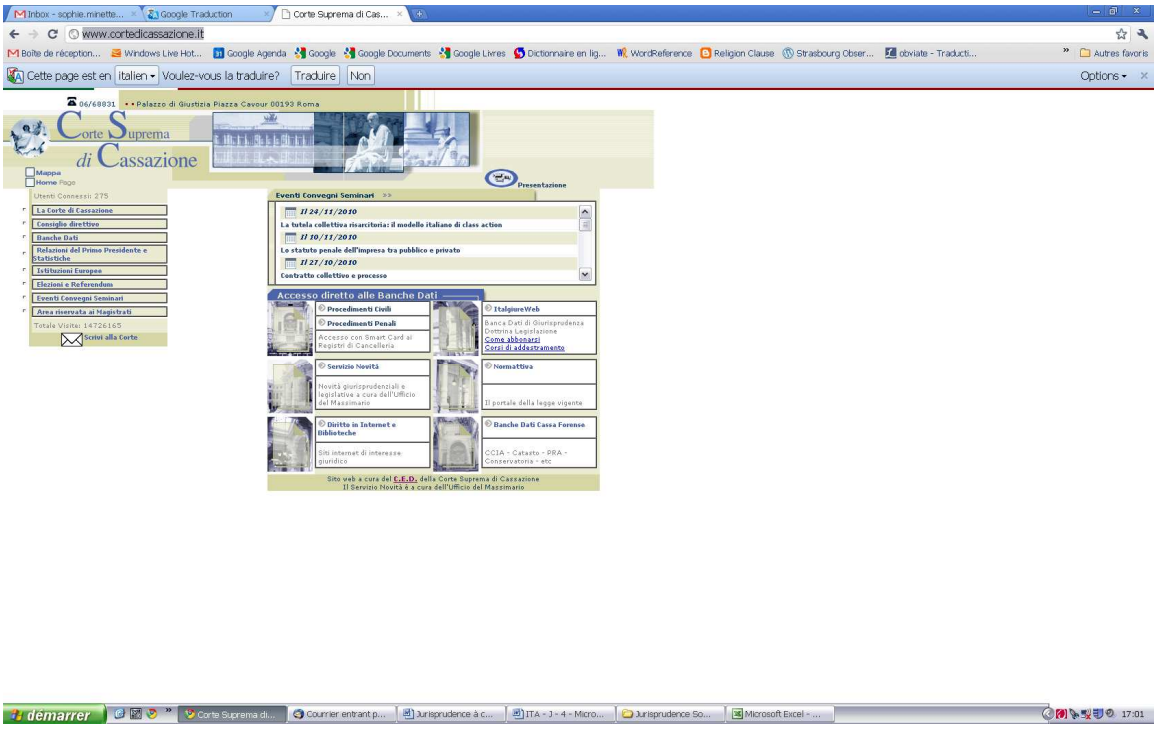
Offence	Source	Scope	Sanction	Relevant Jurisprudence	Remarks
Spread of ideas rooted in racial hatred or superiority: incitement to commit or the commission of discriminatory acts of racial, ethnic, national or religious reasons.	Section 3 (1) a of Act n°654 of 1975, as amended by Act n° 205 of 25 June 1993		Imprisonment of up to 3 years. Additional penalties: a) unpaid community service ; b) temporary prohibition from taking part in election campaigns ; c) ban on attending sports events.		Thus amended in 1993, when a more precise distinction was drawn between "discriminatory acts" and "violents acts or provocation" and additional penalties were introduced.
Incitement to commit or the commission of violent acts or provocation for racial, ethnic, national or religious reasons.	Section 3 (1) b of Act n°654 of 1975, as amended by Act n° 205 of 25 June 1993		Imprisonment of up to 4 years. Additional penalties: a) unpaid community service; b) temporary prohibition from taking part in election campaigns; c) ban on attending sports events.	Court of Cassation 26 January 1997: where incitement has taken place, it is immaterial whether the persons targeted responded or not to that incitement.	Thus amended in 1993, when a more precise distinction was drawn between "discriminatory acts" and "violents acts or provocation" and additional penalties were introduced.

Association, organisation, group or movement, the purpose of which is incitement to racial discrimination or hatred.	Section 3 (2) of Act n°654 of 1975, as amended by Act n° 205 of 25 June 1993	The mere participation in, or giving of assistance to, an association or organisation of this kind is punishable; the penalty is aggravated for those who promote or act as leaders of such an organisation or group.	Prison. Additional penalties: a) unpaid community service ; b) temporary prohibition from taking part in election campaigns ; c) ban on attending sports events ; d) dissolution of the association and confiscation of its property (Section 7 of Act n°205 of 1993.	Court of Cassation 10 January 2002: the limits set by the provisions on freedom of expression are constitutionally justified; it is an offence characterised by a specific intent ("dolo specifico"), namely the will to violate, and an awareness of violating, human dignity on the grounds of racial or ethnic or religious characteristics (see also Court of Cassation 24 November 1999).	Amended in 1993: the bas has been widened to include groups and movements and a distinction is drawn between mere participation or assistance and promoting or running such groups, etc.

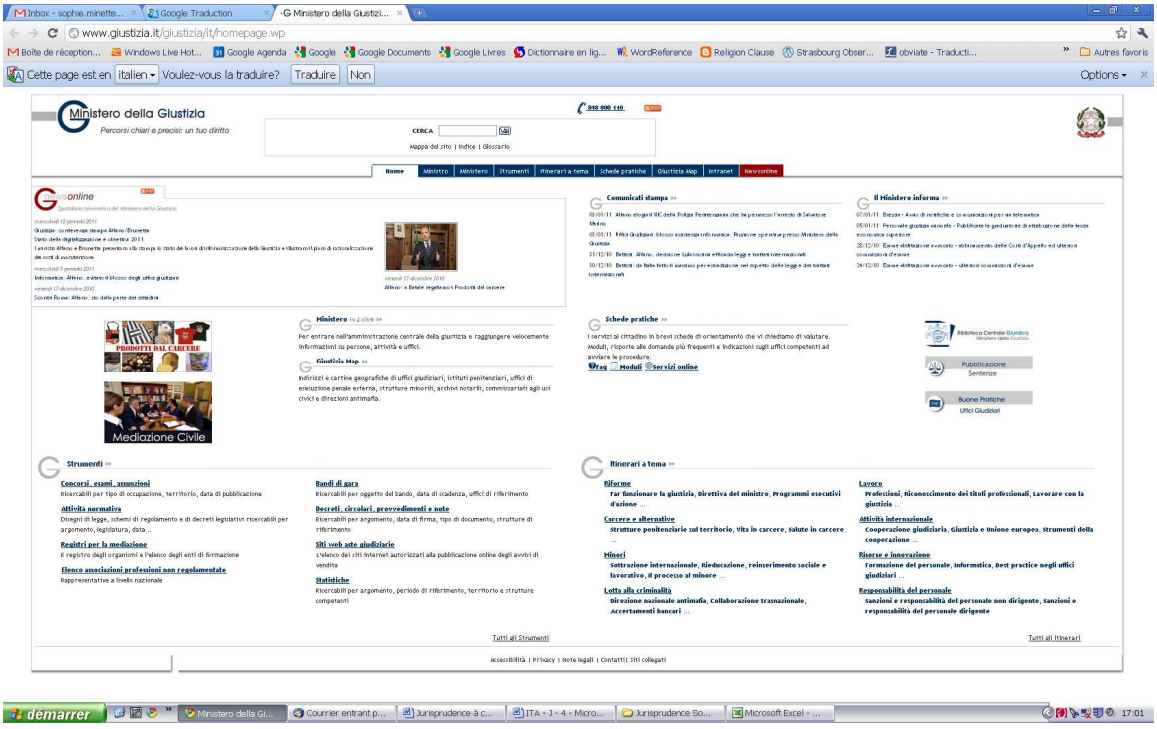
[ECRI, Italy – General overview, "Legal measures to combat racism and intolerance in the member Sates of the Council of Europe", Situation as of 31 December 2004, pp. 12-13]

Italy

Court of Cassation: http://www.cortedicassazione.it/



Judiciary organization: http://www.giustizia.it/giustizia/it/homepage.wp



Public Policies

European Commission against Racism and Intolerance
Commission européenne contre le racisme et l'intolérance

CRI(2006)19

Third report on Italy

Adopted on 16 December 2005

Strasbourg, 16 May 2006

COUNCIL OF EUROPE CONSEIL DE L'EUROPE

such as ethnic origin or religion is subject to specific data protection safeguards and that the debate on the use of this type of data as a tool for combating racial discrimination is only just starting in Italy. ECRI understands that monitoring by nationality reflects a situation where most members of minority groups are non-citizens. It stresses however, that there are members of minority groups who are Italian citizens and that their number is bound to increase rapidly. There is therefore a need to consider ways of adapting the systems for monitoring the situation of minority groups to these changing circumstances.

83. The Italian authorities do not systematically collect data concerning the implementation of existing criminal, civil and administrative law provisions against racism and racial discrimination. ECRI has been informed, however, that the Ministry of Justice and UNAR are collaborating in order to improve collection of this type of data as concerns the criminal justice system.

Recommendations **:**

84. ECRI recommends that the Italian authorities improve their systems for monitoring the situation of minority groups by collecting relevant information broken down according to categories such as ethnic origin, language, religion and nationality in different areas of policy and to ensure that this is done in all cases with due respect for the principles of confidentiality, informed consent and the voluntary self-identification of persons as belonging to a particular group. These systems should also take into consideration the gender dimension, particularly from the point of view of possible double or multiple discrimination.

85. ECRI recommends that the Italian authorities collect readily available and accurate data on the implementation of the criminal, civil and administrative law provisions in force against racism and racial discrimination. This data should cover the number and nature of the complaints filed, the investigations carried out and their results, charges brought, as well as decisions rendered and/or redress or compensation awarded.

II. SPECIFIC ISSUES

Use of racist and xenophobic discourse in politics

86. In its second report, ECRI expressed concern at the widespread use made of racist and xenophobic discourse by the exponents of certain political parties in Italy. It noted that members of the Northern League (*Lega Nord*) had been particularly active in resorting to this type of discourse, although members of other parties had also sometimes made use of xenophobic or otherwise intolerant discourse. ECRI notes with regret that since then, some members of the Northern League have intensified the use of racist and xenophobic discourse in the political arena. Although locally-elected representatives of this party have been particularly vocal in this respect, representatives exercising important political functions at national level have also resorted to racist and xenophobic discourse. Such discourse has continued to target essentially non-EU immigrants, but also other members of minority groups, such as Roma and Sinti. In addition, since ECRI's second report, Muslims have increasingly been the target of political racist and xenophobic discourse. In some cases, this type of discourse has consisted in generalisations concerning these minority groups or in their humiliating and degrading characterisation, even taking the form of propaganda aimed at holding non-citizens, Roma, Sinti, Muslims and other minority groups collectively responsible for a deterioration in public security in Italy. Racist and xenophobic discourse has gone as far as presenting the

members of these groups as a threat to public health and the preservation of national or local identity, resulting in some cases in incitement to discrimination, violence or hatred towards them.

87. In its second report, ECRI recommended that the Italian authorities ensure that the criminal law provisions in force against incitement to discrimination and violence on racial, ethnic, national or religious grounds are fully applied. ECRI notes that in December 2004, the first instance Court of Verona found six local members of the Northern League guilty of incitement to racial hatred in connection with a campaign organised in order to send a group of Sinti away from a local temporary settlement. These persons were sentenced to six month jail terms, the payment of 45 000 Euros for moral damages and a three-year suspended ban from participating in campaigns and running for national and local elections.

88. In its second report, ECRI recommended that, in addition to ensuring an effective implementation of the existing criminal law provisions against incitement to racial hatred, the Italian authorities adopt legal provisions targeting specifically the use of racist and xenophobic discourse by exponents of political parties. ECRI notes that no such provisions have been adopted since ECRI's second report.

89. In its second report, ECRI expressed concern that the influence exercised by the Northern League, a part of the government coalition, on the whole political arena may favour the adoption of policies and practices not always respectful of human rights and of the principle of equal treatment, which ECRI stands to protect. As illustrated by other parts of this report, ECRI considers that, since then, these concerns have become more pressing.

Recommendations **:**

90. ECRI reiterates that political parties must resist the temptation to approach issues relating to non-EU citizens and members of other minority groups in a negative fashion and should instead emphasise the positive contribution made by different minority groups to Italian society, economy and culture. Political parties should also take a firm stand against any forms of racism, discrimination and xenophobia. ECRI reiterates its recommendation that an annual debate be instigated in Parliament on the subject of racism and intolerance faced by members of minority groups.

91. ECRI strongly recommends that the Italian authorities take steps to counter the use of racist and xenophobic discourse in politics. To this end it recalls, in this particular context, its recommendations formulated above concerning the need to ensure an effective implementation of the existing legislation against incitement to racial discrimination and violence[37]. In addition, ECRI calls on the Italian authorities to adopt *ad hoc* legal provisions targeting specifically the use of racist and xenophobic discourse by exponents of political parties, including, for instance, legal provisions allowing for the suppression of public financing for those political parties whose members are responsible for racist or discriminatory acts. In this respect, ECRI draws the attention of the Italian

[37] See above, "Criminal law provisions".

[38] ECRI General Policy Recommendation N°7, paragraph 16 (and paragraph 36 of the Explanatory Memorandum).

ITALY: THE UNAR EDUCATIONAL CAMPAIGN IN THE SCHOOLS

The National Office against Racial Discrimination (UNAR) in collaboration with the General Direction for the Student within the Ministry of Education has promoted a competition for the school-year 2004/2005 with the title "*Proposals and practices to deal with different culture in the schools life*".

This competition is aimed at involving both the students of the primary and secondary schools in Italy and the teachers that will have the possibility to realise "Intercultural projects" for the promotion of equal treatment and removal of all racial discrimination behaviours. The competition wants to realize the sensibility, originality, confrontation and intercultural dialogue, trough the language of the draw, cinema and video, theatre and writing, and the planning elaboration. An evaluation Commission composed by member of the UNAR and by the General Direction for the Student will evaluate and select two awards for the section A ("Intercultural projects" only for the teachers) and six awards for the sections B-C-D (Art and Image, Writing, Audio-visual only for the students).

In occasion of the Human rights international day, the 10th of December, the competition will end giving the prizes to the winners. The first classify school for the section A and the first classify for the primary and secondary schools for the other 3 sections will get € 3.000. The second classify school for the section A and the second classify for the primary and secondary schools for the other 3 sections will get € 2.000.
The amount of the prize will be used to promote several initiative to welcome and integrate the students with another ethnic background different from the Italian one.
All the schools that have participated to the competition will receive an information kit, with a DVD a book and a poster, about UNAR's activities and anti-discrimination legislation.

The expire date to collect all the projects is fixed at 30th May.

I NOSTRI SITI

www.foreignersinuk.co.uk
www.thepolishobserver.co.uk
www.theafronews.eu
www.ziarulromanesc.net
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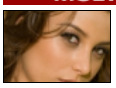

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ILJA RICHARD PAVONE*

Italian Experiences in Combating Hate Crimes and Hate Speech in Light of Recent Violence by and Against Roma**

Abstract. This paper provides an overview of national efforts to combat racism, xenophobia and intolerance in the italian legal framework. It looks specifically at Law n. 94/2009 on public security and its compliance with European and international legal standards. Specifically, the study is devoted to the key issue of the different treatment of Roma and Sinti in Italy due to their legal status.

Keywods: xenophobia; racism; human rights; Roma; Sinti; Law n. 94/2009 on public security; European law; international law

1. Introduction

Public opinion regarding the presence of immigrants in the country has recently been fed with media reports on atrocious crimes committed by foreigners, exacerbating feelings of insecurity, fear, and even xenophobia among Italians.[1] Recently, Italy registered several episodes of xenophobia and racism: in January 2010 a racist attack on African migrant workers in the Southern region of Calabria by local gangs brought to the surface the Italian society tensions that had been simmering for some time. It's an issue of strict actuality because Italy has one of the fastest growing immigrant populations in Europe, with immigrants now reaching about 7 percent of the population.[2]

The EU Special Barometer of July 2009 reported that Italy scored some of the lowest results among the EU member States, as regards "the level of comfort with person from different ethnic origin as a neighbour and especially as regards the comfort with Roma neighbour".

Another special country-based survey of the same EU institution reported a higher than the EU average (76% and 62% respectively) percentage of interviewees in Italy who thought that discrimination on the basis of ethnic origin was "very or fairly widespread".

Apart the issue of racial discrimination and xenophobia against immigrants, there is the problem of Roma and Sinti in Italy.[3] Usually known as Gypsies (a misnomer, derived

* Researcher of International Law, Institute for International Legal Studies, Italian National Research Council, *www.isgi.cnr.it.*
E-mail: ilja.pavone@isgi.cnr.it

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[1] See Beutin, R. et al.: Reassessing the Link between Public Perception and Migration Policy. *European Journal of Migration and Law*, 9 (2007) 4, 389–418.

[2] See Caritas Europe: Annual Activity Report Edition, 2009.

[3] In this paper we will use the term Roma and Sinti–instead of "nomads" as these people are often quoted in italian documents–in line with UN and OSCE language. The terms "Roma" and "Sinti" are authentic proper names meaning "person". Those of eastern European descent are called "Roma" and those of central European origin are referred to as "Sinti". On the other hand, the foreign term "gypsy" is regarded by most minority members as discriminatory. For further reading see Fraser,

from an early legend about Egyptian origins) defy the conventional definition of a population: they have no nation-state, speak different languages, belong to many religions and comprise a mosaic of socially and culturally divergent groups separated by strict rules of endogamy.

Their total amount is 150,000. They include (i) Italian citizens, as well as citizens of both (ii) EU and (iii) non-EU countries. Groups of Roma and Sinti migrated to Italy during different periods, beginning in the 14th century. In the 1980s and 1990s, the conflicts in the former Yugoslavia caused Roma to flee to other countries, including Italy. In the 1990s and the first decade of this century, a large number of Roma arrived from the States of Central and Eastern Europe. The most recent influx of Roma and Sinti communities has come mainly from Romania: these movements intensified since Romania joined the EU in 2007.[4]

In the Italian legislation, nomads are not considered as a minority group and their legal status differs: after Romania's accession to the EU in January 2007, the Romanian Roma became EU citizens and gained the right to free movement within the European Union, while Roma from Western Balkans are non-EU nationals. Many of them have no documents providing their identity or places of origin rendering them *de facto* stateless (with particular negative consequences for children). They are technically subject to Italian immigration legislation.[5]

Although they do not have a large presence in Italy, Romanian Roma migrants have attracted considerable public attention and negative media coverage, due to growing prejudice and the link between Roma and Sinti migrants, criminality and threats to public security. In November 2007, the murder of an Italian woman, by a Romanian Roma, was highly publicized on the Italian media and let to a series of attacks on Roma, culminating in a mob burning down a Roma settlement in Ponticelli (in the suburbs of Naples) in May 2008 after a young Roma woman living in the settlement was accused of kidnapping a baby from a local couple. The Italian government responded to these events introducing a number of measures affecting specifically the Roma and Sinti population in Italy.

2. The Italian response to violence committed by Roma

Since May 2008, a number of government decisions have been issued concerning the Roma and Sinti communities, or "nomads", as they are commonly referred to in Italy. The Prime Minister issued a decree declaring a "state of emergency" in relation to settlements of

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A. M.: *The Gypsies.* Oxford, 1995; Hancock, I.: Gypsy History in Germany and Neighbouring Lands: A Chronology Leading to the Holocaust and Beyond. In Crowe, D. M.–Kolsti, J. (eds): *The Gypsies of Eastern Europe.* Armonk (NY), 1991; Kalaydjieva, L. et al.: A newly discovered founder population: the Roma/Gypsies. *Bioessays,* 27 (2005) 10, 1084–1094; Liegeois, J. P.: *Roma/Gypsies: A European Minority.* London, 1995.

[4] See Ban, C.: Economic Transnationalism and its Ambiguities: The Case of Romanian Migration to Italy. *International Migration,* September 2009.

[5] The Committee on the Elimination of Racial Discrimination (CERD), after examining the periodical report submitted by Italy according to Art. 9 of the UN Convention on the Elimination of all Forms of Racial Discrimination of 1965, *warned the Italian institutions that they must recognise the Roma as an official minority and adopt policies aimed at addressing their needs.* The CERD "recalling its general recommendation Nº 27 on discrimination against Roma, recommends that the State Party adopt and implement a comprehensive national policy as well as legislation regarding Roma and Sinti with a view to recognizing them as a national minority and protecting and promoting their languages and culture" (para. 12).

"nomad" communities in some regions[6] (measure based on Law n. 225/1992 which deals with emergency situations arising from severe natural disasters[7]) and three "ordinances" introducing special and exceptional measures concerning "nomad settlements" in the some regions. The state of emergency lasted until 31 May 2009. Following this decree, the prime minister issued on 30 May 2008 three 'ordinances' introducing special and exceptional measures concerning 'nomad settlements' in the regions of Campania, Lazio and Lombardia and which appointed the prefects of Rome, Milan and Naples as 'delegated commissioners' with powers to carry out 'all the interventions needed to overcome the state of emergency' in relation to Roma and Sinti settlements in those regions.[8] Their specific powers include the monitoring of formal and informal camps, identification and census of the people, including minors, who are present there, the expulsion and removal of persons with irregular status, measures aimed at clearing "camps for nomads" and evicting their inhabitants; as well as the opening of new "camps for nomads".

The government stated that the Ordinances were adopted in order to speed up the administrative procedures, including agreements to build new camps as well as to identify the due additional economic resources from within the State's Budget, in order to grant *ad hoc* reception measures, build new structures and improve those already existing. The Ordinances also entail specific support measures to promote the integration of people in the settlements through comprehensive projects having an integrated nature aimed at facilitating the school enrolment and the search for employment.

Following the issuing of the ordinances, the authorities initiated a census including the collection and use of personal data of nomads (fingerprints of minors).[9] These measures were justified as being necessary to provide support to individuals in camps and to prevent further degradation of their living conditions, as well as to identify people involved in criminal activities. With regard to minors involved in begging and stealing, the stated aim was to identify them and those forcing them into criminal activities. Once such data are collected, the plan was to dismantle criminal networks, put a stop to exploitation of children, assist children with their school registration, and provide them with adequate health care. Harsh criticisms to these policies adopted and implemented by the Italian Government have

[6] Italy, Decree of the President of the Council of Ministers (21/05/2008). "Dichiarazione dello stato di emergenza in relazione agli insediamenti di comunità nomadi nel territorio delle regioni Campania, Lazio e Lombardia" [Decree of the President of the Council of Ministers of 21 May 2008. Declaration of a state of emergency in relation to settlements of nomad communities in the territory of the regions of Campania, Lazio and Lombardia]. Published in the *Official Gazette* No 122 of 26 May 2009.

[7] Law no. 225 of 24 February 1992, "Institution of the National service of the civil protection".

[8] 'Disposizioni urgenti di protezione civile per fronteggiare lo stato di emergenza in relazione agli insediamenti di comunità nomadi nel territorio della regione Lazio, della regione Lombardia e della regione Campania' [*Urgent provisions of civil protection in order to face the state of emergency in relation to settlements of nomad communities for the regions of Campania*] (Ordinance No. 3678).

[9] The special Commissioners are allowed to derogate from a number of laws concerning a wide spectrum of issues affecting constitutional prerogatives, for instance the right to be informed when subjected to administrative procedures such as photographing, fingerprinting or the gathering of anthropometric data.

been made at European level.[10] In particular, some scholars argued a violation of Article 6 paragraph 1 of the Council of Europe's Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data,[11] which states: "Personal data revealing racial origin, political opinions or religious or other beliefs, as well as personal data concerning health or sexual life, *may not be processed automatically unless domestic law provides appropriate safeguards*. The same shall apply to personal data relating to criminal convictions." The Ordinances would not provide the "appropriate safeguards" requested by the Framework Convention.

On 17 July 2008, the Ministry of Interior issued specific guidelines concerning the application of the orders on "emergency" concerning nomads'camps. The aim of these guidelines is to end the situation of degradation and make conditions liveable for those Roma and Sinti communities living in authorized or illegal settlements by providing humanitarian assistance, improving their access to health care, education and social assistance (with particular emphasis to children and schooling).

The Police conducted forced evictions and dismantling of several illegal camps that caused high rates of criminality in the surrounding areas. The Major of Rome, in accordance with the Plan for Nomads issued in 2009 (relocation of many camps realized by settling the people concerned into "authorized villages"[12]) proceeded on 15 February 2010 to the definitive closure of the Nomad Camp Casilino 900.

3. The Italian Legal Framework

The principle of non-discrimination is one of the main pillars of the Italian Constitution (Art. 3) upon which the domestic legislative system is based and enforced, particularly by the domestic Courts.[13] The presence of this article in the Constitution gives equality and

[10] Office for Democratic Institution and Human Rights, High Commissioner on National Minorities, Assessment of the human rights situation of Roma and Sinti in Italy, Report of fact-finding mission to Milan, Naples and Rome on 20–26 July 2008, 7.

[11] CETS No.: 108. The Convention was opened for signature in Strasbourg on 28 January 1981 and entered into force on 1 October 1985. Italy ratified the Convention with Law 21 febbraio 1989, n. 98, published in the Official Gazzette *n. 066 SUPPL.ORD. of 20 March 1989.*

[12] Vitale, T.: Politique des évictions. Une approche pragmatique. In: Cantelli, F.–Pattaroni, L.–Roca, M.–Stavo-Debauge, J. (sous la direction de): *Sensibilités pragmatiques. Enquêter sur l'action publique*. Bruxelles, 2009, 71–92.

[13] The principle of equality and non-discrimination is included in all human rights treaties and declarations. Non-discrimination is both a human right of its own and a constitutive element of all human rights. Non-discrimination rules are to be found at international, supranational (EU) and national level. The United Nations (UN), which was created in the aftermath of the horrors of racism, fascism and National Socialism, has since its very beginning placed the battle against discrimination in the forefront of its human rights activities. Indeed, one of the purposes of the UN, as they are enunciated in the UN Charter, is to promote and encourage the respect for human rights and fundamental freedoms for all "without distinction as to race, sex, language, or religion". By now, the principle of non-discrimination has undoubtedly acquired the status of a fundamental rule of international human rights law. It has been expressly included in most international human rights documents and is implicitly embedded in almost all individual human rights provisions, which are usually worded in universal language, such as "everyone has the right to education" or "no one shall be subjected to arbitrary arrest, detention or exile". It is widely held that the principle of non-discrimination is a principle of customary international law and, at least as regards discrimination on

non-discrimination principles the status of paramount values. Moreover Art. 3 provides a benchmark against which subsequent national and regional laws and regulations can be evaluated when the suspicion of discriminatory provisions exists. In this field, the action of judges is important, as on the basis of this national legislation has to be interpreted and can even be declared unconstitutional and disapplied.

The Criminal Code of Italy contains provisions that expressly enable the racist or other bias motives of the offender to be taken into account by the courts as an aggravating circumstance when sentencing. In particular, Section 3(1)(b) of Law 654/1975, as amended by Section 3 of the Law 205/1993 (which defines racial discrimination as both a crime in itself and as an aggravating factor in other criminal acts) introduces a general aggravating circumstance for all offences committed with a view to discrimination on racial, ethnic, national or religious ground or in order to help organizations with such purposes.

The Italian legal framework against racial discrimination has been reinforced by Legislative Decree No. 215 of 9 July 2003 which foreseen the creation of the National Office Against Racial Discrimination (UNAR). UNAR was established by Decree of the President of Council of Ministers (PCM) of 11 December 2003,[14] in accordance with Art. 13 of Council Directive 2000/43/EC enshrining the principle of equal treatment of all people regardless of their race or ethnic origin.[15]

UNAR carries out in an autonomous and independent way activity of promotion against any form of racism and intolerance. In particular, it provides judicial assistance, it carries out inquiries and it disseminates informations and knowledge on this topic. UNAR promoted the establishment of Agreement Protocols with lawyers' associations available to offer pro-bono juridical assistance to alleged victims of racial or ethnic discrimination.

Very important in this context is the adoption of Law n. 101 of 6 June 2008 which provides for an explicit shift of the burden of proof from the complainant to the respondent (in civil and administrative law) in cases of "prima facie discrimination".

4. Law n. 94/2009 on Public Security

Recently, Law N° 94 of 15 July 2009 titled "Regulations about public security", presents considerable amendments in matters concerning immigration.[16] The most important amendment is the introduction of the new crime of "illegal entry and sojourn in the territory of the State" (Article 1, subpara. 16), entrusted to the competence of the Justice of Peace, which punishes the behaviour of a foreigner who enters or remains in the State, infringing

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the basis of sex, race and ethnic origin, that it also has a status of *jus cogens.* See Fredman, S.: *Human Rights Transformed*: *Positive Rights and Positive Duties*. Oxford, 2008, 175–180; Janis, M. W.: *International Law*. New York, 2009, 65–67.

[14] Italy / Decreto del Presidente del Consiglio dei Ministri (11.12.2003).

[15] Council Directive 2000/43/EC implementing the principle of equal treatment between persons irrespective of racial or ethnic origin–June, 29th 2000. O.J. L 180, 19 July 2000, 22–26. Article 19 of the Consolidated Version of the Treaty on the Functioning of the European Union, as amended in Lisbon, provides: "Without prejudice to the provisions of this treaty and within the limits of the powers conferred by it upon the Community, the Council, acting unanimously on a proposal from the Commission and after consulting the European Parliament, may take appropriate action to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation".

[16] Published in the Official Journal (*Gazzetta Ufficiale*) no. 170, on 24 July 2009.

the regulations of the consolidating legislation on immigration and Law N° 68/2007 (regarding short-term stays) with a fine.[17]

The offence is accompanied by a series of additional sanctions: expulsion, discontinuance of the crime once the "irregular" foreigner is outside Italian territory, the possibility of expelling the "illegal immigrant" even when there is no authorisation. The legal measures contained in this Law with other laws approved by the Italian Government and Parliament in 2008, becomes part of a whole "Security Package", that is, a group of provisions addressing security concerns and issues with a variety of different legal means. In particular, the provisions of Law no. 94 affect several laws already in effect, amending–among others–the Criminal Code, the Code of Criminal Procedure, the Highway Code, the Immigration Law. Adoption of Law no. 94/2009 represents a comprehensive legal action based on the necessity to deal with relevant–and quite heterogeneous–social issues, furthering protection for the weakest members of society–women and children–the fight against illegal immigration. The Law was supported by 157 votes in favour and 124 against and it was particularly opposed by left-wing parties within the Parliament and heavily criticized by the legal doctrine and the public opinion, due to its alleged discriminatory and racial contents.[18]

Among the most important rules introduced by Law no. 94/2009, are worth noting, at the outset, some legal measures against illegal immigrants in the Italian territory whose *rationale* would lie in the enhancement of the fight against illegal immigration. The most relevant measure has been the introduction in the Italian Criminal Code of a provision making illegal immigration a crime. Indeed, Art. 1, s.16, lett. *a)* of Law no. 94/2009 amended Art. 10 *bis* of Legislative Decree 286/1998 (Immigration Law), qualifying as a penal offence–punished with a fine from 5 000 to 10 000 Euros–the entrance and stay in the State territory of a foreign national, performed in violation of the Italian Immigration Law's provisions on lawful entry and stay requirements. This provision is the most criticized of the whole Law and the Italian Constitutional Court has been already called upon to judge on its constitutionality. Indeed, as of today the Tribunals of Pescara, Torino, Bologna, Agrigento and Trento have challenged the Law before the Constitutional Court claiming a contrast with Art. 10 Cost.–affirming that International Law principles are recognized in the Italian legal system,–since International Law provides that illegal entrance in a State must be subject to administrative sanctions and not criminal ones; with Art. 3 Const.–the equality clause, implying also a principle of reasonableness of the State action–, since Law no. 94/2009 would lack any legal justification, in light of the fact that in the Italian legal system Criminal sanctions must be used only as *extrema ratio*; as far as the equality principle is concerned, the Law would also introduce an unreasonable difference between the treatment of illegal immigrants and of those already living in Italy; with Art. 2 Const., which establishes that Italy must guarantee fundamental human rights.

The newly introduced Art. 61, s.1, num. 11*bis* of the Italian Criminal Code (introduced by Art. 1, s.1, Law no. 94 and applicable to all crimes in the Criminal Code) provides that a sentence will be increased in case a crime is committed by an illegal immigrant on the

[17] For a comment on this Law, see Hammarberg, T.: It is wrong to criminalize migration. *European Journal of Migration and Law*, 11 (2009) 4, 383–385.

[18] For an analysis of the reasons of the outcomes of the Italian mechanisms of immigration controls see Finotelli, C.–Sciortino, G.: The Importance of Being Southern: The Making of Policies of Immigration Control in Italy. *European Journal of Migration and Law,* 11 (2009) 2, 119–138.

Italian soil. This rule applies only with regard to extra EU citizen and stateless people. Other restrictive regulations are provided for those foreigners who want to get married in Italy: indeed, the original formulation of Art. 116 of the Italian Civil Code, titled "Marriage with a foreigner within the State", requested that the foreigner, who wanted to get married in Italy–irrespective of getting married with an Italian citizen or a foreign national–had to show to the Italian public officer for the registry and marriage office, that no legal obstacles to the marriage were present, and that all other documents and requirements requested also to Italian citizens were present (e.g. publication of the banns). The new text of Art. 116 of the Civil Code, as modified by Art. 1 s.15 of Law no. 94/2009, obliges a foreigner who wants to get married in Italy to both show that no legal obstacles are present, and to provide for a certification demonstrating the legitimacy of his/her presence in the national territory. Moreover, foreign and stateless spouses, applying for Italian citizenship, must show presence on the Italian territory for a period of at least 2 years (by way of difference with the six months' residence period formerly required) after the marriage. Citizenship will be granted only if the marriage is still valid and the couple is not separated. More restrictive regulations has been set out for special crimes directly affecting a natural person and in particular those affecting women and children. Among the most relevant, it is worth citing the provision qualifying as a crime (and no longer as a mere "offence") the employment of children for begging, and punishing it with a three years' imprisonment.

The conviction for this crime, as well as the one for crimes of enslavement, female genital mutilation or sexual assault committed by a parent or by the legal curator, brings with it the automatic loss and the perpetual disqualification from guardianship. The purpose of these provisions is to enhance children's protection (in particular Roma and Sinti minors) and answer the increasing social concern deriving from crimes committed in schools. The means chosen to answer these concerns are the increase of punishment, provided mainly with the introduction of a common aggravating circumstance (Art. 61, s.1, n. 11*ter* of the Italian Criminal Code), applicable to those committing a crime against a minor near or inside schools or other educational institutions. The same aggravating circumstance applies also for group sexual assault crimes committed near a school against an adult.

5. Compliance of Italy with Human Rights Standards

Italy is a party to the following international treaties that prohibit racial and ethnic discrimination and set standards for the treatment of aliens, refugees and asylum seekers: the International Covenant on Civil and Political Rights (ICCPR), the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT), the International Covenant on Economic, Social and Cultural Rights (ICESCR), the International Convention on the Elimination of all Forms of Racial Discrimination (ICERD), the International Convention on the Rights of Children (CRC) and the Convention relating to the Status of Refugees ("1951 Refugee Convention").

Italy is not a party to the United Nations Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (CMW), the European Convention on Nationality and the United Nations 1964 Convention on the Reduction of Statelessness, the three key instruments that protect the rights of migrants and stateless persons.

The CMW, adopted by the UN General Assembly with resolution 45/158 of 18 December 1990 and in force since 1 July 2003, points out that "the human problems involved in migration are even more serious in the case of irregular migration" (Preamble). It therefore encourages "appropriate action… in order to prevent and eliminate clandestine

movements and trafficking in migrant workers" (ib.). It is worth noting that the measures it deems should be taken, within the jurisdiction of each State concerned, are not directed to irregular migrants, but to those who cause the phenomenon. It in fact calls for "appropriate measures against the dissemination of misleading information relating to emigration and immigration" and the imposition of "effective sanctions on persons, groups or entities which use violence, threats or intimidation against migrant workers or members of their families in an irregular situation" (Art. 68). It instead urges signatories to assure the protection of the fundamental human rights of irregular migrants (Preamble). Indeed, it affirms that "every migrant worker and every member of his or her family shall have the right to recognition everywhere as a person before the law" (Art. 24) and that appropriate measures should be taken "to ensure that migrant workers are not deprived of any rights … by reason of any irregularity in their stay or employment".[19]

The new Italian law, on the contrary, has tightened the norms related to the irregular status of foreigners, and has transformed irregular migration into a criminal offence instead of the administrative breach that it used to be. This change has significant repercussions in the concrete life of the migrant and his family. To start with, it will be difficult for the irregular migrant to find lodging, since whoever rents an apartment to people in his condition runs the risk of imprisonment. It will be difficult if not impossible for him to send remittances back home through money transfer services, since this requires the presentation of a regular permit to stay in the country. This is a serious concern for the welfare of the families who have stayed behind in the home country and also deprives their countries of origin of that income that their poor economies badly need. Law n. 94 does not seem to be "family-friendly". Since all legal acts regarding the civil status requires the presentation of a regular permit to stay, an irregular migrant cannot be registered as a parent of a child who may even have a legal status in Italy. The child will therefore have to be identified as one with unknown parent.

At regional level, Italy is also a party to the Council of Europe's Convention on Human Rights and Fundamental Freedoms (ECHR)[20] and the European Social Charter, whose

[19] For an overview on the implementation of the Convention see Abimourched, R.–Martin, S.: Migrant Rights: International Law and National Action. *International Migration,* 47 (2009) 5, 115–138.

[20] The European Court of Human Rights has recently developed its jurisprudence related to racial discrimination in highly significant ways. The Court has rightly been applauded for abandoning its requirement that racial discrimination be proved "beyond reasonable doubt" and for endorsing the concept of indirect discrimination, allowing it, in the last five years, to begin to find states from "Eastern Europe" in violation of the Convention for having discriminated against especially Roma applicants. While welcome, these new developments should not detract from the need to continue asking difficult questions, including the following: why has it taken decades for the Court to start finding a violation of Article 14 on grounds of race? Why are cases, such as *Menson v. United Kingdom* concerning the slow reaction of the police in investigating the lethal attack of a black man, not found admissible? Can we expect the Court, created in a region which largely built itself upon colonialism, to generate mechanisms fit to tackle racism? In the past, judges themselves have provided the most virulent critique of the Court's inability to tackle racism. Migrants still remain to benefit from their progressive stance in relation to Article 14 claims based on grounds of race. See Dembour, M.-B.: Still Silencing the Racism Suffered by Migrants. The Limits of Current Developments under Article 14 ECHR. *European Journal of Migration and Law*, 11 (2009) 3, 221–234.

preamble establishes the principle of non-discrimination and whose Art. 19 sets out obligations for the equal treatment of migrant workers.

At European level, Chapter III of the EU Charter on Human Rights (included in the Lisbon Treaty, entered into force on 1 December 2009) is devoted entirely to equality. Italy is likewise bound by European Union Directives, in particular European Union Council Directive 2000/43/EC implementing the principle of equal treatment between persons irrespective of racial or ethnic origin (the "Racial Equality Directive") and European Union Council Directive 2004/38/EC on the right of citizens of the Union and their family members to move and reside freely within the territory of European Union Member States (the "Freedom of Movement Directive").[21]

The Directive sets out common standards and procedures in the Member States for returning irregularly staying third country nationals (the Returns Directive). While its impact in terms of harmonising national legal frameworks can be questioned, from the Member States' point of view the agreed standards will underpin their common efforts at removing a higher number of irregular immigrants. From the point of view of immigrants, it will mean longer pre-removal detention periods and a ban on re-entering legally the Union's territory for the foreseeable future.[22]

The Emergency Measures, described above in paragraph 2, according to some scholars, have led directly to the impermissible discriminatory treatment of Roma and Sinti by: (a) defining the very presence of the Roma and Sinti (called 'Nomadi' in the Emergency Measures) as grounds for a state of emergency, creating an intimidating, hostile, degrading environment; (b) directly discriminating against Roma and Sinti by mandating a compulsory census on the basis of their accommodation in camps for nomads created by the government; (c) allowing the creation of an ethnic database of Roma and Sinti without adequate safeguards; (d) allowing unlawful searches of the homes of Roma and Sinti; and (e) permitting destruction of Roma and Sinti settlements and effective evictions without provision for adequate alternate housing.[23]

As part of the Emergency Measures, the Italian government has conducted an official census of Roma and Sinti, which has included a collection of fingerprints, photographs, information on ethnic background and religion, and other personal data. This ethnicity-specific census is in direct violation of ICCPR Art. 17 (guaranteeing the right to respect for family life), as well as ICCPR Art. 26 (the right to non-discrimination). Documentation carried out by non-governmental organizations indicate that many Roma and Sinti felt coerced into complying with this census, either because they felt they did not have any other choice, or because police and NGO census takers provided false information about the nature and purpose of the census to Roma and Sinti living in the camps.

[21] For an overview of EU migration and non-discrimination policy see Peers, S.: Key Legislative Developments on Migration in the European Union. *European Journal of Migration and Law*, 9 (2007) 4, 451–456.

[22] See Baldaccini, A.: The Return and Removal of Irregular Migrants under EU Law: An Analysis of the Returns Directive. *European Journal of Migration and Law*, 11 (2009) 1, 1–17; Acosta, D.: The Good, the Bad and the Ugly in EU Migration Law: Is the European Parliament Becoming Bad and Ugly? (The Adoption of Directive 2008/15: The Returns Directive). *European Journal of Migration and Law*, 11 (2009) 1, 19–39.

[23] See e.g.: Discrimination against Roma in Italy worries UN rights experts. UN press release, <http://www.un.org/apps/news/story.asp?NewsID=27373&Cr=Human>

There are documented cases in which both Italian and non-Italian Roma and Sinti were subjected to the census under explicitly forceful and intimidating circumstances. For example, in the semiformal Camp Tor di Quinto-Baiardo and the formal Camp Tor de Cenci in Rome, where part of the census was conducted in July 2008, officials were reportedly aggressive and violent toward residents, including searching residents' homes using dogs and without a court order. The Italian government has not made clear what it will do with the sensitive information, including fingerprints and information on minors, collected in the database. In the course of implementation of the Emergency Measures, Roma and Sinti communities were subjected to unlawful searches. A number of their settlements were destroyed without advance notice, consultation, or respect for due process of law. The authorities have carried out evictions without providing assurances of adequate alternative accommodations. Several such raids took place in Milan and Turin in 2007. These forced evictions without remedy are in direct violation of Articles 2 and 17 of the ICCPR as well as Art. 11 of the ICESCR.

6. Conclusions

Building equal opportunities for Roma and Sinti minorities requires the establishment of human living conditions. National governments must make clear their political will and support for the promotion of these minorities through the implementation of adequate infrastructure projects. The United Nations and other institutions, such as the European Union, must also make a considerable contribution to such programmes. Members of the minority and their own organizations should be included, from the planning to the implementation of an infrastructure for such projects, to a far greater extent than has thus far been the case. Only if we systematically resist racism and discrimination will majority and minority groups be able to coexist peacefully, with equal rights in all countries of the world.

Certainly, States have the right to control their borders and make sure that it is not a porous entry for criminals, who may also take advantage of the misery and desperate conditions of would-be immigrants. However, justice and solidarity are not antonyms, they come hand in hand, just like public security and welcome. National common good, in any case, has to be considered in the context of the universal common good.

As seen in previous paragraphs, Roma and Sinti contribute to create an atmosphere of insecurity among citizens living in the suburbs of cities like Rome, Milan and Naples. As such, States have a duty to take effective measures to guarantee public security of their citizens. National counter-crime strategies should, above all, seek to prevent acts of violence, robberies, prosecute those responsible for such criminal acts, and promote and protect human rights and the rule of law.

While the complexity and magnitude of the challenges facing States and others in their efforts to balance public security issues and human rights can be significant, international human rights law is flexible enough to address them effectively. Effective public security measures and the protection of human rights are complementary and mutually reinforcing objectives which must be pursued together as part of States' duty to protect individuals within their jurisdiction. At the outset, it is important to highlight that the vast majority of counter-crime measures are adopted on the basis of ordinary legislation. In a limited set of exceptional national circumstances, some restrictions on the enjoyment of certain human

rights may be permissible.[24] These challenges are not insurmountable. States can effectively meet their obligations under international law by using the flexibilities built into the international human rights law framework. Human rights law allows for limitations on certain rights and, in a very limited set of exceptional circumstances, for derogations from certain human rights provisions. These two types of restrictions are specifically conceived to provide States with the necessary flexibility to deal with exceptional circumstances, while at the same time–provided a number of conditions are fulfilled–complying with their obligations under international human rights law.

[24] See, Human Rights Committee, general comment N° 31, para. 6, and Siracusa Principles on the limitation and derogation of provisions in the International Covenant on Civil and Political Rights (E/CN.4/1985/4, annex).

Latvia

Criminal Code (1998) Section 78 - Violation of National or Racial Equality and Restriction of Human Rights

For a person who commits acts knowingly directed towards instigating national or racial hatred or enmity, or knowingly commits the restricting, directly or indirectly, of economic, political, or social rights of individuals or the creating, directly or indirectly, of privileges for individuals based on their racial or national origin, the applicable sentence is deprivation of liberty for a term not exceeding three years or a fine not exceeding sixty times the minimum monthly wage.

For a person who commits the same acts, if they are associated with violence, fraud or threats, or where they are committed by a group of persons, a State official, or a responsible employee of an undertaking (company) or organisation, the applicable sentence is deprivation of liberty for a term not exceeding ten years.

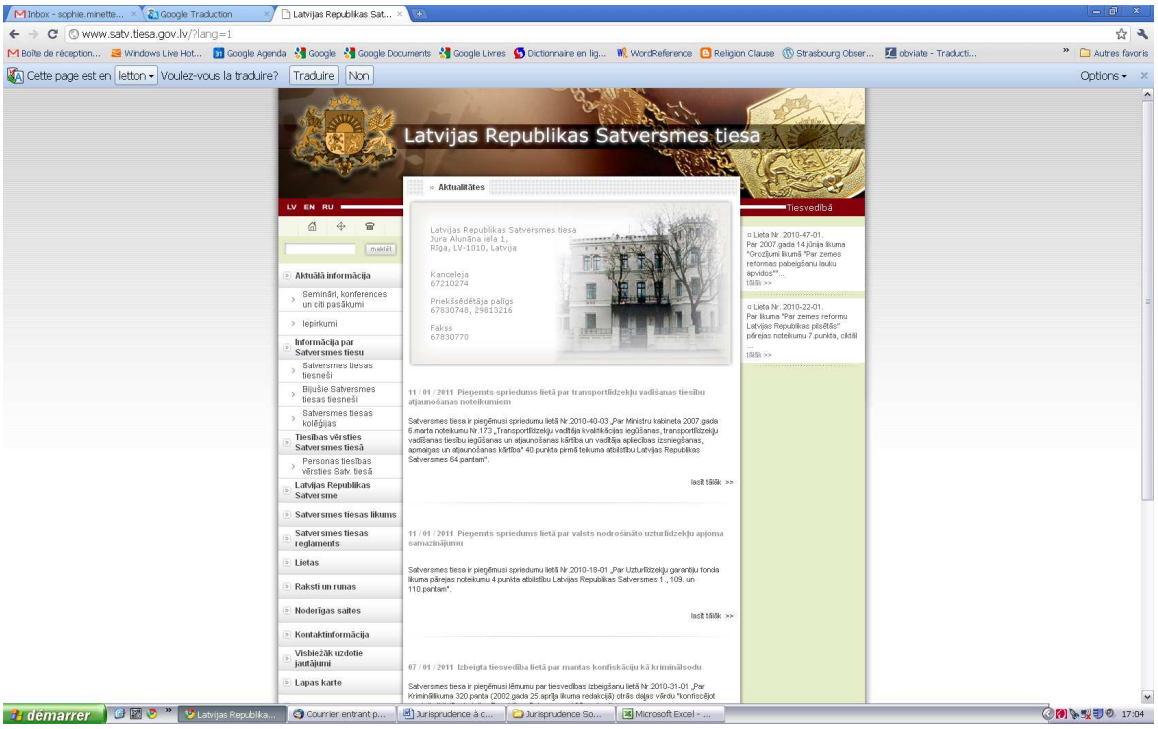
Criminal Code (1998) Section 150 - Violation of Equality Rights of Persons on the Basis of their Attitudes Towards Religion

For a person who commits direct or indirect restriction of the rights of persons or creation of whatsoever preferences for persons, on the basis of the attitudes of such persons towards religion, excepting activities in the institutions of a religious denomination, or commits violation of religious sensibilities of persons or incitement of hatred in connection with the attitudes of such persons towards religion or atheism, the applicable sentence is deprivation of liberty for a term not exceeding two years, or community service, or a fine not exceeding forty times the minimum monthly wage.

Case Law

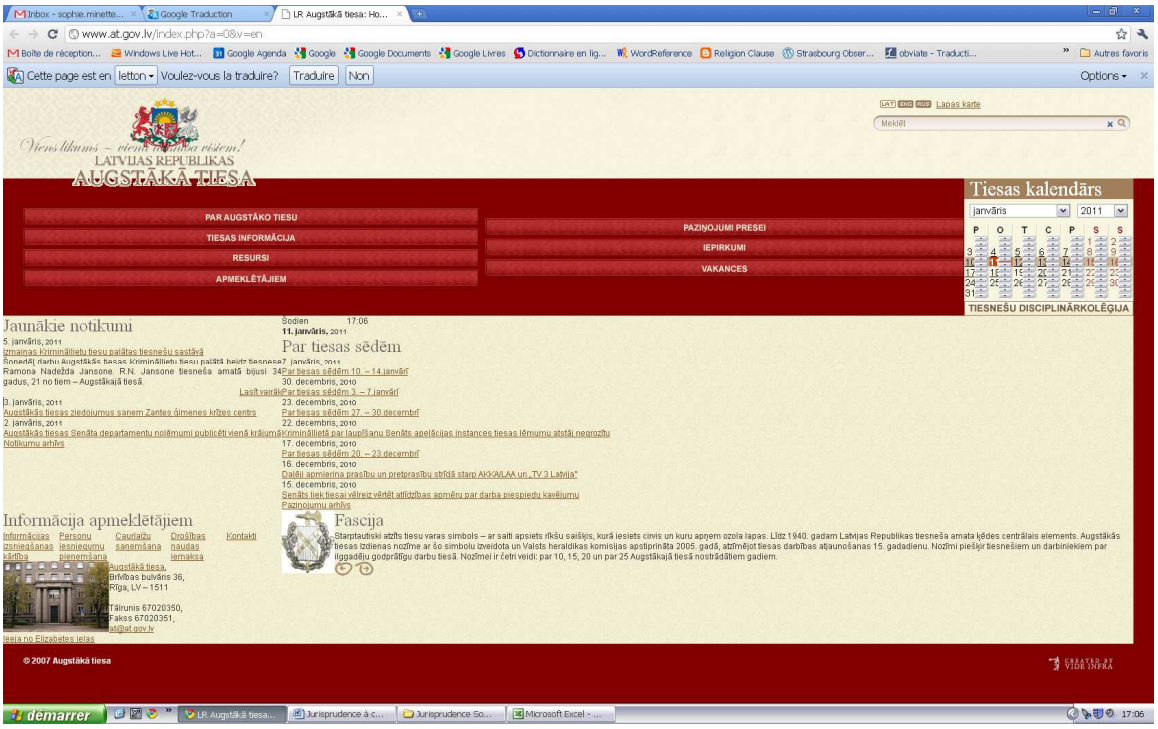
Latvia

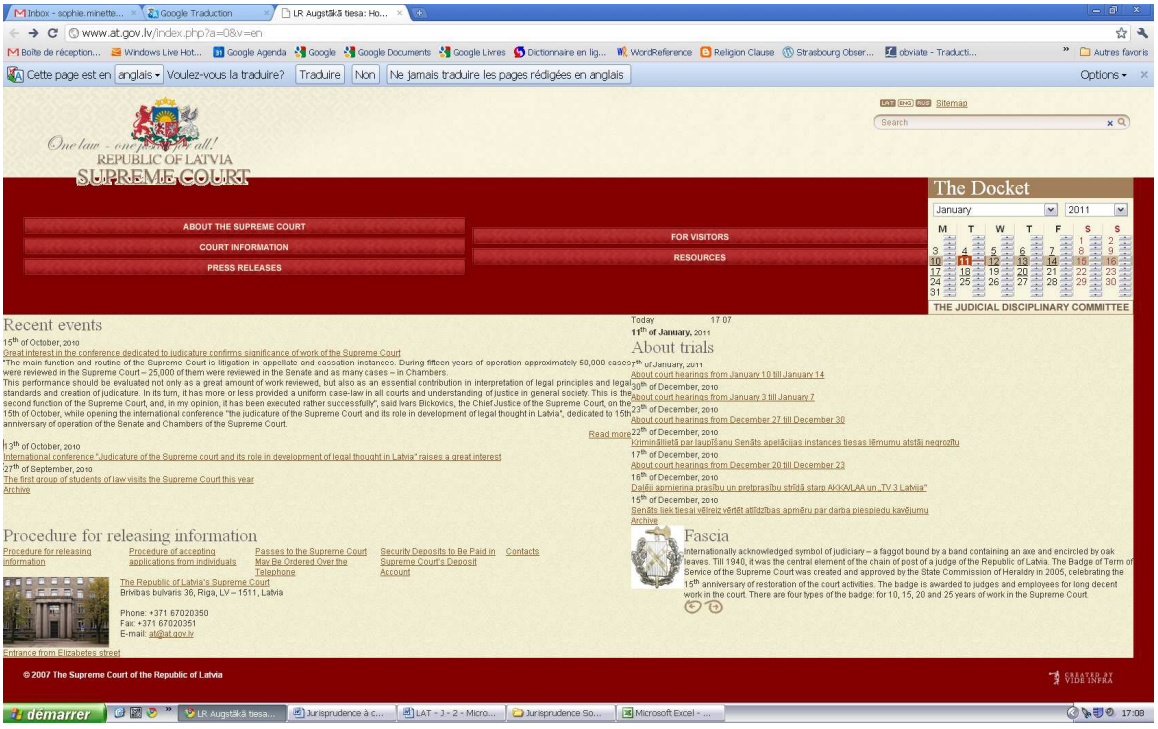
Constitutional Court : http://www.satv.tiesa.gov.lv/?lang=1



Latvia

Supreme Court: http://www.at.gov.lv/index.php?a=0&v=en





Public Policies

KALENDĀRS

← Nov			Dec			Jan →
29	30	1	2	3	4	5
6	7	8	9	10	11	12
13	14	15	16	17	18	19
20	21	22	23	24	25	26
27	28	29	30	31	1	2

Informācijas atjaunošanas datums:
22.12.2010 18:56
Apmeklējumi -> Šodien: 124, Vispār: 131783

ZIŅAS

Satversmes tiesas spriedums lietā par sanitāro apstākļu normām īslaicīgās aizturēšanas vietās
22.12.2010

Satversmes tiesa ir pieņēmusi spriedumu lietā Nr.2010-44-01 "Par Aizturēto personu turēšanas kārtības likuma 7.panta piektās daļas 1.punkta vārdu „kuras augstums nepārsniedz 1,2 metrus" un pārejas noteikumu 1.punkta atbilstību Latvijas Republikas Satversmes 1. un 95.pantam".

vairāk

Pasniegta balva 1000 EUR vērtībā Latvijas žurnālistei Eiropas Savienības konkursa "Kopā pret diskrimināciju" ietvaros
14.12.2010

Piektdien, 10.decembrī Tiesībsarga 2010. gada konferencē, kur eksperti no dažādām institūcijām diskutēja par vārda brīvības ierobežojumiem un sociālās atstumtības riskiem vecuma dēļ tika godināti Eiropas Savienības žurnālistu balvas "Kopā pret diskrimināciju" laureāti.

vairāk

Tiesībsarga 2010.gada konferencē tiks diskutēts par vārda brīvības ierobežojumiem un sociālās atstumtības riskiem vecuma dēļ (papildināts)
09.12.2010

Visiem cilvēkiem piemītošās cieņas un viņu vienlīdzīgu un neatņemamu tiesību atzīšana ir brīvības, taisnīguma un vispārēja miera pamats", teikts ANO Vispārējās cilvēktiesību deklarācijas Preambulā. Kopš 1948.gada 10.decembra, kad tika pieņemts šis pirmais starptautiska mēroga cilvēktiesību dokuments, ik gadu 10.decembrī pasaulē atzīmē Cilvēktiesību dienu. Šajā dienā arī Tiesībsargam ir tradīcija organizēt konferenci, kurā diskutējam par dažādiem cilvēktiesību jautājumiem, kas attiecīgajā gadā ir aktuāli Tiesībsarga darbā un sabiedrībā kopumā.

vairāk

Tiesībsargs: tiek pārkāptas personu tiesības, kuras nav parādā par siltumenerģiju
04.11.2010

Tiesībsargs Romāns Apsītis uzskata, ka tiek pārkāptas to personu patērētāju tiesības, kuras ir veikušas maksājumus par siltumenerģijas pakalpojuma nodrošināšanu, bet nesaņem to citu personu dēļ, kuras šos maksājumus nav veikušas. Līdz ar apkures sezonas uzsākšanos, Tiesībsarga birojā aizvien vairāk tiek saņemti personu iesniegumi par siltumenerģijas pakalpojumu nenodrošināšanu personām, kuras ir pildījušas savas saistības par siltumenerģijas pakalpojumu saņemšanu.

vairāk

Solidaritātes pasākumi, kas veltīti cīņai pret nabadzību un sociālo atstumtību
27.10.2010

Eiropas gada (2010) cīņai pret nabadzību un sociālo atstumtību ietvaros atklās īpašus iedzīvotāju solidaritātes pasākumus Rīgā. Tiesībsarga birojs kopā ar pasākumu rīkotājiem – Eiropas Komisiju, Labklājības ministriju un Rīgas Domi piedalīsies pasākumā „RĪGA VIENO: Cilvēki. Iespējas. Atbalsts", kas notiks š.g.28.oktobrī, tirdzniecības centrā „Origo" kurā piedalīsies arī dažādu sociālās atstumtības riskam pakļauto iedzīvotāju grupas.

vairāk

GADA ZIŅOJUMS

Tiesībsarga ziņojums par 2009.gadu
31.03.2010

Saskaņā ar Tiesībsarga likuma 15.panta pirmo daļu Tiesībsargs reizi gadā sniedz Saeimai un Valsts prezidentam rakstveida ziņojumu par Tiesībsarga biroja darbu. Mājas lapas sadaļas "Publikācijas" apakšsadaļā "Gada ziņojumi" Jūsu uzmanībai ir ievietots Tiesībsarga ziņojums par 2009.gadu.

vairāk

JAUTĀJUMI UN ATBILDES

Jautā Tiesībsargam

Savus jautājumus Tiesībsargam Tu vari uzdot šeit.

Baznicas iela 25, Rīga, LV-1010
tālr.: 67686768, fakss: 67244074
e-pasts: tiesibsargs@tiesibsargs.lv

Liechtenstein

Criminal Code, Section 283 - Racial Discrimination
I. A person shall be punished with imprisonment of up to two years if he or she

1) publicly incites hatred or discrimination against a person or a group of persons on the basis of race, ethnicity or religion;

2) publicly disseminates ideologies aimed at the systematic disparagement or defamation of members of a race, ethnicity or religion;

3) organizes, promotes, or participates in propaganda actions with the same objective;

4) publicly disparages or discriminates against a person or a group of persons on the basis of race, ethnicity or religion in a manner violating human dignity, by means of spoken words, writing, images, electronically transmitted symbols, gestures, physical violence or any other means;

5) publicly denies, grossly plays down the harm or attempts to justify genocide or other crimes against humanity, by means of spoken words, writing, images, electronically transmitted symbols, gestures, physical violence or any other means;

6) denies a service he or she provides that is meant for the general public to a person or a group of persons on the basis of race, ethnicity or religion;

7) participates as a member in an association whose activities consist of promoting and inciting racial discrimination.

II. A person shall be punished in the same manner, if the person

1) manufactures, imports, stores or distributes, for the purposes of further dissemination, documents, sound or image recordings, electronically transmitted symbols, depictions or other objects of this sort whose content is a racial discrimination within the meaning of paragraph I.

2) publicly recommends, exhibits, offers or presents them.

III. Paragraphs I and II do not apply if the propaganda material or the act serves the purpose of art or science, research or education, appropriate reporting on current events or history, or similar purposes.

Criminal Code, Section 321 Genocide : Commission of certain acts with the intention of wholly or partially destroying a religiously, racially, ethnically or nationally distinct group as such. The relevant acts are: killing members of the group; inflicting serious physical or mental injury on its members; subjecting the group to living conditions likely to cause death to all members or a part of the group; imposing measures designed to prevent births within that group; or forcibly transferring children of the group to another group.

Criminal Code, Section 33/5 Aggravating circumstance (for any kind of crime) if the perpetrato has acted out of raciste, xenophonbic or other partuclarly reprehensible motives

Case Law

Décision 1 JG 2005.32 à 49 du **02.08.2006**
Cour : **Oberste Gerichtshof (OGH)** (dernière instance)
Liechtenstein

Leitsatz 1a

Der Aufschub des Ausspruches einer Strafe entspricht selbst bei der gegebenen "Mittelkriminalität" dem Geist und Zweck der Bestimmung des § 8 JGG, zumal durch die Anordnung der Bewährungshilfe und die dem Bewährungshelfer erteilten Weisungen die Hilfestellung zur Personalitätskonsolidierung des Beschuldigten gegeben wird.

Leitsatz 1b

Im Jugendstrafrecht hat die Spezialprävention Vorrang vor der Generalprävention, so dass auch im vorliegenden Fall durch den Schuldspruch und die Einziehung der beschlagnahmten Gegenstände eine ausreichende generalpräventive Wirkung erzielt wird.

Sachverhalt

Vorauszuschicken ist, dass die Revision von der StA insoferne nur wegen des Ausspruches über die Strafe ergriffen wird, als vom Berufungsgericht der Ausspruch einer Strafe gem § 8 Abs 1 JGG für eine Probezeit von drei Jahren vorläufig aufgeschoben wurde. Die nachfolgenden Ausführungen beschränken sich daher auf eine geraffte Darstellung des Sachverhaltes und des bisherigen Verfahrensablaufes und vor allem auf jene Ausführungen der Vorinstanzen, die für die Strafbemessung von Bedeutung sind.

Das Land- als Jugendgericht fällte am 21.02.2006 folgenden Urteilsspruch:

"Der Angeklagte NN ist schuldig, er hat in Nendeln und an anderen Orten im Inland zwischen dem 23.06. 2003 und dem 13.11.2004
1. dadurch, dass er in den von ihm bewohnten Räumlichkeiten im Anwesen in Nendeln eine Hakenkreuzfahne (schwarzes Hakenkreuz im weissen Kreis auf rotem Hintergrund) und eine Fahne mit der Doppelsigrune (weisse Doppelsigrune auf schwarzem Grund) aufgehängt hat, welche auch von ausserhalb des Anwesens sichtbar waren, öffentlich Ideologien verbreitet, die auf die systematische Herabsetzung oder Verleumdung der Angehörigen einer Rasse oder Religion gerichtet sind;

2. Tonaufnahmen, nämlich die CD's "Geheime Reichssache" der Gruppe "Kommando Freisler", "Northeim Live Vo1. 2 - der Terror geht weiter", "Das Reich kommt wieder" der Gruppe "Landser", "Unter dem Hakenkreuz" der Gruppe "Endlösung", "Komm zu uns! - Stellt Freiwillige ein!" der Gruppe "Sturm 18", "Wilde Horden" der Gruppe "Radikahl", "A mighty lion roars" mit dem Titel "Ein ganzes Volk" der Gruppe "Hassgesang" sowie "NSDAP" der Gruppe "Macht und Ehre", die eine Rassendiskriminierung iS von § 283 Abs 1 StGB zum Inhalt haben, zum Zwecke der Weiterverbreitung eingeführt, gelagert und in Verkehr gebracht, indem er diese CD's an eine Vielzahl (ca 20) namentlich nicht bekannte Personen unentgeltlich weitergab oder verkaufte und indem er für eine Vielzahl (ca 20) namentlich nicht bekannte Personen Sammelbestellungen dieser CD's organisierte und durchführte, wobei er die CD's jeweils bei ausländischen Anbietern via Internet bestellte und ihm diese dann im Postwege geliefert wurden;

3. pornographische Bildaufnahmen, die sexuelle Handlungen mit menschlichen Ausscheidungen und Gewalttätigkeiten zum Inhalt haben, und zwar die Filme "Lesbian Extreme XXX" und "La Blue Girl vol 3 & 4", indem er diese in dem von ihm benutzten PC Maxdata, welcher einer Vielzahl (ca 20) von Benützern zur Verfügung stand, gespeichert beliess, diese Filme überlassen und zugänglich gemacht;

4. pornographische Bildaufnahmen, die sexuelle Handlungen mit Gewalttätigkeiten zum Inhalt haben, und zwar den Film "La Blue Girl vol 3 & 4", welcher in dem von ihm benutzten PC Maxdata gespeichert war, besessen;

5. Waffen, nämlich zwei schwarz lackierte hölzerne Schlagstöcke, besessen, obwohl ihm dies als Jugendlicher unter 18 Jahren untersagt war.

Der Angeklagte NN hat hiedurch

zu 1 das Vergehen der Rassendiskriminierung nach § 283 Abs 1 Z 2 StGB;

zu 2 das Vergehen der Rassendiskriminierung nach § 283 Abs 2 Z 1 StGB;

zu 3 das Vergehen der Pornographie nach § 218a Abs 3 StGB;

zu 4 das Vergehen der Pornographie nach § 218a Abs 4 StGB und

zu 5 das Vergehen nach Art 20 Abs 1 lit c WaffG begangen.

Der Angeklagte NN wird hiefür zu 1 bis 5 nach § 283 Abs 1 StGB unter Anwendung von § 28 StGB und unter Bedachtnahme auf § 6 Abs 2 JGG zu einer Freiheitsstrafe von drei Monaten sowie gem § 305 Abs 1 StPO zum Ersatz der mit CHF 1500.- bestimmten Kosten und Gebühren des Strafverfahrens verurteilt.

Gemäss § 43 Abs 1 StGB wird der Vollzug der verhängten Freiheitsstrafe unter Bestimmung einer Probezeit von drei Jahren bedingt nachgesehen.

Gemäss § 32 JGG, § 308 Abs 1 StPO werden die Kosten und Gebühren des Strafverfahrens für uneinbringlich erklärt.

Gemäss § 26 StGB werden folgende beschlagnahmten Gegenstände eingezogen: Die CD's "Das Reich kommt wieder", "Unter dem Hakenkreuz", "Komm zu uns! - Stellt Freiwillige ein!", "Wilde Horden", "A mighty lion roars" sowie "NSDAP"; die zwei schwarz lackierten hölzernen Schlagstöcke; die Festplatte des PC Maxdata; die Hakenkreuzfahne und die Fahne mit der Doppelsigrune.

Gemäss Art 52 Abs 3 JGG werden die beschlagnahmten weiteren 219 Stück CD's eingezogen."

Hinsichtlich der diesem Schuldspruch zugrunde liegenden Feststellungen und der vom Erstgericht vorgenommenen Beweiswürdigung und rechtlichen Beurteilung wird auf dessen Ausführungen auf den Seiten 6 bis 21 seines U verwiesen.

Zur Strafbemessung führte das Erstgericht Folgendes aus:

"Bei der Strafzumessung ist erschwerend das Zusammentreffen von insgesamt fünf Vergehen zu werten (§ 33 Z 1 StGB), mildernd hingegen die Unbescholtenheit (§ 34 Z 2 StGB) und weiters der Umstand, dass er sich zumindest hinsichtlich eines Teils der ihm zur Last gelegten Straftaten, nämlich hinsichtlich des Vergehens der Rassendiskriminierung nach § 283 StGB, geständig gezeigt hat (§ 34 Z 17 StGB). Bei einem Strafrahmen von Freiheitsstrafe bis zu einem Jahr (§ 283 Abs 1 StGB iVm § 6 Abs 2 JGG) erachtet das Gericht beim unbescholtenen Angeklagten eine Freiheitsstrafe von drei Monaten, sohin im mittleren Bereich des ersten Drittels des zur Verfügung stehenden Strafrahmens, für schuld- und tatangemessen. Von der Möglichkeit eines bedingten Strafausspruches gem § 8 Abs 1 JGG oder von der Umwandlung der verhängten Freiheitsstrafe in eine Geldstrafe gem § 37 StGB ist schon aus generalpräventiven Erwägungen Abstand zu nehmen, und zwar insbesondere wegen der dem Angeklagten zur Last liegenden Vergehen der Rassendiskriminierung nach § 283 Abs 1 Z 2 StGB und § 283 Abs 2 Z 1 StGB. Es gilt mit Bezug insbesondere hierauf der Allgemeinheit vor Augen zu führen, dass rassendiskriminierende Taten von der Art und Schwere, wie sie dem Angeklagten zur Last liegen, in einem freiheitlichen und demokratischen Rechtsstaat nicht geduldet und mit empfindlichen Strafen geahndet werden. Weiter sprechen aber auch spezialpräventive Erwägungen gegen eine Anwendung des § 8 Abs 1 JGG oder des § 37 StGB. NN scheint nämlich hinsichtlich der Unrechtmässigkeit seines Tuns, jedenfalls sofern es die ihm zur Last liegenden Vergehen der Rassendiskriminierung nach § 283 StGB anbelangt, in keinster Weise schuldeinsichtig zu sein, gibt er doch selbst zu, nunmehr CD's rechtsextremer Bands, beinhaltend unter Umständen wieder Lieder mit rassendiskriminierenden Texten, nun einfach nicht mehr in den USA, sondern in Deutschland, wo die Gesetzgebung insofern strenger ist, im Rahmen von Sammelbestellungen zu ordern. Darin manifestiert sich die Haltung des NN, auch weiterhin von seinem rassendiskriminierenden Tun jedenfalls nicht unbedingt Abstand nehmen zu wollen. Allerdings erachtet das

Gericht weiter die Voraussetzungen des § 43 Abs 1 StGB für gegeben, um dem unbescholtenen Angeklagten die über ihn verhängte dreimonatige Freiheitsstrafe unter Bestimmung einer angemessenen Probezeit von drei Jahren bedingt nachzusehen."

Gegen dieses U erhob der Angeklagte Berufung wegen Nichtigkeit nach § 221 StPO und wegen des Ausspruches über die Schuld und die Strafe.

Mit U vom 31.05.2006 gab das OG der Berufung wegen Nichtigkeit und Schuld keine Folge, jedoch der Berufung wegen des Ausspruches über die Strafe und änderte das U des Erstgerichtes dahingehend ab, dass der Ausspruch einer Strafe gem § 8 Abs 1 JGG für eine Probezeit von drei Jahren vorläufig aufgeschoben wird. Gleichzeitig ordnete es für die Dauer eines Jahres die Bewährungshilfe an und trug dem Bewährungshelfer auf, mit NN insbesonders die Thematik Nationalsozialismus und Rassendiskriminierung zu bearbeiten und dem Jugendgericht halbjährlich hierüber zu berichten.

Zur Strafbemessung führte das Berufungsgericht Folgendes aus:

"Im vorliegenden Fall sind entgegen der Bestimmung des § 20 JGG keine besonderen Jugenderhebungen beantragt und vom Erstgericht durchgeführt worden, so dass zu den Lebens- und Familienverhältnissen des Beschuldigten, zu seiner Entwicklung und zu allen anderen Umständen, die zur Beurteilung seiner körperlichen, geistigen und seelischen Eigenart dienen können, keine Ermittlungsergebnisse vorliegen. Es liegen damit keine Verfahrenserkenntnisse vor, die Rückschlüsse darauf zuliessen, wie der Beschuldigte dazugekommen ist, rassendiskriminierende und mörderische Botschaften (wer Texte verbreitet, dass Menschen aufgehängt, kaltgemacht oder verheizt werden sollen etc, propagiert Mord) gekommen ist, und welche Defizite in der Erziehung, in der Ausbildung und in der menschlichen Humanität hiefür ursächlich waren oder sind bzw dazu beigetragen haben.

Zur Vermeidung einer weiteren Verfahrensverzögerung hat das Berufungsgericht von der Einholung solcher Erhebungen Abstand genommen und den Beschuldigten ergänzend vernommen, wobei dieser im Wesentlichen angegeben hat, sich mit diesen Inhalten nicht zu identifizieren und geschichtlich wenig über die Zeit des Nationalsozialismus zu wissen. In der Realschule sei mit der Behandlung dieser Zeit eben erst - 14 Tage vor der Berufungsverhandlung - begonnen worden. Konfrontiert mit konkreten Textstellen hat er sich dahin verantwortet, dass er sich "nicht viel gedacht" habe.

Es mag sein, dass in diesen Angaben des Beschuldigten eine ordentliche Portion an Schutzbehauptungen steckten und es ist schwer vorstellbar, dass ein knapp 17-jähriger Schüler im Rahmen seiner Schulausbildung über diese Zeit bislang nichts oder fast nichts erfahren haben soll. Wie auch immer hier die Verhältnisse tatsächlich sein mögen erscheint es angebracht, auf das Verhalten des jugendlichen Beschuldigten mit Massnahmen zu reagieren, die ihn zu einer inhaltlichen Auseinandersetzung mit jenen Botschaften nötigen, die er mehr oder weniger gedankenlos verbreitet. Bei einem Jugendlichen, der wenig Ahnung und Kenntnis von der historischen Betroffenheit der zivilisierten Welt gegenüber den Verbrechen des Nationalsozialismus hat, scheint es zielführender, in ihm Wissens- und Nachdenkprozesse auszulösen, die auch bei ihm zu der Erkenntnis führen, dass er sich mit der Propagierung von rassendiskriminierenden Aussagen und der Verherrlichung nationalsozialistischer Verbrechen ausserhalb der Rechtsordnung stellt, als mit Freiheitsstrafen auf solche Verhaltensweisen zu reagieren.
Das Berufungsgericht hält es daher für angebracht, den Ausspruch einer Strafe wegen der dem Beschuldigten zu Recht angelasteten, schwerwiegenden Delikte auf eine Probezeit von drei Jahren vorläufig aufzuschieben und gleichzeitig für die Dauer eines Jahres Bewährungshilfe anzuordnen, wobei es Sache des Bewährungshelfers sein wird, in Zusammenarbeit mit den in Betracht kommenden Stellen des Landes ein Programm aufzustellen, dass den Beschuldigten zu einer inhaltlichen Auseinandersetzung mit der Thematik Rassendiskriminierung, Nationalsozialismus und Gewalt zu konfrontieren und ihm dadurch eine Hilfestellung zu bieten, die bei ihm bestehenden Defizite im Wissen und in der Entwicklung und in der Humanität auszugleichen. Für die Bearbeitung dieser Thematik mit Hilfe der Bewährungshilfe erscheint ein Jahr ausreichend."

Mit Revision zum OGH bekämpft nun die StA dieses zweitinstanzliche U insofern, als der Ausspruch einer Strafe gem § 8 Abs 1 JGG aufgeschoben wurde. Beantragt wird die Wiederherstellung des erstinstanzlichen U.

Der OGH gab der Revision keine Folge.

Aus der Begründung

Die Revisionswerberin steht auf dem Standpunkt, dass der Ausspruch der Strafe sowohl aus generalpräventiven Erwägungen, wozu Ausführungen des Berufungsgerichtes überhaupt fehlen, als auch aus spezialpräventiven Gründen notwendig sei, da der Angeklagte nicht schuldeinsichtig sei, da er weiterhin CDs mit rassendiskriminierenden Texten bestellt habe.

Dazu hat der Senat des OGH erwogen:

Nach § 8 Abs 1 JGG ist der Ausspruch der wegen einer Jugendstraftat zu verhängenden Geld- oder Freiheitsstrafe für eine Probezeit von 1 bis zu 3 Jahren vorläufig aufzuschieben, wenn anzunehmen ist, dass der Schuldspruch alleine oder iVm den im Jugendgerichtsgesetz angeführten Massnahmen, der Erteilung von Weisungen oder Auflagen oder der Bestellung eines Bewährungshelfers genügen werde, um den Rechtsbrecher von weiteren strafbaren Handlungen abzuhalten, und es nicht des Ausspruches der Strafe bedarf, um der Begehung strafbarer Handlungen durch andere entgegenzuwirken.

Diese Gesetzesbestimmung entspricht im Wesentlichen der Bestimmung des § 13 Abs 1 des österreichischen Jugendgerichtsgesetzes vom 20.10.1988 (auch § 13 öJGG 1961), so dass im vorliegenden Fall durchaus auf die österreichische Lehre und Praxis der Handhabung dieser Gesetzesbestimmung zurückgegriffen werden kann.

Danach sollen Strafsanktionen nur dort zur Anwendung gelangen, wo gelindere Mittel nicht genügen (sogenanntes Ultima-Ratio-Prinzip). Dies gilt vor allem für die Jugendgerichtsbarkeit, bei der verstärkt zu prüfen ist, ob die Verhängung einer Strafe spezialpräventiv notwendig ist, oder ob nicht auch die dem Gericht trotz des Schuldspruches offenstehenden Möglichkeiten, wie etwa bestimmte Hilfestellungen zur Persönlichkeitskonsolidierung (zB Weisungen, Bewährungshilfe) im Hinblick auf eine künftige Legalbewährung ausreichend erscheinen. Die Erfahrung hat gezeigt, dass derartige Massnahmen eher zur Stabilisierung der Lebenssituation des Täters führen können, während repressive strafrechtliche Reaktionen eher behindern. Der Zweck des Institutes der bedingten Verurteilung nach § 8 JGG (§ 13 ÖJGG - Schuldspruch unter Vorbehalt der Strafe) liegt daher darin, dass anstelle der Strafe andere, nicht diskriminierende Massnahmen Platz greifen sollen (EvBl 1956/320), wobei in jedem einzelnen Fall zu prüfen ist, ob der Ausspruch der Strafe ohne Nachteil für den Rechtsbrecher und die Allgemeinheit (Generalprävention) unterbleiben kann (s zB OLG Innsbruck vom 09.12.1981, 3 Bs 384/81; ZVR 1993/116; Dr Christian Grafl, Jugendliche Tatverdächtige - ihre Sanktionierung, ÖJZ 1988/519; Wolfgang Bogensberger, Das JGG, ÖJZ 1991/268; Udo Jesionek, Die Reform des Jugendstrafrechts, ÖRZ 1983, 219).

Trägt man diesen grundsätzlichen Überlegungen Rechnung, so kann man - daher auch der OGH - im vorliegenden Fall dem OG nur beipflichten. Der Aufschub des Ausspruches einer Strafe entspricht selbst bei der gegebenen "Mittelkriminalität" dem Geist und Zweck der Bestimmung des § 8 JGG, zumal durch die Anordnung der Bewährungshilfe und die dem Bewährungshelfer erteilten Weisungen die Hilfestellung zur Persönlichkeitskonsolidierung des Angeklagten gegeben wurde. Damit erscheint es möglich und zielführend, bei dem offensichtlich unbedarften Angeklagten hinsichtlich der Verbrechen des Nationalsozialismus aufklärend zu wirken und einen Nachdenkprozess auszulösen, der auch bei ihm zu der Erkenntnis führen kann, dass er sich mit der Propagierung von rassendiskriminierenden Aussagen und Verherrlichung nationalsozialistischer Verbrechen ausserhalb der Rechtsordnung stellt, als mit einer Freiheitsstrafe auf solche Verhaltensweisen zu reagieren. Dass eine solche Erkenntnis beim Angeklagten eintritt, ist durch die Aufklärungsarbeit des Bewährungshelfers betreffend die Thematik Nationalsozialismus und Rassendiskriminierung mit hoher Wahrscheinlichkeit zu rechnen. Sollte dies wider Erwarten nicht der Fall sein, so könnte gem § 8 Abs 2 JGG die Strafe immer noch ausgesprochen werden. Der Umstand, dass der Angeklagte im Jänner 2006 in Deutschland ua CDs mit rechtsradikalem Inhalt bestellte, tritt dabei in den Hintergrund, da diese Bestellungen vor den Urteilsfällungen I. und II. Instanz erfolgten, der Bewährungshelfer seine Arbeit noch gar nicht aufgenommen hatte und aufnehmen konnte. Vielmehr ins Gewicht fällt die Auskunft des Bewährungshelfers, wonach der Angeklagte sich schuldeinsichtig und kooperativ zeigt. Der Ausspruch einer Strafe würde diesen nunmehr bestehenden positiven Trend zerstören und die Lehrstellensuche des Angeklagten unnötig erschweren.

Es trifft zu, dass iS des Abs 1 des § 8 JGG auch generalpräventive Wirkungen zu berücksichtigen sind, die jedoch im Jugendstrafrecht hintanzustellen sind. Hier hat die Spezialprävention den eindeutigen Vorrang vor der Generalprävention (s Foregger-Fabrizi, öStGB, RN 1 zu § 14 JGG). Der OGH teilt daher die Ansicht des Revisionsgegners, dass allein durch den Schuldspruch und die Einziehung der beschlagnahmten Gegenstände eine ausreichende generalpräventive Wirkung erzielt wurde.

Public Policies

European Commission against Racism and Intolerance
Commission européenne contre le racisme et l'intolérance

CRI(2008)21

Third report on Liechtenstein

Adopted on 14 December 2007

Strasbourg, 29 April 2008

COUNCIL OF EUROPE CONSEIL DE L'EUROPE

For further information about the work of the European Commission against Racism and Intolerance (ECRI) and about the other activities of the Council of Europe in this field, please contact:

Secretariat of ECRI
Directorate General of Human Rights and Legal Affairs
Council of Europe
F - 67075 STRASBOURG Cedex
Tel.: +33 (0) 3 88 41 29 64
Fax: +33 (0) 3 88 41 39 87
E-mail: combat.racism@coe.int

Visit our web site: www.coe.int/ecri

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Foreword

The European Commission against Racism and Intolerance (ECRI) was established by the Council of Europe. It is an independent human rights monitoring body specialised in questions relating to racism and intolerance. It is composed of independent and impartial members, who are appointed on the basis of their moral authority and recognised expertise in dealing with racism, xenophobia, antisemitism and intolerance.

One of the pillars of ECRI's work programme is its country-by-country approach, whereby it analyses the situation as regards racism and intolerance in each of the member States of the Council of Europe and makes suggestions and proposals as to how to tackle the problems identified.

The country-by-country approach deals with all member States of the Council of Europe on an equal footing. The work is taking place in 4/5 year cycles, covering 9/10 countries per year. The reports of the first round were completed at the end of 1998 and those of the second round at the end of the year 2002. Work on the third round reports started in January 2003.

The third round reports focus on "implementation". They examine if ECRI's main recommendations from previous reports have been followed and implemented, and if so, with what degree of success and effectiveness. The third round reports deal also with "specific issues", chosen according to the different situations in the various countries, and examined in more depth in each report.

The working methods for the preparation of the reports involve documentary analyses, a contact visit in the country concerned, and then a confidential dialogue with the national authorities.

ECRI's reports are not the result of inquiries or testimonial evidences. They are analyses based on a great deal of information gathered from a wide variety of sources. Documentary studies are based on an important number of national and international written sources. The in situ visit allows for meeting directly the concerned circles (governmental and non-governmental) with a view to gathering detailed information. The process of confidential dialogue with the national authorities allows the latter to propose, if they consider it necessary, amendments to the draft report, with a view to correcting any possible factual errors which the report might contain. At the end of the dialogue, the national authorities may request, if they so wish, that their viewpoints be appended to the final report of ECRI.

The following report was drawn up by ECRI under its own and full responsibility. It covers the situation as of 14 December 2007 and any development subsequent to this date is not covered in the following analysis nor taken into account in the conclusions and proposal made by ECRI.

Executive summary

Since the publication of ECRI's second report on Liechtenstein on 28 June 2002, progress has been made in a number of the fields highlighted in that report. In 2002 the Government adopted a five-year National Action Plan to Combat and Prevent Racism. Many different measures have been taken to train officials and to raise awareness among the general public about the need to combat racism and racist violence. In the field of education, measures have been taken to tackle the problem of disadvantages encountered by children of immigrant origin and to teach pupils about the danger of racism. The Equal Opportunities Office, which deals amongst other things with immigration and integration issues, was created in 2005. The Government adopted an integration strategy for immigrants providing for many positive initiatives. A Working Group on the Integration of Muslims was set up in 2004 to improve the situation of Muslims living in Liechtenstein.

However, a number of recommendations made in ECRI's second report have not been implemented, or have only been partially implemented. The integration strategy does not encompass some important measures which should be taken in order to achieve full integration in Liechtenstein. In particular, the acquisition of Liechtenstein citizenship through the system of voting by local residents should be reviewed and the procedure to obtain Liechtenstein citizenship by naturalisation should be further facilitated. Non-citizens who are long-term residents still do not have the right to vote in local elections. The new integration strategy puts strong emphasis on requesting efforts from immigrants without requesting the same level of effort on the part of the majority population. There is still a minority among the general public which expresses racist stereotypes and prejudices against non-citizens and there are still some racist acts, including racist violence, perpetrated by non-organised extreme-right activists. The main targets of racism and of racial discrimination, particularly in the field of housing and employment, are immigrants from Turkey and the Balkans and persons of Muslim faith. Despite measures taken by the authorities, Muslims still face some obstacles in practising their religion and children of immigrant background are still faced with disadvantages in access to education.

In this report, ECRI recommends that the authorities of Liechtenstein take further action in a number of areas. ECRI recommends that the authorities continue to take measures to combat all forms of racism, including racist violence. They should find solutions to the obstacles encountered by Muslims who wish to practise their religious and cultural activities. It recommends that they continue and reinforce their efforts in establishing a school system which guarantees children of immigrant background whose mother tongue is not German equal opportunities in access to education. It calls on the authorities to exercise the utmost care when considering the establishment of a system of sanctions concerning integration and particularly the learning of the German language by non-citizens. ECRI recommends that the authorities of Liechtenstein put in place an all-encompassing strategy to combat all forms of racial discrimination.

I. FOLLOW-UP TO ECRI'S SECOND REPORT ON LIECHTENSTEIN

International legal instruments

1. In its second report, ECRI encouraged Liechtenstein to sign and ratify the following instruments as soon as possible: Protocol No 12 to European Convention of Human Rights (ECHR), the European Social Charter (Revised), the ILO Convention No 111 concerning Discrimination (Employment and Occupation), the UNESCO Convention against Discrimination in Education, the European Convention on Nationality, the European Convention on the Legal Status of Migrant Workers and the Convention on the Participation of Foreigners in Public Life at Local Level.

2. Protocol No 12 to the ECHR, which was signed on 4 November 2000, has not been ratified yet. The authorities are currently considering the possibility of ratifying this instrument.

3. The European Social Charter (Revised), the European Convention on Nationality, the European Convention on the Legal Status of Migrant Workers, and the Convention on the Participation of Foreigners in Public Life at Local Level have not been signed yet. Liechtenstein is neither party to the International Labour Organisation nor to UNESCO and has signed neither the ILO Convention No 111 concerning Discrimination (Employment and Occupation) nor the UNESCO Convention against Discrimination in Education. The authorities have explained that it would be difficult for Liechtenstein to become a member of ILO and UNESCO because it would require the authorities to amend several laws and/or to find human and financial resources that are not currently available.

4. Liechtenstein has not yet signed the Convention on Cybercrime and its Additional Protocol concerning the criminalisation of acts of a racist and xenophobic nature committed through computer systems. The authorities are currently considering the possibility of ratifying these instruments. Liechtenstein has not yet signed the International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families, which has entered into force since ECRI's second report.

5. In its second report, ECRI encouraged Liechtenstein to make the declaration under Article 14 of the International Convention on the Elimination of all Forms of Racial Discrimination, recognising the competence of the Committee on the Elimination of Racial Discrimination to examine individual complaints. ECRI is pleased to note that on 18 March 2004, Liechtenstein made the declaration under Article 14 of this Convention. In accordance with Article 14-2 of the Convention, the Constitutional Court has been designated as competent to receive and consider petitions from individuals and groups of individuals within the jurisdiction of Liechtenstein who claim to be victims of a violation of any of the rights set forth in the Convention.

Recommendations:

6. ECRI reiterates its recommendation that Liechtenstein ratify the following international instruments as soon as possible: Protocol No 12 to European Convention of Human Rights (ECHR), the European Social Charter (Revised), the ILO Convention No 111 concerning Discrimination (Employment and Occupation), the UNESCO Convention against Discrimination in Education, the European Convention on Nationality, the European Convention on the Legal

Status of Migrant Workers and the Convention on the Participation of Foreigners in Public Life at Local Level.

7. ECRI recommends that Liechtenstein ratify as soon as possible the Convention on Cybercrime and its Additional Protocol concerning the criminalisation of acts of a racist and xenophobic nature committed through computer systems, and the International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families.

Constitutional provisions and other basic provisions

- *Citizenship legislation*

8. In its second report, ECRI recommended that consideration be given to further reducing the residency requirement for naturalisation. ECRI also recommended that the system of voting by local residents on citizenship requested under the "discretionary" system of naturalisation be reconsidered, particularly in the light of the possible discriminatory effects it might have on persons from certain groups. Finally, ECRI considered that the strict rules which prevented the holding of double citizenship upon acquisition of citizenship of Liechtenstein could have been made more flexible.

9. ECRI has been informed that the legislation on naturalisation is currently being revised by Parliament. Subject to final approval by Parliament, the revised law should require from a candidate proof of German language skills and basic knowledge of the legal order of Liechtenstein and the structure of the State as a prerequisite for naturalisation.

10. ECRI regrets that the current revision of this legislation does not take into account the recommendations concerning naturalisation made in its previous report. Firstly, the length of residence currently required to obtain Liechtenstein citizenship is 30 years. The law already provides that the years from birth to age 20 count double. Subject to final approval by Parliament, in the case of marriage to a Liechtenstein citizen, the length of residence required should be reduced from 12 years to 10 years, and the requirement for a stateless person should only be five years of residence in the country. However, despite debate in the country and within Parliament on this issue, there seems to be no will to change the current requirement for the ordinary procedure of naturalisation. ECRI recalls that 30 years is an extremely long period compared to European standards.

11. Secondly, it is not foreseen to reconsider the system of voting by local residents for the granting of citizenship, as requested by ECRI and by other international and national bodies. ECRI recalls that this system is not based on objective and measurable criteria and leaves the way open for discriminatory effects against persons of certain origins, particularly persons with a Muslim background or who come from non-German speaking countries, who might face higher levels of prejudice and intolerance among the community in which they live. In fact, studies show that very few persons apply for citizenship by this route for fear of seeing their application rejected. Many of those who have nevertheless applied have received a negative vote with no objective reasons.

12. Lastly, the authorities of Liechtenstein have not taken any measures to make the strict rules which prevent the holding of double citizenship upon acquisition of citizenship of Liechtenstein more flexible. Representatives of immigrants, and particularly those from non-German speaking countries such as Turkey, have indicated that they would very much appreciate such a move. ECRI would like to reiterate here the importance of these two measures, i.e. reducing the length of

the residence requirement and allowing for double citizenship, for the achievement of a fully integrated society in Liechtenstein[1].

Recommendations:

13. ECRI recommends that the authorities continue the current process of reducing the residency requirement for naturalisation.

14. ECRI urges the authorities to seriously reconsider the system of voting by local residents for the granting of citizenship.

15. ECRI recommends that the authorities take steps to facilitate the possibility of holding double citizenship for non-citizens who would like to obtain citizenship of Liechtenstein through naturalisation.

Criminal law provisions

16. In its second report, ECRI recommended that the authorities of Liechtenstein monitor very closely the implementation of the criminal law provisions to combat racism which are already in force and ensure in particular that the police, prosecuting authorities and courts were made aware of their contents and were encouraged to make use of them. ECRI also encouraged the police and prosecuting authorities to set up a system of monitoring, classification and recording of racist incidents brought to their attention and of the follow-up to and outcome of such incidents.

17. Article 33-5 of the Criminal Code provides for an aggravating circumstance for all criminal offences when the act is committed with a racist or xenophobic motivation. However, the authorities do not gather statistics which would indicate whether this provision is applied or not. Article 321 prohibits genocide. Article 283 of the Criminal Code prohibits a range of racist acts, including: incitement to hatred or discrimination on the grounds of race, ethnic origin or religion; dissemination of racist ideologies; denial of genocide and other crimes against humanity; refusal of a service meant for the general public on the grounds of race, ethnic origin or religion; and participation in an association promoting racism.

18. According to governmental statistics, between 2002 and 2006 15 complaints concerning racist acts were filed with the police. The police investigated all of these incidents and sent reports to the Public Prosecutor's office. 3 cases concerned unknown perpetrators. Of the other cases, 6 were terminated because the facts did not constitute an offence or due to lack of evidence. In 6 other cases charges were filed by the Public Prosecutor, which resulted in 4 convictions and 2 not guilty verdicts. These cases concern problems of racist verbal abuse, dissemination of a racist ideology, or display of racist material through Internet or other means.

19. The authorities have also indicated that there are a number of racist acts which have remained unpunished due to lack of information about the identity of the perpetrators, for instance in two cases of racist graffitis sprayed over posters for anti-racist campaigns. The authorities of Liechtenstein also stated that there are probably a certain number of racist acts which are not reported to the police. ECRI notes with interest that a law on assistance to victims which enters into force in April 2008 provides for the creation of an Agency responsible for legal, psychological, medical, material and other forms of assistance to victims of

[1] See also below, Integration of immigrants.

violations of the Criminal Code. ECRI hopes that the establishment of such a structure will encourage victims of racist acts to come forward with their complaints.

20. ECRI is pleased to learn that several seminars on combating racism and hate crime have been organised for the police, prosecutors and judges in recent years, particularly in the context of the National Action Plan against Racism[2]. ECRI also notes with interest that following a parliamentary petition launched by a youth anti-racist NGO *Colorida* in order to reinforce the fight against right-wing extremism, the Parliament unanimously asked the Government in November 2006 to reflect on fine-tuning the criminal law provisions aimed at combating racism, with a view in particular to making it very clear that the wearing and displaying of Nazi symbols is prohibited. The petition is under examination by the relevant ministerial bodies.

Recommendations:

21. ECRI recommends that the authorities of Liechtenstein pursue their efforts in terms of training for the police, prosecutors, judges and future legal professionals as regards the application of the criminal law provisions aimed at combating racist offences, and in particular Articles 283 and 33-5 of the Criminal Code. ECRI recommends that the authorities of Liechtenstein continue to inform the public about the existence of criminal provisions for sanctioning racially motivated acts on a regular basis. It also recommends that they continue taking steps to encourage victims to report such acts.

22. ECRI encourages the authorities of Liechtenstein in their efforts to fine-tune the criminal legislation concerning racist offences. In this respect, ECRI draws the attention of the authorities to its General Policy Recommendation N°7 on national legislation to combat racism and racial discrimination[3] which provides guidelines in this field.

23. ECRI recommends that the authorities of Liechtenstein continue collecting statistical data on the implementation of criminal law provisions against racism and that they extend this data collection so as to cover Article 33-5 of the Criminal Code.

Civil and administrative law provisions

24. See below, Section II - Specific Issues: - The need to reinforce measures against racial discrimination.

Specialised bodies and other institutions

- The Equal Opportunities Office and the Equal Opportunities Commission

25. ECRI notes with interest the establishment of the Equal Opportunities Office in February 2005 through the expansion of the already existing Gender Equality Office. The Equal Opportunities Office primarily works in the areas of gender equality, disability, sexual discrimination and sexual orientation, but also on immigration, integration of foreigners and religious issues. The Equal Opportunities Office will continue the work of the Working Group against Racism which was established to coordinate the implementation of the National Action

[2] See below, Measures taken to combat racism.

[3] See Paragraphs 18 to 23 of the General Policy Recommendation and Paragraphs 38 to 49 of its Explanatory Memorandum.

Plan to Combat Racism[4]. The Equal Opportunities Office is the contact, coordination, and advisory body for all questions of equal opportunities.

26. The Equal Opportunities Commission, whose secretariat is run by the Office of the same name, was established in March 2005 to develop and ensure the implementation of interagency solutions to issues of equal opportunities in all areas of life. It is composed of nine members, all from State services, including the Office for Social Affairs, the Office of Education, the Police, the Office of Foreigners and Passport, and the Equal Opportunities Office. Both the Office and the Commission are governmental bodies.

27. These two bodies are tasked with making recommendations and proposals in their field of action. They will monitor measures taken and adopt awareness raising measures in the field of equal opportunities. Individuals can seek legal advice and lodge a complaint with the Equal Opportunities Office, even though the powers of the Office remain limited in this respect. There is still a need to draw the public's attention to the existence of the Office and the Commission and to the existing possibility of lodging a complaint with the Office.

28. ECRI welcomes the establishment of these bodies. However, it considers that it is essential that the body which deals with problems of racism and racial discrimination and which receives individual complaints be independent from the government. It is also important that such a body be given all the necessary powers to deal with a complaint of racial discrimination in an efficient way[5].

Recommendations:

29. ECRI recommends that the authorities of Liechtenstein guarantee the independence from the government of the Equal Opportunities Office. ECRI also recommends that the authorities consider extending the powers of the Equal Opportunities Office, in particular to ensure that it can act as a mediator or sanction the perpetrators of racial discrimination, as recommended by ECRI in its General Policy Recommendation N°2 on specialised bodies to combat racism, xenophobia, antisemitism and intolerance at national level. More generally, ECRI draws the authorities' attention to this General Policy Recommendation which provides guidelines as concerns the status and the powers of a specialised body to combat racism and racial discrimination.

Education and awareness-raising

30. See below, Measures taken to combat racism.

Access to education

31. In its second report, ECRI expressed concern at reports that children of immigrant origin whose mother tongue is not German tended to perform less well in school than children of Liechtenstein origin, that they were more likely to attend the lower-tier secondary schools (*Oberschule*) and that they were less likely to carry on to tertiary education. ECRI considered that this area should be investigated and that measures should be taken where necessary to address any disparities between the educational achievements of children from different groups.

[4] See below, Measures taken to combat racism

[5] Concerning racial discrimination, see also below, Specific issues : - The need to reinforce measures to combat racial discrimination.

32. ECRI notes with concern that several studies based on statistical data, including from the Office of Education, confirm the disadvantaged situation of children of immigrant origin whose mother tongue is not German, especially from southern, eastern, and south-eastern Europe and from Turkey, in the field of education. Liechtenstein and Swiss citizens are overrepresented in the middle-tier secondary schools (*Realschule*) and upper-tier secondary schools (*Gymnasium*), while pupils from other countries are overrepresented in the lower-tier secondary schools (*Oberschule*) and in special needs schooling. The Office of Education has identified several problems which may be at the origin of this situation. Among them, the language factor plays an important role in the performance deficits of the students with migrant backgrounds. The lower socio-economic status of many families with the above-mentioned migrant background also constitutes a factor.

33. ECRI is pleased to note that the authorities, aware of the disadvantages suffered by pupils of immigrant origin whose mother-tongue is not German, have taken several remedial measures. They have established a system of one-year intensive courses called "German as a Second Language", complemented by additional German courses after re-integration into mainstream classes for up to seven years after the end of the intensive course. The authorities are currently setting up a programme of "day structures and care outside home" which could be a solution for children whose parents do not master German to do their homework in favourable conditions, for instance with the help of a tutor. The Government has decided to create six "joint profile-schools" where all pupils at the secondary level will study a joint curricula not divided into three different tiers. Another project is to postpone the time of selection between several school types to increase the opportunities of children of immigrant origin, as research shows that the opportunities of children are less dependent on the background of their parents if the selection takes place at a later stage.

34. In its second report, ECRI recommended that given the large non-citizen population in Liechtenstein, the authorities should provide financial support for mother tongue teaching for children of immigrant origin. ECRI notes that the authorities have not taken any measures in this direction. For the moment, they only offer access to school premises and facilities to persons who wish to organise such mother-tongue courses as extra-curricular activities.

Recommendations:

35. ECRI recommends that the authorities of Liechtenstein continue and reinforce their efforts in establishing a school system which guarantees all children of immigrant background whose mother tongue is not German equal opportunities in access to education, including higher education and eventually in access to employment.

36. ECRI reiterates its recommendation that the authorities of Liechtenstein provide financial support for mother tongue teaching for children of immigrant origin whose mother tongue is not German.

Integration of immigrants

37. The total population of Liechtenstein (35 168 persons) is composed of around one third of non-citizens[6]. Among non-citizens, 57.4% are from the following German-speaking countries: Switzerland, Austria and Germany. There are also

[6] As of 31 December 2006.

15 477 commuters who cross the borders with Switzerland and Austria every day to come to work in Liechtenstein. All these persons share a similar linguistic background with the majority population as German is the official language in Liechtenstein. Other non-citizens living in Liechtenstein mainly come from Italy, Turkey, Spain, Portugal and from countries of the Balkans[7]. Non-citizens from non-German speaking countries thus constitute 14.6% of the total population of Liechtenstein. Most of the non-citizens living in Liechtenstein are in the country for work purposes and some have come for purposes of family reunification with persons working in the country.

38. In its second report, ECRI encouraged the authorities in their efforts to set up and implement an integration strategy which would contain clear policies to improve the integration of persons of immigrant origin in concrete terms. In particular, ECRI recommended that the strategy include a wider and more accessible range of German language learning possibilities, with the collaboration and participation of employers themselves, and measures to ensure that non-citizens can participate in the public and political life of the country.

- ***The concept of integration***

39. ECRI is pleased to note that the authorities of Liechtenstein have actively pursued their efforts in setting up and implementing an integration strategy for non-citizens. As explained below, the National Action Plan against Racism focused on two topics, one of which was integration[8]. The Working Group against Racism, Anti-Semitism and Xenophobia (WG-R) which has coordinated the implementation of the Plan took several initiatives in favour of integration and published, in August 2007 a Status Report on facts, causes, measures and recommended integration policy actions concerning the integration of the foreign population in Liechtenstein[9]. It is impossible to describe all the positive initiatives which have been taken in favour of integration in this report but they are described in the report of the Working Group against Racism (WG-R) referred to above and some of them are also mentioned in other parts of this report.

40. The concept of integration is now enshrined in several documents such as the 2004 Ordinance on the Movement of Persons which provides that the integration of non-citizens is a State objective. In March 2006, the Equal Opportunities Commission presented to the Government a Concept Paper on Integration. On the basis of this document, the Government adopted a Policy Paper on Liechtenstein Integration Policy on 27 February 2007[10]. ECRI has been informed that the legislation on non-citizens is being revised and that the new legislation, which will probably be adopted in 2008, should include provisions dealing specifically with the integration of non-citizens.

41. On the basis of all the documents mentioned above, it is possible to summarise the main features of the Government's integration policy as follows: Integration is based on two principles, "*fördern und fordern",* i.e. promoting and demanding. Under the "promotion" aspect, the authorities should establish a general framework to promote integration, including through the adoption of measures aimed at: improving mutual understanding between the host society and the migrant population; taking account of specific problems encountered by

[7] As of June 2006.

[8] See below, Measures taken to combat racism.

[9] Integration der Ausländischen Bevölkerung in Liechtenstein, verfasst für die Arbeitsgruppe gegen Rassismus, Antisemitismus, und Fremdenfeindlichkeit, Vaduz, August 2007, 146 p.

[10] (RA 2006/2949, *Grundsatzpapier der Regierung zur Liechtensteinischen Integrationspolitik*).

immigrants; creating the conditions for immigrants to participate on equal terms in the social life of the country and to contribute to the integration process; promoting the learning of the German language by immigrants; promoting professional integration of immigrants; ensuring equal access to social welfare systems and health care for immigrants; and making financial resources available for the integration process.

42. Under the "demanding" part, the Government stresses that integration requires efforts not only on the part of the authorities, but also on the part of all members of the society and in particular on the part of immigrants. The latter have to, amongst other things: make active efforts to master the German language; recognise the fundamental social order, particularly as concerns gender equality; and inform themselves about their rights and duties. Employers are asked - without being obliged - to support their foreign employees in making use of integration opportunities. Members of the majority population are asked to be "open" to immigrants.

43. ECRI recalls that integration is a two-way process involving both majority and minority communities. It stresses that measures taken under the "demanding" approach should extend to society as a whole and not exclusively focus on immigrants, in order to avoid their stigmatisation and the impression that the success of integration depends solely on their efforts. It is also important that the authorities continue to put emphasis on combating racism. The problem of stigmatisation, generalisations, stereotypes and prejudices among the majority population against immigrants should also be tackled in order for the integration process to be a complete success. In particular, in order to further emphasise the responsibilities of the majority population, ECRI considers that the authorities should focus on measures to combat discrimination in a way that is explicitly and consistently presented to the public as forming an integral part of integration policy. The issue of racial discrimination will be addressed in section II of this report[11]. Another significant aspect of a successful integration process, which is the possibility of acquiring Liechtenstein citizenship, is dealt with above[12]. In the present section, ECRI will address two aspects which it finds fundamental for an integrated society in Liechtenstein, namely the question of proficiency in the German language and the issue of political rights for non-citizens.

Recommendations:

44. ECRI recommends that the authorities of Liechtenstein continue their efforts in favour of an integration policy which reflects the idea of integration as a two-way process involving both majority and minority communities. To this end, ECRI recommends that the authorities further develop the "promotion" aspect, in particular by adopting measures aimed at promoting genuine mutual respect for diversity and knowledge of different cultures or traditions and eradicating stereotypes and prejudices on cultures and values. To the same end, it recommends that the authorities make their work against racial discrimination an integral part of their integration policy and that they consistently present it as such to the public[13].

[11] See below, Specific Issues: - The need to reinforce measures against racial discrimination.

[12] See above, Constitutional law provisions and other basic provisions.

[13] See also below, recommendations made under Specific Issues: - The need to reinforce measures against racial discrimination.

- ***Integration and the German language***

45. ECRI is aware that mastering the German language is an important tool for improving integration of immigrants from non-German speaking regions. In this respect, it notes with interest that, in line with the "promoting" approach, some initiatives have been taken or supported by the authorities of Liechtenstein to encourage immigrants to learn German. An example which has generally been described as successful is the introduction of financial vouchers of 200 CHF (around 120 Euro) to partially cover the costs of German lessons for adults. The Association for Intercultural Education (*Verein für interkulturelle Bildung*, ViB) also provides a wide range of German courses including a course specifically tailored to mothers staying at home, whereby mothers and their young children can learn German together. Such NGO initiatives are supported by the State even though the lack of sustained and guaranteed public financial support makes the task of organising such activities more complicated for NGOs.

46. ECRI wishes to express its concern at indications that the future Law on Foreigners will introduce a system of sanctions for non-citizens who do not reach a sufficient level of German. The current plan is to introduce "integration agreements" (*Integrationsvereinbarungen*) whereby non-citizens from countries other than Switzerland or the European Economic Area (EEA) commit themselves to learning German and acquiring basic knowledge about the structures and values of the State. It is currently envisaged that failure to respect the agreement could lead to withdrawal of the residence permit.

47. ECRI notes that some representatives of NGOs and immigrants have expressed doubts about the efficiency of exclusively placing demands on immigrants and about a system of sanctions against those who do not have a sufficient command of German. ECRI stresses that if a system of sanctions is to be introduced as currently foreseen, it should at least be based on the principle of proportionality and in full accordance with the rights of the individual and in particular the right to private and family life.

48. ECRI considers that the introduction of sanctions is not an appropriate means to persuade non-citizens to integrate and that positive incentives should be regarded as a sufficient means of persuasion. Therefore, ECRI believes that the "promoting" approach should be reinforced in the field of mastering the German language. The few measures taken in this direction have already proven to be effective and any such measure can only bring about positive results for non-citizens and society as a whole. According to NGOs working in this field, there is indeed a strong demand from immigrants for German language courses of good quality, tailored to the individual circumstances of the persons concerned and which are free of charge or inexpensive. For instance, a wider variety of courses should be offered, catering for the needs of all non-citizens, ranging from women who stay at home to employees who have unusual working hours or particularly hard working conditions.

49. ECRI notes with interest that the authorities have introduced good practices such as German courses, financed by the Office for Economic Affairs, for unemployed non-citizens looking for a job to increase their chances of success. While some employers are already supporting to a greater or lesser extent their employees who wish to learn German, it seems that not all of them provide adequate conditions in this field, in particular when the employee works in a job where German is not absolutely necessary to accomplish his/her task. Therefore, measures targeting employers and requiring them to offer their employees all opportunities to learn German are important in order to avoid putting the burden

of integration exclusively on the shoulder of immigrants who work and contribute to the economy and welfare of the country.

50. ECRI also underlines that particular attention should be paid to the issue of dialect spoken in the country as it is very different from standard German. This constitutes an additional difficulty for non-German-speaking adults who learn standard German. In fact, native Liechtenstein citizens use standard German only in written communication and Liechtenstein dialect in oral communication. In this field, the authorities could raise the awareness among the population and officials about efforts they should make towards non-citizens by speaking standard German with those who even after having acquired a satisfactory command of German may not or not fully master Liechtenstein dialect. German lessons mentioned above could also be conceived in taking this particularity into account.

Recommendations:

51. ECRI recommends that the authorities exercise the utmost care when considering the establishment of a system of sanctions concerning the learning of the German language by non-citizens. It is important that no measures be taken which would have a counterproductive effect on the integration process by increasing the stigmatisation of non-citizens or by jeopardising the full respect of their individual rights.

52. ECRI recommends that the authorities of Liechtenstein put strong emphasis on measures aimed at encouraging learning of German by non-German speaking non-citizens, through the adoption of complementary adequate incentives and opportunities to learn such a language, which implies necessary financial and other efforts on the part of the authorities. The authorities should also take measures to make society as a whole, and particularly officials working in public administration and employers, aware of the need to make efforts on their side to help the non-citizens concerned to learn German.

53. In particular, ECRI recommends that measures be taken to provide non-citizens with German language training of good quality, tailored as much as possible to the individual competencies and needs of the person concerned and which is inexpensive. In this connection, ECRI considers that the provision of public long-term support to organisations with successful experience in providing German language training to non-citizens would be a more effective measure than the solution currently envisaged of an “integration agreement” coupled with sanctions.

- ***Integration and participation in public and political life***

54. In its second report, ECRI recommended that the possibility of allowing voting rights at local level for long-term residents be considered as a means to increase their participation in their local communities.

55. ECRI notes with regret that although the issue of granting voting rights to long-term residents has been discussed in Liechtenstein on several occasions since its second report, there are no indications that this will be achieved in the near future. Parliament is currently revising the legislation on non-citizens but there is no intention on the part of the authorities of Liechtenstein to introduce such rights.

56. ECRI notes with concern that the opportunities to participate in political life even on a consultative level remain scarce. Some municipalities have organised meetings with non-citizens to discuss matters of interest to them before taking a

decision on such matters. NGOs representing immigrants are also consulted by the State authorities. For instance, a networking platform of non-citizens' organisations, called Integration Working Group, was set up in 2006. This platform makes proposals to the government in the field of integration under the coordination of the Equal Opportunities Office. However, much more could be done to involve immigrants in the political life of Liechtenstein at national and local levels, including through the ratification and subsequent implementation of the Convention on the Participation of Foreigners in Public Life at Local Level[14].

Recommendations:

57. ECRI urges the authorities of Liechtenstein to confer eligibility and voting rights to long-term resident non-citizens in local elections.

58. ECRI also recommends that adequate mechanisms be set up which allow for non-citizens to be consulted and participate actively in the political decision-making process both at national and local levels.

Reception and status of non-citizens

- Refugees and asylum seekers

59. There are few asylum seekers and refugees in Liechtenstein. The number of asylum applications has been constantly decreasing since 2001. The authorities have indicated that in 2006 they received 47 applications for asylum. In principle, the asylum procedure provides for the presence of an NGO, namely Liechtenstein Refugee Assistance, as an observer, during interviews with the relevant authorities on the grounds of the application. However, ECRI has been informed that the authorities make extensive use of the possibility of holding an interview without the presence of the NGO, particularly in the case of interviews linked to the decision not to examine the application on the merits. ECRI believes that the presence of an NGO as an observer during all interviews can contribute to ensuring that the whole procedure is run in an adequate manner. ECRI notes that the Commissioner for Human Rights of the Council of Europe already asked in the 2005 report on his visit to Liechtenstein that the authorities allow for the presence of the NGO during *all* hearings throughout the application process.

60. In general, ECRI notes with concern that despite the small number of asylum seekers in Liechtenstein, the general climate of opinion concerning refugee issues has become less open in recent years. ECRI has been informed that a poster, put up throughout the country for a United Nations Commissioner for Refugees' campaign aimed at raising the population's awareness about refugee issues, was anonymously sprayed with racist symbols and slogans in several areas. The legislation on asylum is being revised, with the risk according to several sources of this leading to a more restrictive asylum procedure than the existing one. A poll indicated in 2007 that a large majority (78.2%) of those who have answered would like to see the asylum legislation becoming more restrictive. Such trends are probably linked to current general debates occurring in some European countries and particularly in neighbouring countries about restricting access to the asylum procedure. However, experts in this field have pointed to the fact that the situation in Liechtenstein cannot be compared with the situation of nearby countries. Therefore, there is no reason why measures taken and debates going on in the field of asylum in other countries should be automatically reflected in the Liechtenstein legal order and debate.

[14] See above, International Legal Instruments.

Recommendations:

61. ECRI recommends that the authorities of Liechtenstein allow the person concerned to benefit from the presence of an NGO specialised in asylum issues as an observer during all interviews throughout the asylum procedure.

62. ECRI also recommends that the authorities of Liechtenstein continue and reinforce their efforts to ensure that asylum be granted to all those who fulfil the current legal conditions and to combat stereotypes and prejudices among the majority population against asylum seekers and refugees.

- The situation of immigrant women

63. In its second report, ECRI recommended that the authorities take steps to ensure that the system of residence permits did not leave immigrant women in an unnecessarily precarious or vulnerable situation in areas such as domestic violence.

64. In the case where the residence permit of an individual is linked to his/her marriage, it has been reported to ECRI that some women may hesitate to leave their partner even in cases of violence, since they fear expulsion from Liechtenstein. ECRI notes that immigrant spouses who divorce their partner on grounds of violence are permitted to stay in Liechtenstein even if the five-year-residence requirement is not fulfilled, provided that the violence is documented by a doctor, psychologist or police report. The authorities can also allow an immigrant to stay for other reasons such as the interest of his/her child or his/her professional situation. However, NGOs have insisted on the need, and the possibility of creating a more flexible, case-by-case approach in this field where the residence permit would not automatically be linked to the civil status of the persons concerned.

65. As far as residence permits for spouses who are victims of domestic violence are concerned, ECRI notes that the main problem lies in the fact that these persons are not always aware of their rights and that it is not always easy to produce the necessary evidence of violence, particularly in the case of psychological violence. ECRI is pleased to note that measures have been taken to inform the persons concerned about their rights. However, according to NGOs, more efforts could be made to increase the transparency of the decision-making process in this field.

66. In general, immigrant women from non-German speaking countries who are without professional activity are in a particularly vulnerable situation, mostly due to the isolation they experience. This is why ECRI welcomes good practices such as the creation of a structure by the NGO Infra and financially supported by the State where women, in particular immigrant women, can meet for social events. There is also another structure where they can seek psychological, legal and other forms of free advice. It is also important that these immigrant women be given every opportunity to learn the German language[15].

Recommendations:

67. ECRI recommends that the authorities of Liechtenstein continue their efforts in finding adequate solutions to problems faced by those immigrant women who find themselves in a particularly vulnerable situation.

[15] See above: Integration of immigrants, - Integration and the German language.

Vulnerable groups

- *Muslim communities*

68. See below, Section II – Specific issues: - The situation of Muslim communities in Liechtenstein.

- *Immigrants from non-German speaking countries*

69. See above, Integration of immigrants and below, Specific Issues: - The need to reinforce measures to combat racial discrimination.

Measures taken to combat racism

70. ECRI is pleased to note that many measures have been taken by the authorities to combat racism and raise the population's awareness among the general public about the danger of racism and related intolerance and the need to firmly counter such phenomena. These measures include general awareness-raising measures and more specific issues aimed at combating racist violence and right-wing extremism.

- *General awareness-raising measures*

71. The results of two recent surveys among the population and in particular Liechtenstein youth indicate that a significant majority of the respondents are open to non-citizens and of the opinion that immigration is good for the economy and brings an enrichment of culture. Unfortunately, however, a minority of them believe that immigrants increase the crime rate, take jobs away from those born in Liechtenstein, and that the State spends too much money on immigrants. A minority also express their fear of immigrants becoming too numerous in the country. Other studies show that some members of Liechtenstein population believe that immigrants should give up their culture if they wish to stay in the country, advocating therefore the assimilation of the latter rather than the integration. Both non-governmental and governmental sources consistently report that currently immigrants from Turkey and the Balkans and persons of Muslim faith are the main targets of racist prejudices and stereotypes.

72. Against this background, measures which have been taken by the authorities to raise awareness among the population on the need to combat racism and to promote diversity are to be welcomed. Some of these measures are mentioned in other parts of this report. It is impossible to describe all other initiatives taken in this field since ECRI's second report. To mention but a few of them, ECRI welcomes the adoption of a five-year National Action Plan to Combat and Prevent Racism (2003-2007), based, among others, on the recommendations made in ECRI's second report on Liechtenstein. An intergovernmental Working Group against Racism, Anti-Semitism, and Xenophobia (WG-R) was set up to coordinate all activities organised in the framework of this Action Plan. The Action Plan focused on two main issues: combating racism and promoting integration. Within the limited yearly budget allocated to the Working Group to accomplish its task, it organised several awareness-raising activities such as training, seminars, round tables etc. on the problem of racism. In co-operation with the Equal Opportunities Office, the Working Group contributed to the development and implementation of a comprehensive concept for the integration of non-citizens in Liechtenstein[16]. A training session on intercultural communication and conflict

[16] See also above, Integration of immigrants.

resolution for officials working in contact with non-citizens was successfully organised and was therefore repeated for other officials. The National Action Plan has not been renewed and the Working Group was dissolved at the end of 2007. However, the Equal Opportunities Office will continue the work of the Working Group both in the field of combating racism and promoting integration.

73. ECRI also notes that the Forum on Racism organised in March 2007 by the Youth NGO *Colorida* with the participation of other NGOs and relevant public authorities was a successful event, which helped in raising awareness among the general population. In 2006, Liechtenstein introduced an annual Holocaust Memorial Day in Liechtenstein. Activities to raise general awareness about the problem of antisemitism and racism are regularly organised, including in the field of school education.

- ***Measures to combat racist violence and right-wing extremism***

74. In its second report, ECRI encouraged the authorities in their efforts to monitor and deal with the problem of right-wing extremism.

75. ECRI is pleased to note that the authorities have continued their efforts to combat racist violence and right-wing extremism. They have been monitoring the situation since ECRI's second report. On the basis of the information collected thanks to this monitoring, it is possible to say that there is no right-wing extremist political party in Liechtenstein and that right-wing extremism is circumscribed to a non-organised circle of 20 to 40 young activists and to the same number of followers. Since ECRI's last report, the authorities have been registering the same level of incidents involving right-wing extremists every year. Such incidents include physical attacks, racist graffiti, racist slogans shouted during public events and some violent clashes between right-wing extremists and non-citizens or anti-racist activists, particularly during such events. The authorities have also stressed that right-wing extremists tend to operate underground more than before and therefore are also less openly violent. This change in attitude seems to be linked to the refusal by and condemnation among the general population of any kind of violence, including racist violence.

76. To counter right-wing extremism and other forms of violence, the authorities set up in 2002 an interagency Violence Protection Commission, composed of representatives of the police, the prosecution authorities, the Office of Education and the Office of Social Affairs, which monitors the situation and coordinates measures against violence in society and at school. A Campaign called "Respect, please!" and mainly targeting school pupils was organised in order to address the issue of all forms of violence including racist violence. The Commission is currently preparing a sociological study which will aim at understanding the reasons for the presence of right-wing extremism in the country. On the basis of this study, the authorities intend to take adequate preventive and remedial measures in this field.

Recommendations:

77. ECRI strongly encourages the authorities of Liechtenstein in their efforts to combat all forms of racism, ranging from racist stereotypes and prejudices to more violent forms of racism such as right-wing extremism. Aware that combating racism and changing mentalities require long-term strategies, ECRI recommends that these efforts be maintained by all relevant authorities beyond the five-year National Action Plan against Racism.

78. ECRI recommends that the authorities maintain their efforts in raising school pupils' awareness about the need to combat racism, in particular racist violence, and right-wing extremism. In this respect, it draws the authorities' attention to its General Policy Recommendation N° 10 on combating racism and racial discrimination in and through school education.

Monitoring the situation

79. ECRI is pleased to note that since its second report, the authorities of Liechtenstein have carried out or encouraged and supported, a significant number of studies in the field of combating racism. In some cases these studies have been used as a basis by the authorities for remedial measures against situations of disadvantage experienced by persons on the grounds of their ethnic origin or their nationality. This is the case in the field of employment or education, for instance.

80. The Working Group against Racism (WG-R) mentioned above commissioned a study on "Statistical Data on Racism and Discrimination in the Principality of Liechtenstein – Requirements, analyses and perspective" from the independent Liechtenstein Institute, which was published in September 2005. This study allows a better assessment of the extent of racism and direct and indirect racial discrimination in Liechtenstein. It also indicates the fields where there is a lack of statistical data, namely the fields of education, health care, the labour market and housing. The study concludes with a list of recommendations on the kind of statistical data needed and on the ways in which it should be collected. It also insists on the lack of survey and polls about racism both among the general public and among the groups vulnerable to racism and racial discrimination about their own perception and experience in this field. A Statistics Project Group was set up in 2006 to further reflect and make proposals as concerns statistical data needed to combat racism and racial discrimination.

Recommendations:

81. ECRI strongly encourages the authorities of Liechtenstein to continue looking into means of setting up a full and coherent system of data collection so as to evaluate the situation regarding the different minority groups in Liechtenstein and determine the extent of manifestations of racism and direct and indirect racial discrimination. In this respect, ECRI draws the authorities' attention to its General Policy Recommendation No 4 on national surveys on the experience and perception of discrimination and racism from the point of view of potential victims, which provides guidelines in this field.

82. ECRI recommends that the authorities collect relevant information broken down according to categories such as ethnic origin, language, religion and nationality in different areas of policy, and ensure that this is done in all cases with due respect for the principles of confidentiality, informed consent and the voluntary self-identification of persons as belonging to a particular group. These systems should also take into consideration the gender dimension, particularly from the point of view of possible double or multiple discrimination.

II. SPECIFIC ISSUES

The situation of Muslim communities in Liechtenstein

83. In its second report, ECRI encouraged the authorities of Liechtenstein to keep the issue of possible verbal harassment and discrimination against members of Muslim communities under close examination and drew attention to its General Policy Recommendation No 5 on combating intolerance and discrimination against Muslims. It also recommended that the authorities find a solution concerning adequate prayer rooms for Muslim communities.

84. Approximately 3 to 4 % of the population living in Liechtenstein belongs to the Muslim faith. In May 2004 the Government established a Working Group on the Integration of Muslims. The Working Group is composed of an equal number of representatives of Muslims and of governmental departments familiar with the subject matter. The aim of the Working Group is to build up an institutionalised dialogue between Muslims and the authorities and to contribute to a climate of mutual respect. Measures which have been taken following suggestions made by this Working Group include the acquisition of literature on Islam available to the public in the Liechtenstein National Library, the payment since 2006 of a State contribution to the Islamic communities for religious and cultural uses, and the granting of a short-term stay permit for an additional Imam during Ramadan. ECRI notes with interest that, under the impulsion of this Working Group, the decision was taken to run a pilot project during the school year 2007/2008 offering optional religious courses on Islam for Muslim pupils in public primary schools in the same way as they already exist for Catholic and Protestant pupils. This decision was welcomed by the representatives of Muslim communities. It is to be hoped that this pilot project will be generalised across the whole country in the coming years.

85. ECRI wishes to express its concern at reports indicating the existence of expressions of hostility on the part of some members of the majority population against members of Muslim communities. ECRI has received reports of cases of verbal and even physical abuse in the streets against Muslims and particularly against women wearing headscarves. Examples of such abuse include the case of a person who openly spat in the direction of a woman wearing a headscarf ; the case of a woman wearing a headscarf being publicly insulted, and that of a Muslim woman whose headscarf was snatched off in public. Cases of harassment against Muslim pupils at schools and other forms of misbehaviour on the part of some teachers or pupils have also been reported. ECRI is also concerned at reports of discrimination against members of Muslim communities on the grounds of their religion in the field of access to housing, public services and employment, particularly for Muslim women wearing a headscarf[17]. Some reports in the foreign media widely read by Liechtenstein residents have been cited as negatively influencing the majority population by spreading racist prejudices and stereotypes against Muslims. ECRI believes that there is need for further awareness-raising action on the part of the authorities in order to counterbalance this negative influence[18].

86. Representatives of Muslim communities have stressed the problem of the lack of an adequate mosque in Liechtenstein and of a cemetery where they could bury the deceased according to their religious rites. The authorities have explained

[17] See below, The need to reinforce measures against racial discrimination in Liechtenstein.

[18] See above, Measures taken to combat racism.

that the issue of a cemetery has been dealt with intensively by the above-mentioned Working Group on the Integration of Muslims, but that the Muslim members of this Working Group did not consider it necessary to include this matter in the list of short-term or long-term projects. Representatives of Muslim communities have also complained about unjustified difficulties in finding premises for running their cultural activities. In one particular case, they contested before the courts, without success so far, the refusal of a municipality to rent them a place for cultural purposes which was based on arbitrary reasons according to them. The authorities have declared that the reasons for the refusal in this case were not arbitrary and were based on the rules on the use of buildings applying to industrial zones of municipalities. Representatives of Muslim communities have stressed that some politicians, locally elected persons or even lawyers sometimes prefer not to cater to Muslim communities' needs, reportedly under the pressure of general public opinion. ECRI considers that a solution should be found, allowing all religious groups, and in particular Muslims, who wish to exercise their cultural activities on the territory of Liechtenstein to do so without being confronted with insurmountable obstacles.

87. ECRI notes that, while the Orthodox Christians do not suffer from the same intolerance and discrimination problems as the Muslim communities, they constitute a group of 365 members who ask for more support on the part of the authorities in their religious and cultural activities. In particular, this group would like to receive more financial support for their religious activities such as organisation of religious courses at school. They also would like to be given the possibility of participating more actively in the national decision-making process concerning religious issues. The authorities could therefore envisage giving more attention to the general issue of religious diversity. Such move would benefit to all small religious groups, including Muslim and Orthodox Christian communities.

Recommendations:

88. ECRI strongly recommends that the authorities of Liechtenstein maintain and reinforce their efforts to effectively combat racist stereotypes and prejudices as well as any other manifestations of religious intolerance on the part of members of the majority population against members of Muslim communities. In this connection, ECRI draws the attention of the authorities of Liechtenstein to its General Policy Recommendation No. 5 on combating intolerance and discrimination against Muslims, which provides detailed guidance on the measures which should be taken in this field.

89. ECRI recommends that the authorities of Liechtenstein continue their efforts and their dialogue with representatives of Muslim communities to find solutions as soon as possible to all the obstacles encountered by members of Muslim communities who wish to practise their religious and cultural activities.

The need to reinforce measures against racial discrimination

90. In its second report, ECRI recommended that the authorities of Liechtenstein introduce a comprehensive body of civil and administrative law prohibiting racial discrimination in all the various fields of daily life.

91. Since ECRI's second report, no changes have been made to the legislation in Liechtenstein to reinforce the fight against racial discrimination. The main provisions that apply in this field are Article 31 of the Constitution and Article 283 of the Criminal Code[19].

92. ECRI notes that Article 31 of the Constitution[20] only provides for the principle of equality between citizens of Liechtenstein. However, the authorities have indicated that, according to the case law of the Constitutional Court, it is also applicable to non-citizens. Furthermore, this provision does not clearly establish that discrimination is prohibited on the grounds of race, colour, language, religion, nationality and ethnic or national origin. In principle, this provision is directly applicable by Liechtenstein courts. In practice however, no court has ever applied this provision in the framework of the principle of non-discrimination on racial grounds.

93. Article 283 of the Criminal Code, entitled "Racial Discrimination", prohibits in its paragraph 6 the refusal of a service meant for the general public to a person or a group of persons on the basis of race, ethnicity, or religion. So far, no complaint under this provision has been brought to the authorities' attention.

94. There are other provisions applicable within the domestic legal order which prohibit discrimination. Among them, Article 14 of the European Convention on Human Rights prohibits discrimination with respect to the rights set forth in the Convention. The Convention is directly applicable by Liechtenstein courts but Article 14 has never been applied in cases of racial discrimination before domestic courts. Article 46 para 1 (a) of the Employment Contract Act prohibits termination of a labour relationship on the grounds of personal traits, that is to say on the basis of race, colour, descent, nationality or ethnic origin. ECRI understands that this article has not been applied yet. There is no other provision in the labour law which would clearly prohibit racial discrimination outside the scope of contract termination such as in the field of access to employment, occupation and self-employment as well as work conditions, remuneration or promotions.

95. The fact that none of these provisions has yet been applied does not mean that no case of racial discrimination has occurred in Liechtenstein. ECRI notes with concern that many different sources and studies point to problems of direct racial discrimination[21] in access to employment and housing, when a person has been

[19] Concerning Article 283 of the Criminal Code, see also above, Criminal law provisions.

[20] Art. 31 of the Constitution: 1) All Liechtenstein citizens shall be equal before the law. Public offices shall be equally open to them, subject to observance of the legal provisions. 2) Men and women shall enjoy equal rights. 3) The rights of foreigners shall be determined in the first instance by international treaties, or, in their absence, by reciprocity.

[21] According to Paragraph 1 b) of ECRI General Policy Recommendation N°7, " 'direct racial discrimination' shall mean any differential treatment based on a ground such as race, colour, language, religion, nationality or national or ethnic origin, which has no objective and reasonable justification. Differential treatment has no objective and reasonable justification if it does not pursue a legitimate aim or if there is not a reasonable relationship of proportionality between the means employed and the aim sought to be realised".

refused a job or rental accommodation on the grounds of his/her ethnic origin or religion. Reportedly, the victims of such cases are mainly from Turkey or from the Balkans and/or of Muslim faith. As there have been no formal complaints, it is difficult to know the real extent of this problem. Representatives of immigrants, NGOs and officials working in different public services have consistently reported such cases to ECRI. For example, some of them have explained that they have themselves experienced or witnessed such problems; others have indicated that they have received credible reports about such cases of racial discrimination.

96. Several reasons can be put forward to explain the discrepancies between the reports mentioned above and the lack of complaints before courts. A first reason is that the scope of some of the existing provisions mentioned above does not cover the specific cases referred to above. For instance, racial discrimination in recruitment is in principle covered neither by Article 14 of the ECHR nor by the Employment Contract Act. Another reason may be that, under the current law, it is difficult to prove the existence of such discrimination before the courts because discrimination is sometimes hidden behind a fallacious justification. Due to the principle of presumption of innocence, strict rules of evidence apply in criminal law, a fact that makes it more difficult for the victim to use this avenue to obtain redress in many cases of discrimination. There are no civil and administrative anti-discrimination provisions establishing a shared burden of proof as recommended by ECRI[22]. A shared burden of proof means that the complainant should establish facts allowing for the presumption of discrimination, whereupon the onus shifts to the respondent to prove that discrimination did not take place. Thus, in cases of alleged direct racial discrimination, the respondent must prove that the differential treatment has an objective and reasonable justification.

97. Another reason may be that the population in Liechtenstein and particularly the victims of such acts are not aware of the fact that these acts are - or should be - prohibited as they constitute a violation of human rights. NGOs have explained that, in the end, victims of racial discrimination in employment nearly always find a job thanks to the fact that the labour market is currently favourable. Likewise, victims of racial discrimination in the field of housing eventually find appropriate accommodation despite the tense housing market, thanks in particular to the help of the Office for Social Affairs. Therefore, despite the gravity of racial discrimination, and for all the reasons explained above, victims do not necessarily see the benefit of complaining before a court.

98. ECRI considers that efforts towards the integration of Liechtenstein society should include an all-encompassing strategy to combat direct and indirect forms of racial discrimination[23]. In particular the strategy should include both legal and awareness-raising measures, targeting discrimination on the grounds of ethnic or religious origin and occurring in access to employment and housing but also in other fields of everyday life such as access to goods and services.

99. Civil and administrative law provisions should be adopted to complement the existing constitutional and criminal law provisions against racial discrimination. In the field of combating racial discrimination, whereas criminal law both has a symbolic effect which raises the awareness of the seriousness of racial discrimination and a strong dissuasive effect, civil and administrative law often provide more flexible legal avenues, which may facilitate victims' recourse to legal action and provide easier mechanism for redress. While the Equal

[22] See Paragraph 11 of General Policy Recommendation N°7 on national legislation to combat racism and racial discrimination and Paragraph 29 and 30 of its Explanatory Memorandum.

[23] Concerning integration, see also above, Integration of immigrants.

Opportunities Office set up in 2005 is competent to receive individual complaints of racial discrimination, it has only an advisory role in this respect. So far, no complaints of racial discrimination have been brought to the attention of this body but this may be partly due to its limited powers in this respect and to the fact that its competence as an advisory body in this field is not yet known by the general public[24]. For these reasons, the body responsible for dealing with individual complaints of racial discrimination should be reinforced, as recommended above[25].

100. In this respect, the authorities of Liechtenstein may draw inspiration from ECRI's General Policy Recommendation N°7 on national legislation to combat racism and racial discrimination[26]. ECRI notes that a Law on Gender Equality adopted in 1999 and amended in 2006 (*Gleichstellungsgesetz, GLG*) in order to transpose Council Directive 76/207/EEC as amended[27] prohibits gender-based discrimination in the field of work. This law defines direct and indirect discrimination and provides for a mechanism of simplified burden of proof in civil law. Thus, the authorities could also draw inspiration, *mutatis mutandis*, from the Law on Gender Equality and the existing European Union Directives covering the issue of racial discrimination in employment and other fields of life[28].

101. ECRI believes that legal measures should be complemented by an awareness-raising campaign about the problem of direct and indirect racial discrimination. It notes with interest that some awareness-raising measures have been taken by the authorities, for instance through the participation in a poster campaign organised by the Swiss Federal Commission against Racism called "Without Exclusion" and aimed at denouncing the phenomenon of racial discrimination. Many other awareness-raising measures have been taken in the framework of the National Action Plan against Racism, but so far these measures have been focusing more on the problem of racist physical and verbal violence and less on the notion of racial discrimination in everyday life.

Recommendations:

102. ECRI recommends that the authorities of Liechtenstein adopt an all-encompassing strategy to combat all forms of racial discrimination in all fields of life.

103. In particular, ECRI strongly recommends that the authorities of Liechtenstein reinforce without delay the civil and administrative legal framework aimed at combating racial discrimination to cover all types of discrimination in all spheres of life, having due regard to ECRI's General Policy Recommendation No. 7 on national legislation to combat racism and racial discrimination. It stresses the importance of providing for a system of shared burden of proof with respect to discrimination to all areas of civil and administrative law and especially

[24] See also above, Specialised bodies and other institutions.

[25] See above, Specialised bodies and other institutions.

[26] See ECRI General Policy Recommendation N°7, paragraphs 4 to 17 and 25 to 27 and paragraphs 6 to 8, 12 to 37 and 56 to 57 of the Explanatory Memorandum.

[27] Council Directive 76/207/EEC on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions.

[28] Directive 2000/43/EC of the Council of the European Union implementing the principle of equal treatment between persons irrespective of racial or ethnic origin, and Directive 2000/78/EC of the Council of the European Union establishing a general framework for equal treatment in employment and occupation.

employment, training, access to housing and goods and services available to the public.

104. ECRI also recommends that the authorities of Liechtenstein continue and intensify their efforts to provide the public with information, for example through an awareness-raising campaign, about the existing provisions prohibiting racial discrimination and about any provisions that will be adopted in the future. Emphasis should be placed on the complementary relationship between civil and administrative law and criminal law, as both forms of law have a positive role to play in the fight against racial discrimination.

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Lituania

Constitution, Article 25

1) Individuals shall have the right to have their own convictions and freely express them.

2) Individuals must not be hindered from seeking, obtaining, or disseminating information or ideas.

3) Freedom to express convictions, as well as to obtain and disseminate information, may not be restricted in any way other than as established by law, when it is necessary for the safeguard of the health, honour and dignity, private life, or morals of a person, or for the protection of constitutional order.

4) Freedom to express convictions or impart information shall be incompatible with criminal actions - the instigation of national, racial, religious, or social hatred, violence, or
5) discrimination, the dissemination of slander, or misinformation.

6) Citizens shall have the right to obtain any available information which concerns them from State agencies in the manner established by law.

Constitution, Article 27

A person's convictions, professed religion or faith may justify neither the commission of a crime nor the violation of law.

Criminal Code, § 170

> *"Any person who by public statements orally, in writing or through mass media mocks, expresses contempt, incites hatred or discrimination against a group of people or an individual belonging to such group on account of their sex, sexual orientation, race, nationality, language, origin, social status, religion, conviction or belief, shall be punished by fine or restriction of freedom, or arrest, or imprisonment up to 2 years.*
>
> *Any person who publicly incites violence or use of deadly physical force against a group of people or an individual belonging to such group on account of their sex, sexual orientation, race, nationality, language, origin, social status, religion, conviction or belief, or provides financial or other kind of material support for such acts, shall be punished by a fine or restriction of freedom, or arrest, or imprisonment up to 3 years."*

The Law of the Republic of Lithuania of 18th November 1997 on the Supplementation of the Code of Administrative Violations by Articles 214(12), 214(13), the Abolition of Article 214(1) and Amendment of Articles 224, 259(1), 32033 introduced definitions of unlawful conduct related to public advocacy of national, racial or religious discord

Article 214(12). The Production, Storage or Distribution of Information Products Which Advocate National, Racial or Religious Discord

The production or storage with a purpose of distribution and distribution of printed, visual, audio or other products, which advocate national, racial or religious discord, incurs a fine from 1000 to 10000 Litas either with confiscation of such products being produced, stored or distributed and of the means essentially used for production of such products, or without confiscation of the means of production.

Article 214(13). The establishment of an organisation which advocates national, racial or religious discord or participation in activities of such an organisation

The establishment of an organisation which advocates national, racial or religious discord or participation in activities of such an organisation, incurs a fine of between 3000 and 10000 Litas.

The same conduct performed by a person who had previously been punished by an administrative fine for the offences foreseen in Part 1 of this Article, incurs a fine from 10000 to 20000 Litas."

Case Law

Lituanie

ECRI notes that in February and March 2004 a series of articles of an antisemitic character were published in the daily newspaper *Respublika* and that in March 2004 these articles were published in a separate edition which was received by all readers of that newspaper and of another newspaper, *Vakaro žinios*. ECRI notes that, at the request of civil society organisations, the General Prosecutor's Office opened an investigation into possible breach of Article 170 of the Criminal Code ECRI also notes that the Inspector of Journalists' Ethics and the Commission on the Ethics of Journalists and Editors concluded that the provisions against incitement to racial or religious hatred contained in the Law on Provision of Information to the Public had been breached and that an ad hoc commission set up to consider these articles concluded that the articles in question amounted to incitement to racial hatred. However, ECRI notes that in March 2005 the General Prosecutor's Office decided to discontinue the case, reportedly on grounds, inter alia, that these articles did not constitute incitement to racial hatred, but were rather of a humorous nature. However, ECRI is pleased to note that, following much public criticism of the decision of the General Prosecutor's Office to discontinue the case, the latter decided more recently to re-open the investigations.
[ECRI, Third report on Lituania, adopted on 24 June 2005, CRI(2006)2, § 55]

L'ECRI note en particulier la parution en février et mars 2004 d'une série d'articles antisémites dans le quotidien *Respublika*, ainsi que la parution en mars 2004 d'une édition spéciale rassemblant tous ces articles reçue ensuite par tous les lecteurs du quotidien et par ceux d'un autre journal, *Vakaro žinios*. A la demande d'organisations de la société civile, le Parquet a ouvert une enquête judiciaire pour une éventuelle violation de l'article 170 du Code pénal. Le Contrôleur de l'éthique du journalisme et la Commission sur l'éthique des journalistes et des éditeurs ont conclu à la violation des dispositions contre l'incitation à la haine raciale ou religieuse contenues dans la Loi sur l'information publique et qu'une commission ad hoc mise en place pour examiner ces articles est parvenue à la conclusion qu'ils constituaient une incitation à la haine raciale. Cependant, en mars 2005, le Parquet a décidé de classer l'affaire au motif, entre autres, que ces articles ne constituaient pas une incitation à la haine raciale, mais seraient plutôt de nature humoristique. Toutefois, le Parquet a récemment décidé de rouvrir l'enquête, suites aux vives critiques publiques provoquées par sa décision de classer l'affaire.
[ECRI, Troisième rapport sur la Lituanie adopté le 24 juin 2005, CRI(2006)2, § 55]

Lithuania

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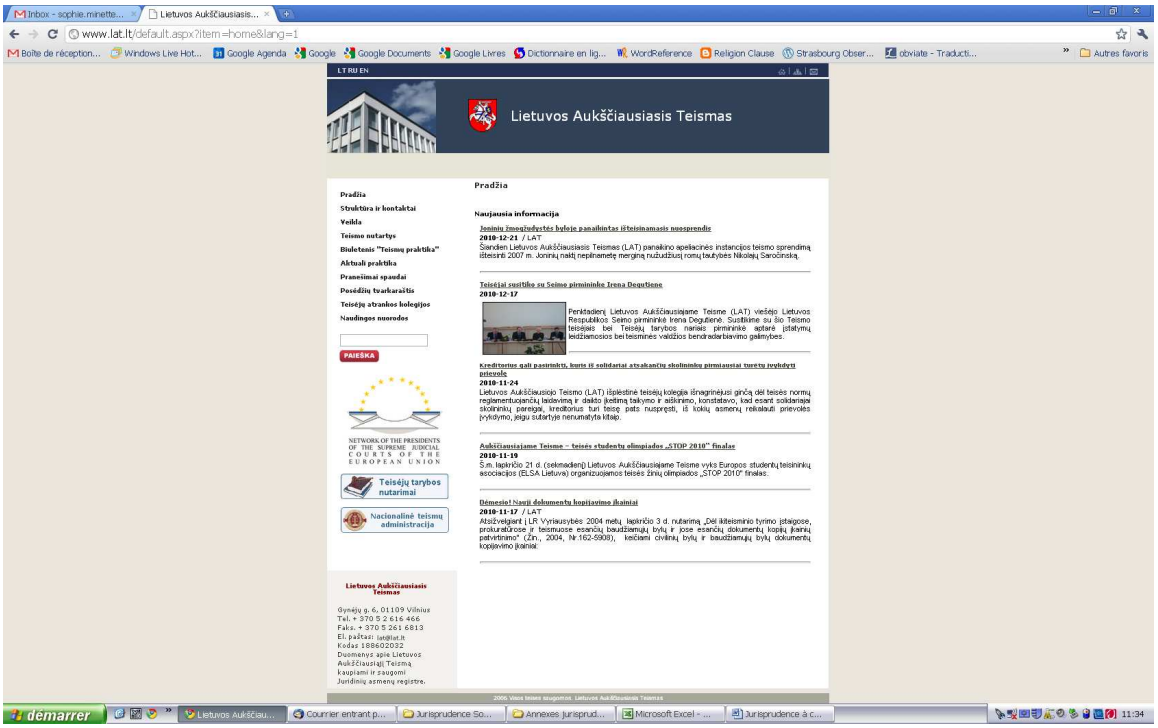
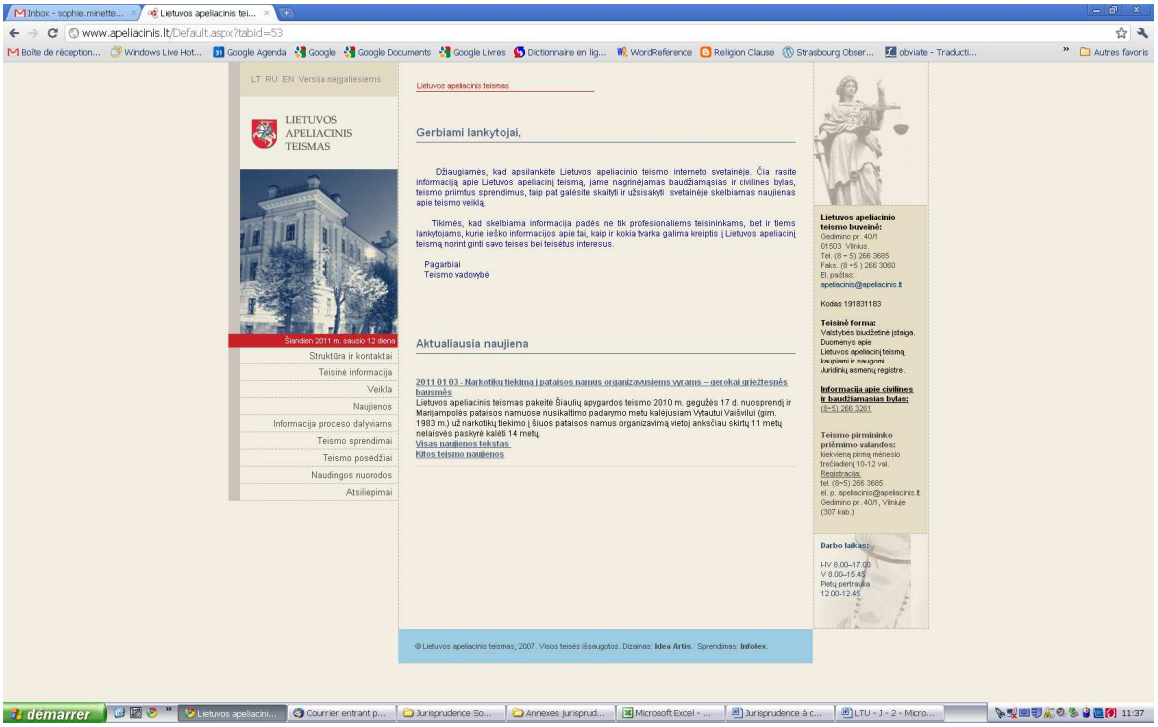
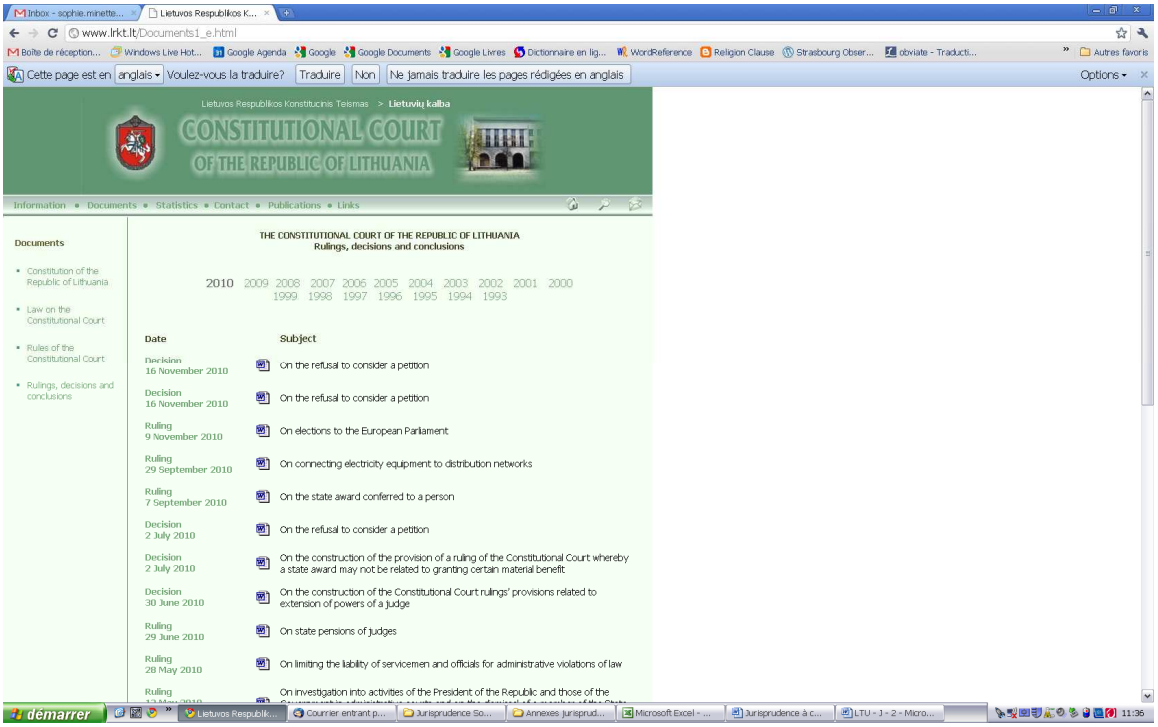
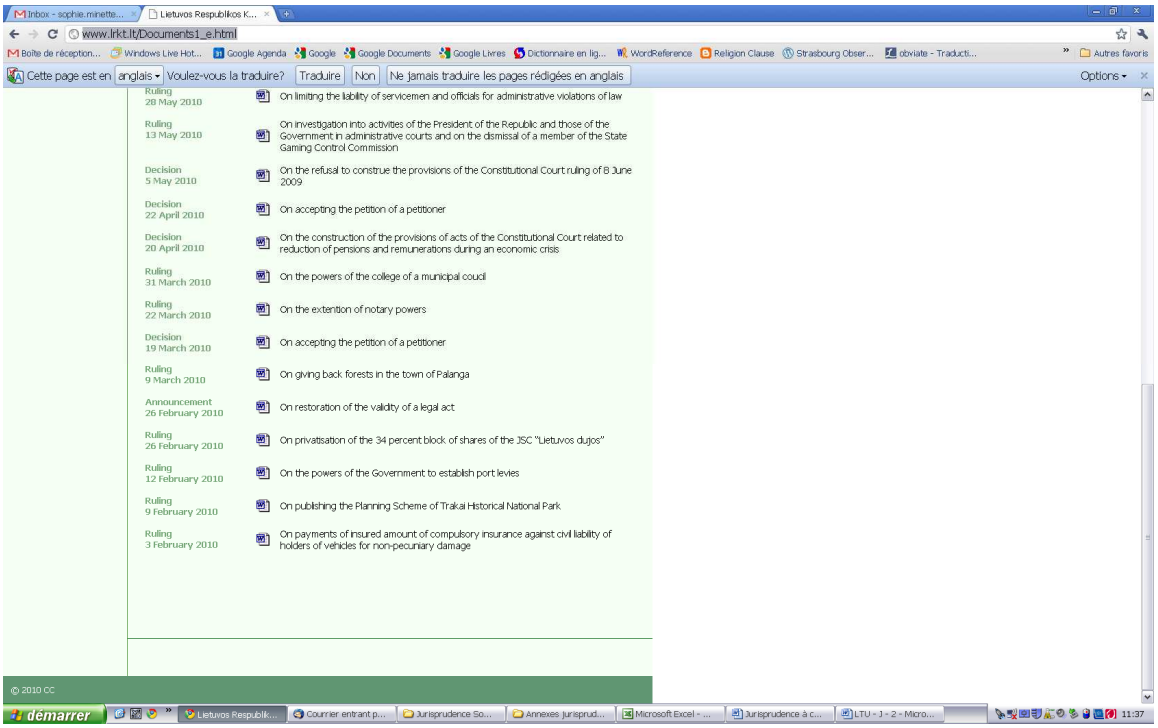


Appeal Court of Vilnius: http://www.apeliacinis.lt/Default.aspx?tabid=53



Constitutional Court (decisions): http://www.lrkt.lt/Documents1_e.html





Public Policies

Lygių galimybių kontrolieriaus tarnyba

Renginiai Skundai Žiniasklaidoje

Lygių galimybių kontrolieriaus tarnyboje gautas D. K. skundas, kuriame nurodoma, kad 2005 m. liepos 1 d. Migracijos departamento įsakymu buvo konstatuota, kad jis neteko Lietuvos Respublikos pilietybės.

Visi skundai

Apie tarnybą

Kontrolierė

Aušrinė Burneikienė gimė 1961 m. gegužės 12 d. Vilniuje. 1985 m. baigė Vilniaus universiteto Teisės fakultetą. Baigusi universitetą, iki 1990 m. dirbo Vilniaus tardymo valdybos tardytoja. 1990-1992 m. buvo Vidaus reikalų ministerijos vyresnioji juristkonsultė. 1992 m. tapo Vidaus reikalų ministerijos Juridinio skyriaus viršininke. 1999 m. balandžio 20 d. Seimo nutarimu paskirta Moterų ir vyrų lygių galimybių kontroliere. 2003 m. balandį kontrolierė paskirta antrai ketverių metų kadencijai.

1998 m. gruodžio 1 d. Seimas priėmė Moterų ir vyrų lygių galimybių įstatymą, kuris įsigaliojo 1999 m. balandžio 1 d. 1999 metų balandžio 20 d. Seimas paskyrė Aušrinę Burneikienę moterų ir vyrų lygių galimybių kontroliere, o gegužės 25 d. įsteigė Moterų ir vyrų lygių galimybių kontrolieriaus tarnybą bei patvirtino šios tarnybos nuostatus. 2003 m.balandį kontrolierė paskirta antrai ketverių metų kadencijai.

2002 m. birželio 18 d. priimti Moterų ir vyrų lygių galimybių įstatymo pakeitimai ir papildymai išplėtė sritis, kuriose būtina įgyvendinti moterų ir vyrų lygias galimybes, uždraudžiant diskriminaciją dėl lyties vartotojų teisių apsaugos ir reklamos srityse.

2003 m. lapkričio 18 d. Seimui priėmus Lygių galimybių įstatymą, tarnybos kompetencija papildyta draudimo diskriminuoti dėl asmens amžiaus, lytinės orientacijos, negalios, rasės ir etninės priklausomybės, religijos ar įsitikinimų priežiūra, o pati įstaiga pavadinta Lygių galimybių kontrolieriaus tarnyba.

Lygių galimybių kontrolieriaus tarnyba yra savarankiška institucija, atskaitinga Seimui. Į kontrolieriaus tarnybą gali kreiptis vyrai ir moterys, patyrę diskriminaciją dėl savo lyties darbo, švietimo, prekių ir paslaugų teikimo sferose ar patyrę seksualinį priekabiavimą.

Nuo 2005 m. sausio 1 d. tarnyba taip pat tiria skundus asmenų patyrusių diskriminaciją ar priekabiavimą dėl amžiaus, lytinės orientacijos, negalios, rasės ir etninės priklausomybės, religijos ar įsitikinimų darbe, švietimo įstaigoje ar teikiant paslaugas.

Įstatymu draudžiamos abi diskriminacijos dėl lyties formos – tiesioginė ir netiesioginė. Svarbu, kad visuose sprendimų priėmimo lygmenyse būtų išvengta veiksmų ar nuostatų, kurios iš pirmo žvilgsnio atrodo neutralios moterų ar vyrų atžvilgiu, bet jas įgyvendinus būtų pabloginama padėtis didesnės dalies vienos lyties asmenų (netiesioginės diskriminacijos).

Reglamentuota specialių priemonių (pozityvios diskriminacijos) taikymo galimybė, siekiant lyčių pusiausvyros bei užkirsti kelią lygių galimybių pažeidimui dėl amžiaus, lytinės orientacijos, negalios, rasės ar etninės priklausomybės, religijos ar įsitikinimų.

Valdžios ir valdymo institucijos įpareigotos rengti ir įgyvendinti programas ir priemones, skirtas moterų ir vyrų lygių galimybių užtikrinimui bei lygybės principo įgyvendinimui neatsižvelgiant į amžių, lytinę orientaciją, negalią, rasęar etninę priklausomybę, religiją ar įsitikinimus.

Švietimo įstaigos privalo užtikrinti vienodas sąlygas asmenims nepaisant jų lyties, amžiaus, lytinės orientacijos, negalios, rasės ar etninės priklausomybės, religijos ar įsitikinimų, kai:

- priimama mokytis;
- skiriamos stipendijos;
- sudaromos mokymo programos;
- vertinamos žinios.

Darbdavys, neatsižvelgdamas į asmens lytį, amžių, lytinę orientaciją, negalią, rasę ar etninę priklausomybę, religiją ar įsitikinimus, privalo:

- taikyti vienodus atrankos kriterijus, priimdamas į darbą ar atleisdamas iš tarnybos;
- sudaryti vienodas darbo sąlygas;

Kontaktai

Šeimyniškių 1A, LT-09312 Vilnius
Tel. (8~5) 261 2787, fax (8~5) 261 2725
El.p. mvlgk@lrs.lt

Pirmadieniais-ketvirtadieniais nuo 8 iki 17 val.
Penktadienį nuo 8 iki 15.45 val.

- naudoti vienodus darbuotojų vertinimo kriterijus;
- mokėtį vienodą darbo užmokestį;
- sudaryti palankias sąlygas neįgaliesiems.

Darbdavys privalo imtis priemonių, kad darbuotojas nepatirtų seksualinio priekabiavimo ar nebūtų persekiojamas, jei pateikė skundą dėl diskriminacijos.

Prekių ar paslaugų pardavėjas bei gamintojas, neatsižvelgdamas į asmens lytį, amžių, lytinę orientaciją, negalią, rasę ar etninę priklausomybę, religiją ar įsitikinimus, privalo:

- sudaryti vienodas sąlygas gauti tokias pat prekes ir paslaugas (įskaitant apsirūpinimą būstu) bei taikyti vienodas apmokėjimo sąlygas ir garantijas;
- teikdamas informaciją užtikrinti, kad asmuo ar asmenų grupė nėra žeminama ar pateikiama kaip pranašesnė dėl minėtų savybių.

Diskriminuojantys skelbimai: iš darbo ieškančių asmenų įstatymas draudžia reikalauti informacijos apie jų amžių, šeiminę padėtį, privatų gyvenimą ar šeimos planus. Skelbimuose priimti į darbą ar mokytis draudžiama nurodyti reikalavimus, suteikiančius pirmenybę vienai iš lyčių, tam tikro amžiaus, tam tikros lytinės orientacijos asmenims, sveikiems asmenims, tam tikros rasės ar tautybės, religijos ar įsitikinimų asmenims.

Asmenys, patyrę diskriminaciją dėl išvardintų pagrindų ir minėtose srityse, į tarnybą gali kreiptis telefonu (8-5 2612787), elektroniniu paštu (mvlgk@lrs.lt), faksu (8-5 2612725) ar apsilankyti tarnyboje adresu Šeimyniškių g. 1A, 09312 Vilnius (5 aukštas).

LIETUVOS RESPUBLIKOS NUOLATINĖ ATSTOVYBĖ PRIE JUNGTINIŲ TAUTŲ BIURO IR KITŲ TARPTAUTINIŲ ORGANIZACIJŲ ŽENEVOJE

MISSION PERMANENTE DE LA LITUANIE AUPRÈS DE L'OFFICE DES NATIONS UNIES ET DES AUTRES ORGANISATIONS INTERNATIONALES À GENÈVE

No.: SN-104/2005

The Permanent Mission of the Republic of Lithuania to the United Nations Office and other International Organisations in Geneva presents its compliments to the Office of the United Nations High Commissioner for Human Rights (HCHR) and has the honour to submit the information on the implementation of the United Nations Commission on Human Rights resolution 2005/3 "Combating Defamation of Religions" and resolution 2005/36 "The Incompatibility between Democracy and Racism". The following information has been drafted at the request of 4 July 2005 of the UN HCHR under reference GVA1558.

The Permanent Mission of the Republic of Lithuania to the United Nations Office and other International Organisations in Geneva avails itself of this opportunity to renew to the Office of the High Commissioner for Human Rights assurances of its highest consideration.

Geneva, 4 October 2005

To the Office of the High Commissioner
for Human Rights
Geneva

INFORMATION OF THE GOVERNMENT OF THE REPUBLIC OF LITHUANIA ON THE IMPLEMENTATION OF THE UNITED NATIONS COMMISSION ON HUMAN RIGHTS RESOLUTION 2005/3 "COMBATING DEFAMATION OF RELIGIONS" AND RESOLUTION 2005/36 "THE INCOMPATIBILITY BETWEEN DEMOCRACY AND RACISM"

The Government of the Republic of Lithuania has the honour to submit to the United Nations High Commissioner for Human Rights the information on the United Nations Commission on Human Rights resolution 2005/3 "Combating defamation of religions" paragraph 16 and on the United Nations Commission on Human Rights resolution 2005/36 "The incompatibility between democracy and racism" paragraph 16. The following information has been drafted at the request of 4 July 2005 of the United Nations High Commissioner for Human Rights under reference: GVA1558.

On the paragraph 16 of Resolution 2005/5 "Combating defamation of religions"

According to the census of 2001 there were 2.9 thousand Muslim Sunnis living in Lithuania. Lithuanian Tartars, a historic and well – integrated ethnic group, form the majority of Lithuanian Muslims. Representatives from other traditionally Muslim countries – Azerbaijanis, Uzbeks, Tadjiks, Kazakhs, Chechens and others amount about 2500. Since the independence a small number of people coming from Afghanistan, Pakistan, Turkey, Lebanon and other countries of Middle East and North Africa, where Islam is a dominating religion, settled in Lithuania.

The article 2 of the Law on religious communities and associations (1995) indicates that there is no state religion in the Republic of Lithuania. The article 5 names nine traditional religious communities and associations, which constitute a part of Lithuanian historic, spiritual and social heritage, including Muslim Sunnis. Every year by the resolution of Lithuania Government Muslim Sunnis spiritual centre Muftist receives contribution from state budget. In 2005 that was 12.7 thousand litas (1 EUR=3.45 LTL).

There were no acts of violence motivated by discrimination or on the ground of ethnicity registered in Lithuania. In 2003 a few incidents took place in which Chechen people were involved, but they were qualified as hooliganism or affray. In Lithuania there are five working mosques, Lithuanian Tartars community house and cemetery. There are a few shops, restaurants and other public centering objects belonging to Muslims. None of these objects was attacked on the ground of racist or religious motives.

It should be noted that after the events of 11 September 2001 in New York Lithuanian Tartars and a few other Muslim communities made a statement condemning terrorism.

Signs of Islamophobia in public sphere are noticed in the means of mass media – press, Internet, television. According to the recently conducted public polls, the negative attitude towards immigrants and refugees, which are associated with Afghans, Arabs, Chechens, Pakistanis and other residents of Asia and Middle East countries, has increased in Lithuania. The number of those who wouldn't prefer to live in the neighbourhood of Muslims increased from 31% in 1999 to 51 % in 2005.

In the Republic of Lithuania there is no special legal or institutional mechanism which ensured the participation of Muslims or another national (ethnic) group in the political life (for example, quotas in the Parliament). Absolute majority of Lithuanian Muslims (Tartars, Azerbaijanis, Uzbeks, Tadjiks) has the citizens of the Republic of Lithuania and therefore enjoy equal rights as Lithuanians. The Constitution of the Republic of Lithuania guarantees the right to participate in the elections of the President of the Republic of Lithuania, the Parliament, the local Councils and

referendums and to be elected as a member of the Parliament (Seimas) of the Republic of Lithuania and the local Councils. The representatives of Muslim communities (Tartars, Azerbaijanis, Uzbeks, Tadjiks, Lebanese) are elected to the Council of National Communities at the Department of National Minorities and Lithuanians living abroad. Every year the Department assigns about 10 thousand litas to support the cultural and educational activities of these communities.

On the paragraph 16 of Resolution 2005/36 "The incompatibility between democracy and racism"

In 1995, The Seimas of the Republic of Lithuania issued a statement On the signs of racism, xenophobia and related intolerance. It preaches the ideology based on racial intolerance, violence or discrimination, as well as any actions straining relations and encouraging mistrust between different racial, ethnic, national, religious and social groups; strongly condemns racism, xenophobia, anti-Semitism and intolerance, national, religious, racial and other forms of discrimination; assures not to tolerate anti-Semitism of any possible form, also in the mass media, publications, public declarations, the institutions of education and training; undertakes an obligation to pay a special attention to the improvement and implementation of the Lithuanian laws against these unjustifiable acts; urges the Government of Lithuania to support the means of prevention against still existing intolerance, especially promoting reciprocal understanding and trust; contributes to the studies of other nationalities and languages, what provides better understanding of the peculiarities of other countries and nations.

On 7 November, 2002 by the decision No. IX - 1185 of The Seimas of the Republic of Lithuania The National Plan on the Promotion and Protection of Human Rights in the Republic of Lithuania was approved. The implementation of this plan is sponsored by the UN Development Programme. The Committee of Human Rights of the Seimas formed a working group which prepared a project of the programme on the combat against intolerance, racism and xenophobia. Since 2005 a part of the means included in this programme is being implemented by the Department of National Minorities and Lithuanians Living Abroad in its 2005- 2010 programme of integration of national minorities into Lithuanian society.

The problem of racism, anti-Semitism, xenophobia in Lithuanian political life mostly emerges in the context of opinions expressed by non-parliament parties, insignificant political organizations or individual politicians. The parties in Parliament, the Board of the Seimas unreservedly condemn racist or xenophobic rhetoric. Due to the anti-Semitic, Islamophobic or xenophobic declarations of the members of the Parliament during 2001- 2003, the Seimas Commission of Ethics and Procedure issued five decisions.

Certain debates took place in the Seimas in 2002 when the amendment of the Law on Citizenship was adopted. On the opinion of national minorities, the new provisions in the law violate the constitutionally established principle of equality. A group of Parliament Members addressed The Constitutional Court of Lithuania requesting to consider if those provisions are not discriminating with regard to national minorities. The request was accepted by the Constitutional Court.

In 2004 a group of Parliament Members addressed the Board of the Seimas proposing to initiate a referendum for the amendment of the article 91 of the Constitution of the Republic of Lithuania in order to establish that only the person of Lithuanian nationality could become the Prime Minister. This proposal was criticized as discriminating during the political debates, in the means of mass media and rejected by the Board of Seimas on the formal grounds.

Luxembourg

Code pénal, Art. 454 (L. 28 novembre 2006)
Constitue une discrimination toute distinction opérée entre les personnes physiques à raison de leur origine, de leur couleur de peau, de leur sexe, de leur orientation sexuelle, de leur situation de famille, de leur âge, de leur état de santé, de leur handicap, de leurs moeurs, de leurs opinions politiques ou philosophiques, de leurs activités syndicales, de leur appartenance ou de leur non appartenance, vrai ou supposée, à une ethnie, une nation, une race ou une religion déterminée.
Constitue également une discrimination toute distinction opérée entre les personnes morales, les groupes ou communautés de personnes, à raison de l'origine, de la couleur de peau, du sexe, de l'orientation sexuelle, de la situation de famille, de leur âge, de l'état de santé, du handicap, des moeurs, des opinions politiques ou philosophiques, des activités syndicales, de l'appartenance ou de la non-appartenance, vraie ou supposée, à une ethnie, une nation, une race, ou une religion déterminée, des membres ou de certains membres de ces personnes morales, groupes ou communautés.

Art. 455. (L. 19 juillet 1997)
Une discrimination visée à l'article 454, commise à l'égard d'une personne physique ou morale, d'un groupe ou d'une communauté de personnes, est punie d'un emprisonnement de huit jours à deux ans et d'une amende de 251 euros à 25.000 euros ou de l'une de ces peines seulement, lorsqu'elle consiste :
1) (L. 21 décembre 2007) à refuser la fourniture ou la jouissance d'un bien et/ou l'accès à un bien ;

2) (L. 21 décembre 2007) à refuser la fourniture d'un service et/ou l'accès à un service ;

3) (L. 21 décembre 2007) à subordonner la fourniture d'un bien ou d'un service et/ou l'accès à un bien ou à un service à une condition fondée sur l'un des éléments visés à l'article 454 ou à faire toute autre discrimination lors de cette fourniture, en se fondant sur l'un des éléments visés à l'article 454 ;

4) à indiquer dans une publicité l'intention de refuser un bien ou un service ou de pratiquer une discrimination lors de la fourniture d'un bien ou d'un service, en se fondant sur l'un des éléments visés à l'article 454 ;

5) à entraver l'exercice normal d'une activité économique quelconque,

6) à refuser d'embaucher, à sanctionner ou à licencier une personne ;

7) L. 28 novembre 2006) à subordonner l'accès au travail, tous les types de formation professionnelle, ainsi que les conditions de travail, l'affiliation et l'engagement dans une organisation de travailleurs ou d'employeurs à l'un des éléments visés à l'article 454 du code pénal.

Art. 456. (L. 19 juillet 1997)
Une discrimination visée à l'article 454, commise à l'égard d'une personne physique ou morale, d'un groupe ou d'une communauté de personnes par une personne dépositaire de l'autorité publique ou chargée d'une mission de service public, dans l'exercice ou à l'occasion de l'exercice de ses fonctions ou de sa mission, est punie d'un emprisonnement d'un mois à trois ans et d'une amende de 251 euros à 37.500 euros ou de l'une de ces peines seulement, lorsqu'elle consiste :

1) à refuser le bénéfice d'un droit accordé par la loi ;

2) à entraver l'exercice normal d'une activité économique quelconque.

Art. 457.
(L. 19 juillet 1997) Les dispositions des articles 455 et 456 ne sont pas applicables :

1) aux différenciations de traitement fondées sur l'état de santé, lorsqu'elles consistent en des opérations ayant pour objet la prévention et la couverture du risque décès, des risques portant atteinte à l'intégrité physique de la personne ou des risques d'incapacité de travail ou d'invalidité ;

2) aux différenciations de traitement fondées sur l'état de santé ou le handicap, lorsqu'elles consistent en un refus d'embauche ou un licenciement fondé sur l'inaptitude médicalement constatée de l'intéressé ;

3) aux différenciations de traitement fondées, en matière d'embauche, sur la nationalité, lorsque l'appartenance à une nationalité déterminée constitue, conformément aux dispositions statutaires relatives à la fonction publique, aux réglementations relatives à l'exercice de certaines professions et aux dispositions en matière de droit du travail, la condition déterminante de l'exercice d'un emploi ou d'une activité professionnelle ;

4) aux différenciations de traitement fondées, en matière d'entrée, de séjour et de droit de vote au pays, sur la nationalité, lorsque l'appartenance à une nationalité déterminée constitue, conformément aux dispositions légales et réglementaires relatives à l'entrée, au séjour et au droit de vote au pays, la condition déterminante de l'entrée, du séjour et de l'exercice du droit de vote au pays ;

5) abrogé (L. 28 novembre 2006)

Art. 457-1. (L. 19 juillet 1997)
Est puni d'un emprisonnement de huit jours à deux ans et d'une amende de 251 euros à 25.000 euros ou de l'une de ces peines seulement :

1) quiconque, soit par des discours, cris ou menaces proférés dans des lieux ou réunions publics, soit par des écrits, imprimés, dessins, gravures, peintures, emblèmes, images ou tout autre support de l'écrit, de la parole ou de l'image vendus ou distribués, mis en vente ou exposés dans des lieux ou réunions publics, soit par des placards ou des affiches exposés au regard du public, soit par tout moyen de communication audiovisuelle, incite aux actes prévus à l'article 455, à la haine ou à la violence à l'égard d'une personne, physique ou morale, d'un groupe ou d'une communauté en se fondant sur l'un des éléments visés à l'article 454 ;

2) quiconque appartient à une organisation dont les objectifs ou les activités consistent à commettre l'un des actes prévus au paragraphe 1) du présent article ;

3) quiconque imprime ou fait imprimer, fabrique, détient, transporte, importe, exporte, fait fabriquer, importer, exporter ou transporter, met en circulation sur le territoire luxembourgeois, envoie à partir du territoire luxembourgeois, remet à la poste ou à un autre professionnel chargé de la distribution du courrier sur le territoire luxembourgeois, fait transiter par le territoire luxembourgeois, des écrits, imprimés,

dessins, gravures, peintures, affiches, photographies, films cinématographiques, emblèmes, images ou tout autre support de l'écrit, de la parole ou de l'image, de nature à inciter aux actes prévus à l'article 455, à la haine ou à la violence à l'égard d'une personne, physique ou morale, d'un groupe ou d'une communauté, en se fondant sur l'un des éléments visés à l'article 454.
La confiscation des objets énumérés ci-avant sera prononcée dans tous les cas.

Art. 457-2. (L. 19 juillet 1997)
Lorsque les infractions définies à l'article 453 ont été commises à raison de l'appartenance ou de la non-appartenance, vraie ou supposée, des personnes décédées à une ethnie, une nation, une race ou une religion déterminées, les peines sont de six mois à trois ans et d'une amende de 251 euros à 37.500 euros ou de l'une de ces peines seulement.

Art. 457-3. (L. 19 juillet 1997)
Est puni d'un emprisonnement de huit jours à six mois et d'une amende de 251 euros à 25.000 euros ou de l'une de ces peines seulement celui qui, soit par des discours, cris ou menaces proférés dans des lieux ou réunions publics, soit par des écrits, imprimés, dessins, gravures, peintures, emblèmes, images ou tout autre support de l'écrit, de la parole ou de l'image vendus ou distribués, mis en vente ou exposés dans des lieux ou réunions publics, soit par des placards ou des affiches exposés au regard du public, soit par tout moyen de communication audiovisuelle, a contesté, minimisé, justifié ou nié l'existence d'un ou de plusieurs crimes contre,l'humanité ou crimes de guerre tels qu'ils sont définis par l'article 6 du statut du tribunal militaire international annexé à l'accord de Londres du 8 août 1945 et qui ont été commis soit par les membres d'une organisation déclarée criminelle en application de l'article 9 dudit statut, soit par une personne reconnue coupable de tels crimes par une juridiction luxembourgeoise, étrangère ou internationale.

Est puni des mêmes peines ou de l'une de ces peines seulement celui qui, par un des moyens énoncés au paragraphe précédent, a contesté, minimisé, justifié ou nié l'existence d'un ou de plusieurs génocides tels qu'ils sont définis par la loi du 8 août 1985 portant répression du génocide et reconnus par une juridiction ou autorité luxembourgeoise ou internationale.

Art. 457-4. (L. 19 juillet 1997)
Dans les cas prévus aux articles 455, 456, 457-1, 457-2 et 457-3, les coupables pourront de plus être condamnés à l'interdiction des droits conformément à l'article 24.

Act of 27 july 1991 on electronic media, section 28 : Stipulates that television advertising must not violate human dignity, be discriminatory on grounds of race, sex or nationality or attack religious or political opinions.

Case Law

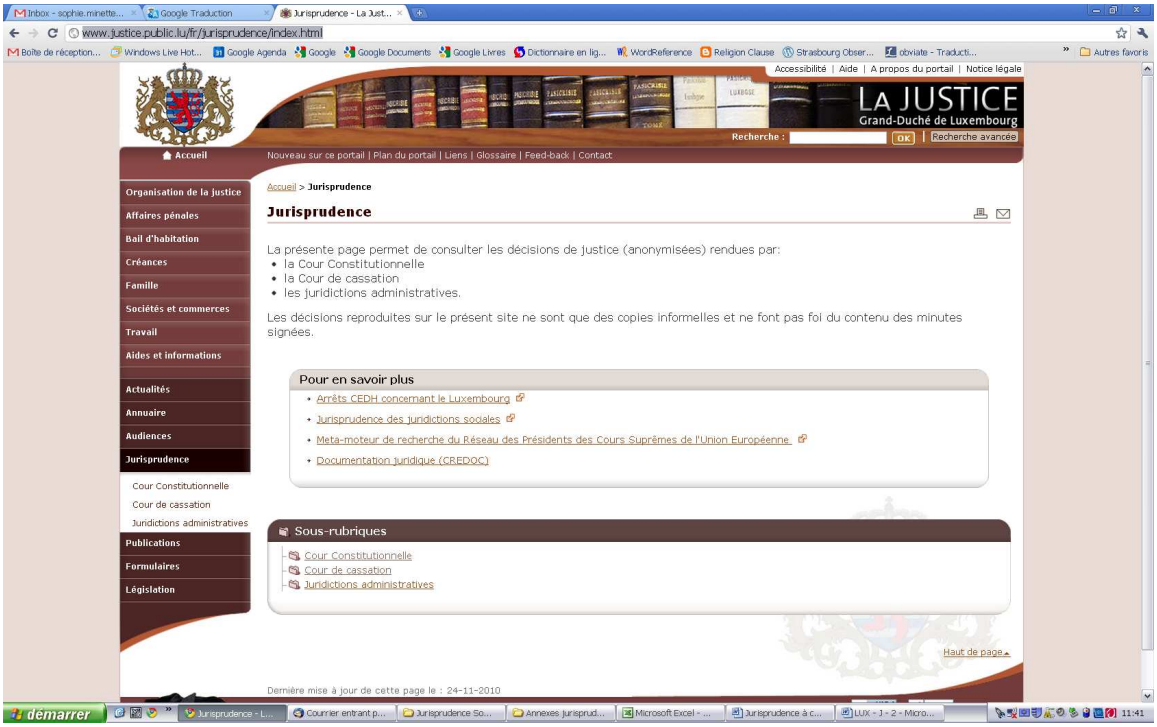
Luxembourg / Cour d'appel, 5ème chamber - 263/05 V.

Inventory No.	CASE 91 1
Deciding body	Cour d'appel, 5ème chamber [Court of Appeal, 5th chamber]
Date	Date of decision: 07.06.2005
Deciding Body	National court / tribunal
Topic	Hate speech
Keywords	Legal finding, court decision, National-Socialism and Fascism, Luxembourg.
Abstract	Key facts of the case: The defendant was 18 at the time of the infraction and homeless. He was in a drunken state when he was found carrying an unauthorised weapon in public and shouting 'Heil Hitler' and 'Sieg Heil', holding a paper with a swastika. On arrest, he immediately handed over the gun. He did not appear either at the two hearings at the 12ème Chambre and the Tribunal d'Arrondissement, nor for the appeal procedure at the Tribunal Correctionnel. Main reasoning/argumentation: a) Infraction against articles 2 and 5 of the law of 15.03.1983 concerning arms and munitions or bidding the carrying of arms subject to ministerial authorisation without such an authorisation. b) Incitation to hatred and violence with regards to a community of persons by shouting fascist slogans and presenting fascist symbols (articles 454, 455 and 457-3 of Penal Code). Public order was disturbed because of the gun the defendant was carrying. Key issues (concepts, interpretations) clarified by the case: The Luxembourgish Criminal Justice system demonstrated its will not to tolerate the carrying of weapons in public and the disturbance of public order by shouting fascist slogans. Results and most important consequences, implications of the case: The defendant was sentenced to four months prison without probation and a fine of EUR 1000. He appealed against the sentence but did not appear at the appeal hearing. The sentence was confirmed without the possibility of probation as he had not appeared at either hearing. This relatively strong punishment of a young person who had just reached the age of criminal responsibility can be explained by the fact that he had carried weapons, exposed many fascist symbols (texts, shouting 'Heil Hitler'), did not appear for the hearings, and hence did not present any sign of cooperation with the criminal justice system. The case shows the will of the state to counter any type of dissemination of fascist symbols, any type of incitation to hatred and violence and any illegal carrying of weapons. This can be considered as a harsh punishment if one takes into account the young age and the homeless status of the defendant.

[FRA Database]

Luxembourg

Justice and case law (Constitutional Court – Court of Cassation – Administrative Courts): http://www.justice.public.lu/fr/jurisprudence/index.html



Public Policies

Le Centre pour l'égalité de traitement (CET) a été créé par la loi du 28 novembre 2006.

Le CET exerce ses missions en toute indépendance et a pour objet de promouvoir, d'analyser et de surveiller l'égalité de traitement entre toutes les personnes sans discrimination fondée sur la race ou l'origine ethnique, le sexe, l'orientation sexuelle, la religion ou les convictions, le handicap et l'âge.

Brochure (PDF)

Clip audio : Le lecteur Adobe Flash (version 9 ou plus) est nécessaire pour la lecture de ce clip audio. Téléchargez la dernière version **ici**. Vous devez aussi avoir JavaScript activé dans votre navigateur.

Projet de loi n° 6161 portant modification de la loi modifiée du 12 septembre 2003 relative aux personnes handicapées et du code du travail

vendredi 17 décembre 2010

Avis du CET

Suivant l'article 10 de la loi du 28 novembre 2006, le CET peut notamment émettre des avis ainsi que des recommandations sur toutes les questions liées aux discriminations fondées sur la race, l'origine ethnique, le sexe, la religion ou les convictions, le handicap et l'âge.

Considérant que le présent projet de loi s'inscrit dans la thématique des discriminations basées sur le handicap, le CET a adopté le présent avis de sa propre initiative.

Continuer la lecture →

Publié dans Avis & communiqués | Commentaires fermés

Projet de loi n° 6141 portant approbation de la Convention relative aux droits des personnes handicapées

vendredi 17 décembre 2010

Avis du CET

Le CET s'est autosaisi pour donner son avis sur le projet de loi portant approbation :

- de la Convention relative aux droits des personnes handicapées, faite à New York, le 13 décembre 2006

- du Protocole facultatif se rapportant à la Convention relative aux droits des personnes handicapées relatif au Comité des droits des personnes handicapées, fait à New York, le 13 décembre 2006. Continuer la lecture →

Publié dans Avis & communiqués | Commentaires fermés

Louer sans discriminer – Guide pratique pour les professionnels de l'immobilier

mardi 23 novembre 2010

Recherche

European Commission against Racism and Intolerance
Commission européenne contre le racisme et l'intolérance

CRI(2006)20

Third report on Luxembourg

Adopted on 16 December 2005

Strasbourg, 16 May 2006

COUNCIL OF EUROPE CONSEIL DE L'EUROPE

Recommendations:

39. ECRI strongly recommends that the Luxembourg Government continue and improve basic and on-going training on issues concerning racism and racial discrimination provided to the police as well as to the staff of the Luxembourg Detention Centre and the Directorate of Immigration. It also recommends that the government pay special attention to the complaints of racist and/or xenophobic insults recorded in respect of prison officers of the Luxembourg Detention Centre, by conducting enquiries on the subject and taking disciplinary measures against anyone found guilty of such behaviour.

40. In its second report, ECRI noted that the Luxembourg school system did not include specific human rights lessons, although the subject was tackled in a cross-disciplinary way at various levels and in different subjects such as history and languages. It further strongly recommended that the Luxembourg Government take steps to enhance pupils' mutual understanding and stressed the need to ensure that the teaching material used at all stages of education better reflect the different components of Luxembourg society.

41. The "Education" sub-commission of the Consultative Commission on Human Rights[14] has informed ECRI that it has attempted to convey to the government the importance of providing teaching staff with training in human rights. In 2005, it also submitted to the government an "Outline of a consistent and multidisciplinary approach to human rights education"[15] in which, among other points, it stated that it was important for young people to learn about Luxembourg's legislation when they were required to think about issues such as racism[16]. Unfortunately, ECRI notes that the Luxembourg Government does not appear to have taken account of this very important proposal in its general policy announced on 12 October 2005[17]. However, the latter has informed ECRI that teachers training to teach in secondary schools have transversal course components relating to human rights. ECRI further notes that teachers do not appear to value pupils' cultural diversity as the asset it really is. NGOs have informed ECRI that some teachers still perceive young foreigners as a liability because of their lack of knowledge of the languages spoken in Luxembourg and take the view that they lower classroom standards.

42. The Luxembourg Government should nevertheless be credited with a number of initiatives. For example, Article 4 of the law of 25 July 2005 setting up a pilot secondary school[18] provides that pupils will receive education in values to ensure that they acquire appropriate knowledge of the main religions and currents of thought throughout the world. ECRI also welcomes the adoption of the law of 25 June 2004 on the organisation of secondary and technical secondary schools[19], which provides in its Article 42 that incitement to racial hatred, to xenophobia and to religious intolerance is an offence punishable by

[14] For further information on this commission, see below the part of the report entitled "Specific issues".

[15] See Rapport annuel de la Commission consultative des droits de l'homme 2003 et 2004, p.173- 180.

[16] See Rapport annuel de la Commission consultative des droits de l'homme 2003 et 2004, p. 177 and 178

[17] See the general policy statement presented to the Chamber of Deputies by Mr Jean-Claude Juncker, http://www.gouvernement.lu/salle_presse/actualite/2005/10/12juncker_chd/index.ht.

[18] See Mémorial A (Official Gazette) No.139 of 26 August 2005.

[19] See Mémorial A No.126 of 16 July 2004.

the reception classes for these children are not provided for by law, so municipalities are not compelled to set them up. The authorities have stated that a new law on primary education, which will include provision for these classes, is in preparation. This law is also expected to provide for mediators and teachers who do not speak Luxembourg's three official languages to be hired as civil servants[27].

Recommendations:

74. ECRI recommends that the Luxembourg Government frame a clear long-term policy for improving the integration of foreign pupils and those from an immigrant background into the Grand Duchy's school system. It considers that all the measures taken for that purpose should be enshrined in law so that they apply throughout the country.

Media

75. In its second report, ECRI noted with concern that the media had been showing less tolerance for some time. It therefore considered it necessary to alert media professionals to the dangers of publishing racist or antisemitic statements and strongly supported any steps they might take to adopt and implement guidelines encouraging journalists to report on events in a more responsible manner and to receive training for the purpose.

76. ECRI has been informed that the media continue to mention the colour or nationality of a suspect when this is neither necessary nor relevant. Furthermore, according to its sources, some media still convey a poor image of foreigners and particularly of asylum seekers. In this regard, Article 32 of the law of 8 June 2004 on the press set up a complaints commission which is to act both as a mediator and as a quasi-judicial body[28]. Regrettably, however, this commission, which is headed by a retired judge, comprises only editors and journalists and does not therefore include anyone not involved in journalism. The Press Council has informed ECRI that a new code of professional ethics, which will take account of the issues of racism and racial discrimination, is being drawn up and should be adopted at the beginning of 2006.

Recommendations:

77. ECRI recommends that the Luxembourg Government help the media to do their job in a spirit of full respect for everyone, by promoting and supporting any initiatives to provide them with training courses on racism, racial discrimination and antisemitism. It also calls on the government to ensure a more active implementation of the legislation on discrimination to media circles when this proves necessary.

Climate of opinion

78. In its second report, ECRI drew the Luxembourg Government's attention to the principles laid down in the Charter of European Political Parties for a Non-Racist Society and hoped that these principles would be reflected in political life in Luxembourg.

[27] The authorities stated that this law might be passed before summer 2007.

[28] See Mémorial A No.85 of 8 June 2004, p.1207.

79. The National Council for Foreigners has informed ECRI that discriminatory acts peaked in 2004 as a result of the populist discourse of some politicians, but that the situation calmed down in 2005. ECRI has also learnt that in 2004, a number of politicians openly equated Africans with drug dealers. Moreover, during the October 2005 local elections campaign, a number of parties used rhetoric which played on people's fears of insecurity, with xenophobic overtones. NGOs and members of civil society have also described a climate of latent racism in Luxembourg society, which is not expressed through violence but is nevertheless tangible.

Recommendations:

80. ECRI reiterates its recommendation that the Luxembourg Government ensure that politicians across the political spectrum refrain from using language likely to fuel racial hatred and xenophobia.

81. ECRI urges the Government of the Grand Duchy of Luxembourg to continue conducting public awareness campaigns on the adverse consequences of racism and xenophobia.

Conduct of law enforcement officials

82. In its second report, ECRI pointed out that if the police were made more aware of cultural differences, this might improve their relations with immigrant communities. It also encouraged the Luxembourg Government to pursue its efforts to provide basic and on-going training in human rights.

83. It appears that no steps have been taken to increase the police's awareness of the different communities living in Luxembourg. The authorities have also stated that few complaints have been made to the police on account of racist acts or behaviour on the part of police officers. Only 20 were received in 2004 and 15 between January and June 2005, and these chiefly concerned racist insults. In general, however, no action is taken on complaints of this kind because, according to the authorities, there are no objective witnesses and because the complaints are considered unfounded. ECRI also notes with concern reports that the police tend to equate Africans with drug dealers, which sometimes causes wrongful arrests and imprisonment. Representatives of African communities have stated to the authorities that they encounter difficulties in submitting complaints on the subject. ECRI has been informed that when the police receive complaints from persons who have been subjected to discriminatory or racist acts by third parties, they refer them to a body responsible for providing them with assistance and support. The role of the police force itself in investigating complaints of this kind is therefore unclear. ECRI considers that all these problems reflect the police's insufficient knowledge of the issues relating to racism and racial discrimination and the way in which they should tackle them.

84. In its second report, ECRI firmly encouraged the Luxembourg Government to make all the necessary human and material resources available to enable the police to communicate properly with victims and alleged offenders who do not speak any of Luxembourg's official languages.

85. ECRI notes that a bill providing that any victim or offender who does not speak one of Luxembourg's languages is entitled to the services of an interpreter has been before the Chamber of Deputies for two years. As a result, to date, interpreters' services are provided only during criminal court hearings. This

FYR Macedonia

Criminal Code (23 July 1996), Article 319 - Causing national, racial or religious hate, discord and intolerance

1) A person who by force, mistreatment, endangering the security, ridicule of the national, ethnic or religious symbols, by damaging other people's objects, by desecration of monuments, graves, or in some other manner causes or excites national, racial or religious hate, discord or intolerance, shall be punished with imprisonment of one to five years.

2) A person, who commits the crime from item 1 by misusing his position or authorization, or if because of these crimes, riots and violence were caused among people, or a property damage with a large extent was caused, shall be punished with imprisonment of one to ten years.

Racial or other discrimination, Article 417

A person who based on the difference in race, color of skin, nationality or ethnic belonging, violates the basic human rights and freedoms, acknowledged by the

international community, shall be punished with imprisonment of six months to five years.

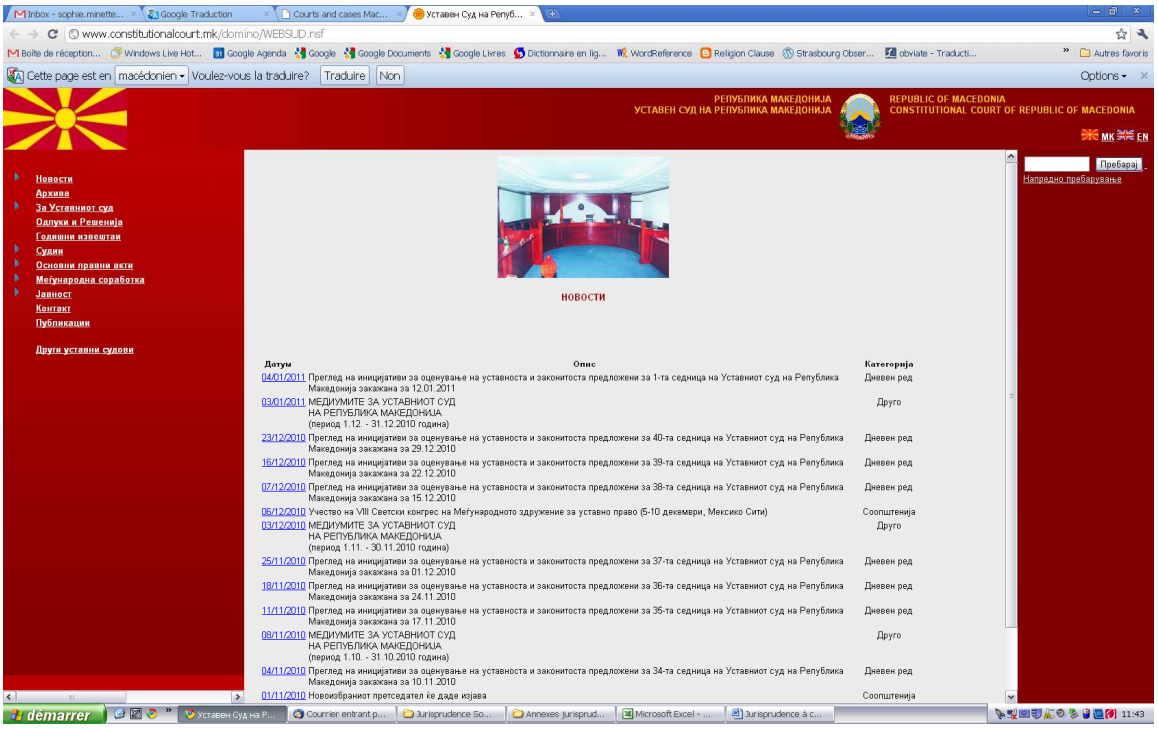
The punishment from item 1 shall apply also to a person who persecutes organizations or individuals because of their efforts for equality of the people.

A person who spreads ideas about the superiority of one race above some other, or who advocates racial hate, or instigates to racial discrimination, shall be punished with imprisonment of six months to three years.

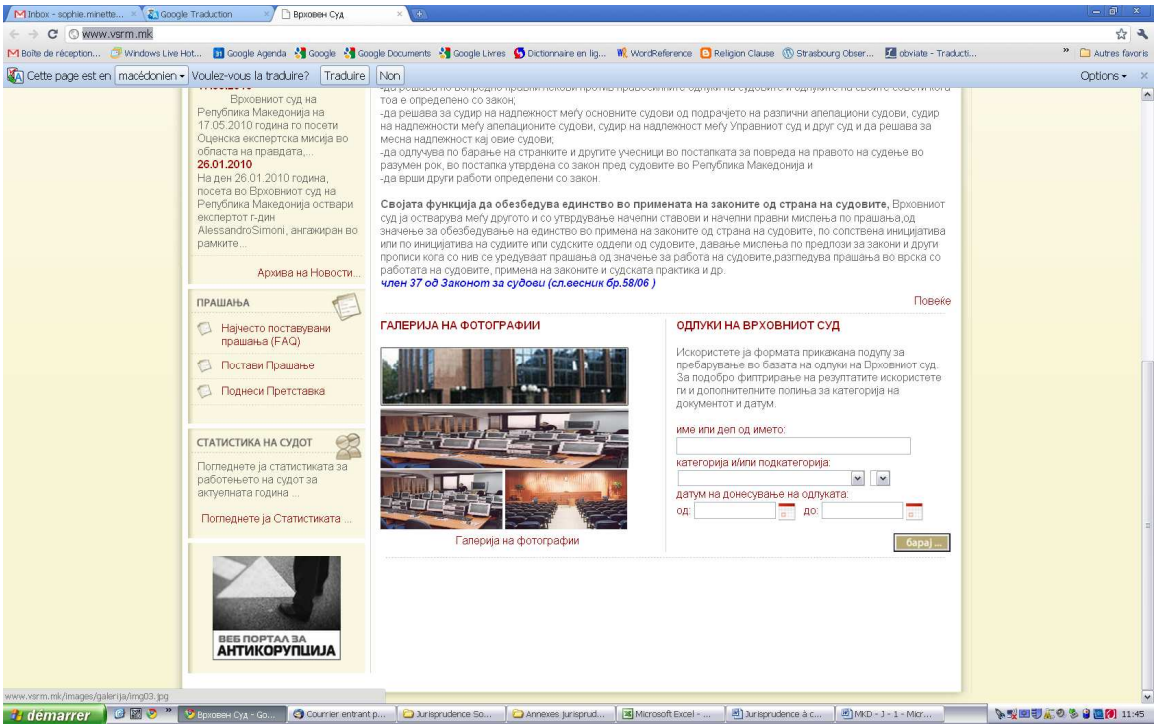
Case Law

Macedonia

Constitutional Court: http://www.constitutionalcourt.mk/domino/WEBSUD.nsf



Supreme Court: http://www.vsrm.mk/



Public Policies

ECRI

European Commission against Racism and Intolerance
commission europeenne contre le raclsm[e] et l'intolerance

CRI(2010)19

REPORT ON THE FORMER YUGOSLAV REPUBLIC OF MACEDONIA"

(fourth monitoring cycle)

Adopted on 28 April 2010

Published on 15 June 2010

COUNCIL OF EUROPE CONSEIL DE L'EUROPE

63. ECRI recommends that the authorities step up their efforts to ensure that the right to translation and interpretation in judicial proceedings is effectively guaranteed, in particular by taking measures to increase the number of translators and interpreters and their level of qualification.

64. ECRI recommends that the authorities establish a full system of legal aid.

III. Racist violence

65. The authorities have indicated that the country has no problem of racist violence. However, as mentioned above, collection of statistical data on offences against the criminal law provisions to combat racism is inadequate. Further, since criminal law until recently took no account of a racist motivation, except for special offences," it seems reasonable to assume that the racist element of a number of violent acts has escaped the authorities. ECRI moreover notes that non-governmental organisations sometimes report attacks possibly perpetrated on ethnic grounds. It also regards the relatively low-level, but constant interethnic tensions within the population as a potential breeding ground for violence.

66. ECRI recommends that the authorities reinforce their vigilance with regard to racist violence.

IV. Racism in public discourse

Opinion leaders and the media

67. In its previous reports ECRI voiced concerns about the fact that many political leaders, intellectuals and religious figures and the media adopted positions which furthered ethnic divisions rather than promoting increased acceptance and trust between communities. It also noted that the media, which are divided along ethnic lines, reported events in a very different manner depending on their ethnic tinge, a situation which tended to foster intolerance and mistrust between ethnic communities. It was also concerned about the way in which Roma were portrayed in the media, in particular by mentioning the Roma origin of suspected offenders, and called for effective application of the code of ethics and the criminal law provisions relating to hate speech.

68. According to non-governmental sources, expressions of interethnic intolerance have recently become more frequent. The attitude of certain political figures, who are tempted to fan ethnic tensions as a means of vote-catching, is apparently particularly problematic, especially during election campaigns. On this specific matter, ECRI draws attention to the benefits of having political parties sign the Charter of European Political Parties for a Non-Racist Society of 28 February 1998.[21]

69. Some sixty incidents of ethnic hostility in the media have been noted by the "Journalists' Council of Honour" over the last three or four years, and civil society representatives point out that the media help to propagate stereotypes concerning not only Roma but also women and homosexuals, in particular.

20 See "Criminal law provisions to combat racism and racial discrimination" above.

21 The signatory parties undertake inter alia to "refuse to display, to publish or to have published, to distribute or to endorse in any way views and positions which stir up or invite, or may reasonably be expected to stir up or to invite, prejudices, hostility or division between people of different ethnic or national origins or religious beliefs, and to deal firmly with any racist sentiments and behaviour within [their] own ranks."

70. ECRI notes that the press code of ethics duly requires journalists to refrain from intentionally relaying or publishing information that jeopardises human rights or fundamental freedoms and from propagating hatred or encouraging violence and discrimination; it also requires them to respect ethnic, cultural and religious diversity. In addition, Article 69 of the broadcasting law expressly prohibits the transmission of information which aims to incite hatred or intolerance on grounds of ethnicity, race or religion. ECRI nonetheless notes that the "Journalists' Council of Honour", which is competent for ensuring compliance with the code of ethics, has no powers of coercion: its only means of action is public denouncement of breaches of the code. Moreover, Article 69 of the broadcasting law solely applies to the audiovisual media, and the Broadcasting Council" has almost never raised any matter related to ECRI's mandate that might come within the scope of this article. This contrasts sharply with the observations of the Journalists' Council of Honour and civil society representatives and would seem to imply that the Broadcasting Council perhaps does not pay sufficient heed to the issue of intolerance.

71. Division of the media along ethno-linguistic lines and ethnically tinted reporting of events are still very widespread. The dividing line is primarily between media and news published and broadcast in Macedonian and those in Albanian. According to non-governmental sources, the key problem is that there is significant political interference in the media and the country's politics are focalised on ethnic issues. For instance, most private television channels - which constitute the majority of the audiovisual media - are reportedly linked to political figures or parties. Further, the fact that the state is a major client of the media has apparently permitted successive governments to favour those media outlets deemed to be pro-government. ECRI accordingly draws attention to the need to support projects aimed at fostering interethnic cohesion through access to the same objective information for all. The "Monitor", a local weekly paper published in both Macedonian and Albanian in the region of Tetovo and Gostivar, was an example, but it unfortunately ceased circulation for lack of funds.

172. ECRI recommends that the authorities, through their most senior representatives, systematically and publically denounce in the strongest terms any expressions of intolerance by opinion leaders or persons in the media eye. It also recommends that they initiate proceedings in cases where the remarks in question might qualify as hate speech and come within the scope of criminal law.

173. ECRI recommends that the authorities bring together media professionals and civil society representatives to take stock of the situation regarding the propagation of stereotypes in the media and the possible role this plays in fostering intolerance and to determine measures to be taken to raise awareness among media professionals of the issue of discrimination and strengthen application of the relevant provisions of the code of ethics.

174. ECRI recommends that, while preserving media independence, the authorities encourage and actively support initiatives in the field of the media that aim at fostering interethnic cohesion.

22 The Broadcasting Council has nine members appointed by parliament for a six-year term and is responsible, inter alia, for ensuring compliance with Article 69 of the law on telecommunications. It can deal with cases of its own initiative and can impose penalties going as far as licence withdrawal.

The Internet

75. The authorities indicated that they had noted no cases of use of the Internet for disseminating racist or hate-based content via sites hosted in the country. They pointed out that the Ministry of the Interior had a unit to combat cybercrime, which nonetheless did not specifically monitor the situation regarding racism or incitement of hatred on the Internet. To identify problem cases, they primarily rely on complaints by individuals, who can contact the Ministry of the Interior via the telephone number available for reporting all kinds of offences. According to the authorities, the staff of this unit has been increased so as to be able to deal with racist content more effectively.

176. ECRI recommends that the authorities step up their vigilance concerning use of the Internet for disseminating racist or hate-based content. It recommends in particular that they establish a surveillance system, in co-operation with access providers and without interfering in the latter's independence, and that they monitor the situation. It draws their attention to its General Policy Recommendation No. 6 on combating the dissemination of racist, xenophobic and antisemitic material via the Internet.

V. Interethnic relations"

77. In its third report ECRI noted a deterioration of interethnic relations and a deepening of the gulf between communities, in particular the majority population and the Albanian minority. In this connection it noted that, although the Ohrid Framework Agreement had ended the conflict in 2001 and set out provisions of considerable importance for enhancing recognition of minority groups and their participation in society, the ways in which it had been implemented had helped to aggravate the situation. It considered that the problem lay in the fact that the measures taken to give effect to the agreement had not included initiatives to build communication and constructive contacts between communities and to identify discrimination in different fields of life so as to overcome it. It consequently recommended that the authorities take measures of this kind.

78. As already noted in the sections of this report concerning education and opinion leaders and the media, the country is still strongly divided along ethnic lines, and the gulf does not seem to have diminished since the publication of the third report. Relations between the majority population and the Albanian minority have not become less tense - although few clashes between individuals have been reported - a situation for which certain opinion leaders can be held at least partly responsible. The recent events surrounding the publication of the "Macedon ian Encyclopaedia" offer an illustration of these divisions and tensions, of the difficulties the country's two major ethnic groups have in entering into a dialogue and of the over-politicisation of ethnic issues." Significant efforts are clearly now needed to strengthen interethnic relations and preserve the concept of a multiethnic, multicultural society.

23 See also "Discrimination in various fields - Education" and "Racism in public discourse - Opinion leaders and the media" above.

24 The drafting of the publicly funded "Macedonian Encyclopaedia" was entrusted to the Academy of Science in Skopje. Its publication, on 17 September 2009 following several years' work, sparked a fierce row, in particular - but not solely - because the book questioned the length of time for which the Albanian community had been present in the region and used allegedly pejorative terms to refer to this community. Following weeks of tension, the academy decided to suspend the book's distribution and announced that it would be revised by a team not including the Chief Editor who had initially worked on the book.

nonetheless indicated that they wish to continue increasing the percentage of staff originating from the communities most under-represented among law enforcement officials. In particular, they encourage young Roma to choose this career course. ECRI further notes that the police code of ethics, adopted by the Ministry of the Interior in 2004, provides in particular that police officers shall be required to perform their duties in compliance with the principles of impartiality and the equality of citizens (Article 42) and with due regard for their fundamental rights (Article 45) and must provide victims of offences with the support and assistance they need, regardless of their race, sex, religion or ethnicity (Article 58). A law on the police, intended to guarantee full compliance with European standards in such matters, also entered into force in 2007. Police training is the responsibility of the police training centre established in 2008 when the police college was divided up. As provided for in the code of ethics (Article 26), a significant share of initial training focuses on respect for human rights and fundamental freedoms and on fighting racism and xenophobia. The same applies to in-service training, which is organised according to the needs identified. In 2006, in co-operation inter alia with the OSCE, a total of 4,150 police officers, or 47.5% of the entire force, received human rights training entitled "Police and human rights". The authorities have also indicated that a one-week course on police respect for human rights was held in March 2009 for all members of the above-mentioned "Alpha" unit based in Skopje.

117. ECRI encourages the authorities to continue their efforts to improve relations between the police and minority groups.

118. Referring the authorities to its General Policy Recommendation No. 11 on combating racism and racial discrimination in policing, ECRI recommends that they pursue the process of recruiting members of under-represented minority groups into the police. It also recommends that they include in the law and the code of ethics a ban on racial profiling and, more broadly, a requirement that the police promote equality and prevent discrimination in the performance of their duties with regard to both suspects and victims. Lastly, it recommends that they also focus initial and in-service training for the police on the issue of

..__ __ ,Qolicing in a multi-ethnic society.:.... _____ ---
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VIII. Monitoring racism and racial discrimination, awareness-raising and education in fundamental rights and tolerance and co-operation with the non-governmental sector

Monitoring racism and racial discrimination

119. ECRI notes that, although data on the ethnicity of public servants are gathered, there is still no system for collecting full statistics making it possible to assess minorities' participation in public life and their economic and social circumstances, particularly regarding access to employment, health care, education and housing.

120. ECRI reiterates its recommendation that the authorities establish a comprehensive, consistent system for collecting data making it possible to assess the situation of various minority groups in different fields of life and to determine the extent of manifestations of racism and direct and indirect discrimination. In this connection, it recommends that they envisage collecting data broken down according to categories such as ethnic or national origin, religion, language or nationality so as to identify manifestations of discrimination, while ensuring that this collection is systematically carried out in accordance with the principles of confidentiality, informed consent and individuals' voluntary self-identification as members of a Qarticular grouQ. This

system should be developed in close co-operation with all the operators concerned, including civil society organisations. It should also take into consideration the potential existence of cases of double or multiple discrimination.

Awareness-raising and education in fundamental rights and tolerance and co-operation with the non-governmental sector

121. As mentioned in the third report, content relating to human rights and democratic values is part of the primary and secondary school curricula, and, since the *2002/2003* school year, civics education at primary level covers the themes of diversity and the fight against discrimination (grade 7) and peace and tolerance (grade 8). At secondary level the sociology curriculum covers subjects such as rights and freedoms and civic values. In 2005 the country also adopted the United Nations plan of action for the implementation of the World Programme for Human Rights Education and a national action plan on human rights education has apparently been developed. There are apparently also plans for teacher training courses to include a module on the significance and importance of fighting discrimination.

122. ECRI strongly encourages the authorities to continue integrating civics education into all levels of the education system, developing the teaching of human rights, tolerance and respect for differences and enhancing the efforts to train teachers in these subjects.

123. During the contact visit, on a number of occasions ECRI's attention was drawn to the general public's low awareness of the issues of intolerance and discrimination. The authorities mentioned a public awareness-raising campaign entitled "Enhancing respect and tolerance within the population" which was run in the media in 2008, with the broadcasting of video clips on television between 3 and 23 November 2008 and 30 December 2008 and 9 January 2009. The civil society representatives whom the delegation met during the contact visit reported that this initiative had gone unnoticed and that awareness-raising measures were still needed. Moreover, in the light of ECRI's findings in this report, it would be useful to devise and implement a national strategy to combat racism and intolerance.

124. ECRI recommends that the authorities devise and implement, in close cooperation with civil society, a national strategy to combat racism and intolerance in the long term, including a long-lasting general information and awareness-raising camr::!aigc:..;n.:... ----

125. Lastly, ECRI notes that many non-governmental organisations engaged in fighting intolerance, safeguarding fundamental rights *andlor* protecting the interests of minority groups consider that they do not have a sufficient role in the decision-making process in these fields. It also notes, however, that the authorities would like to involve them more and draws the authorities' attention to the importance of providing them with lasting support so they have sufficient stable financial resources with which to perform their tasks.

126. ECRI encourages the authorities to further their co-operation with nongovernmental organisations engaged in fighting intolerance, safeguarding fundamental rights *andlor* protecting the interests of minority groups and recommends that they provide them with lasting support so they have sufficient stable financial resources with which to Qerform their tasks. ,

Malta

Criminal Code, §82A(1)

Whosoever uses any threatening, abusive or insulting words or behaviour, or displays any written or printed material which is threatening, abusive or insulting, or otherwise conducts himself in such a manner, with intent thereby to stir up racial hatred or whereby racial hatred is likely, having regard to all the circumstances, to be stirred up shall, on conviction, be liable to imprisonment for a term from six to eighteen months. Racial hatred is defined in (2) as hatred against a group of persons in Malta defined by reference to colour, race, nationality (including citizenship) or ethnic or national origins.

Article 83B: General Provision applicable to offences which are racially aggravated or motivated by xenophobia": The punishment established for any offence shall be increased by one to two degrees when the offence is racially or religiously aggravated within the meaning of sub-articles (3) to (6), both inclusive, of article 222A or is motivated, wholly or partly, by xenophobia.

Article 222A: Increase in punishment in certain cases": (2) The punishments established in the foregoing provisions of this sub-title shall also be increased by one to two degrees when the offence is racially or religiously aggravated or motivated, wholly or partly, by xenophobia within the meaning of the following subarticles. (3) An offence is racially or religiously aggravated or motivated by xenophobia if: (a) at the time of committing the offence, or immediately before or after the commission of the offence, the offender demonstrates towards the victim of the offence hostility, aversion or contempt based on the victim's membership (or presumed membership) of a racial or religious group; or (b) the offence is motivated, wholly or partly, by hostility, aversion or contempt towards members of a racial group based on their membership of that group (4) In subarticle (3) (a): "membership", in relation to a racial or religious group, includes association with members of that group; "presumed" means presumed by the offender. (5) It is immaterial for the purposes of subarticle (3) (a) or (b) whether or not the offender's hostility is also based, to any extent, on any other factor not mentioned in those paragraphs. (6) In this article: "racial group" means a group of persons defined by reference to race, descent, colour, nationality (including citizenship) or ethnic or national origins; "religious group" means a group of persons defined by reference to religious belief or lack of religious belief.

Press Act 1974, Article 6

Whosoever by means of the publication or distribution in Malta of printed matter, or by means of any broadcast shall threaten, insult, or expose to hatred, persecution or contempt, a person or group of persons because of their race, creed, colour, nationality, sex, disability or national or ethnic origin shall be liable on conviction to imprisonment for a term not exceeding three months and to a fine.

Case Law

MALTA

QORTI TAL-MAGISTRATI (MALTA)
BHALA QORTI TA' GUDIKATURA KRIMINALI

MAGISTRAT DR.
CONSUELO-PILAR SCERRI HERRERA

Seduta tas-27 ta' Marzu, 2008

Numru 518/2006

Il-Pulizija
Supretendent Peter Paul Zammit
Spettur George Cremona
Spettur Angelo Caruana
v

NORMAN LOWELL

Il-Qorti;

Rat li l-imputat **NORMAN LOWELL** ta' disgha w hamsin sena bin Albert u Catherine nee Grech, imwieled l-Gzira nhar d-disgha w ghoxrin ta' Lulju 1946 u residenti 'Halcyon', 44, Triq z-Zaghfran, H'Attard, detentur tal-karta tal-identita numru 621346M gie mressaq quddiemha akkuzat talli b'diversi atti maghmulin minnu wkoll jekk fi zminijiet differenti li jiksru l-istess dispozizzjoni tal-ligi;

1. Fir-Rabat, Malta, nhar t-tlieta t'April 2006, uza kliem jew imgieba ta' theddid abbuziv jew

insulenti, jew xort'ohra gab ruhu b'dan il-mod bil-hsieb li b'hekk qajjem mibgheda razzjali jew b'hekk holoq l-probabbilita li meta wiehed iqis c-cirkostanzi kollha, titqajjem mibgheda razzjali;

2. Talli fil-Qawra limiti ta' San Pawl il-Bahar, nhar t-tmienja ta' Mejju 2006, uza kliem jew imgieba ta' theddid abbuziv jew insulenti, jew xort'ohra gab ruhu b'dan il-mod bil-hsieb li b'hekk qajjem mibgheda razzjali jew b'hekk holoq l-probabbilita li meta wiehed iqis c-cirkostanzi kollha, titqajjem mibgheda razzjali;

3. Talli bejn Dicembru 2003 w s-sebgha w ghoxrin ta' Marzu 2006, permezz ta' artikolu bit-titolu 'Coming Cataclysmic Crises', uza kliem jew imgieba ta' theddid abbuziv jew insulenti, jew xort'ohra gab ruhu b'dan il-mod bil-hsieb li b'hekk qajjem mibgheda razzjali jew b'hekk holoq l-probabbilita li meta wiehed iqis c-cirkostanzi kollha, titqajjem mibgheda razzjali;

4. Talli fil-Qawra limiti ta' San Pawl il-Bahar nhar t-tmienja ta' Mejju 2006 uza kliem, ghemil jew gesti li jingurjaw jew jinsulentaw jew imaqdru lil persuna tal-President ta' Malta.

Rat l-atti kollha tal-kawza w id-dokumenti kollha esibiti fosthom l-artikoli mibghuta mill-Avukat Generali nhar t-tnax ta' Settembru 2006 [fol 121] sabiex f'nuqqas t'oggezzjoni da parti tal-imputat, din il-kawza tigi trattata u deciza minn din il-Qorti fil-kompetenza taghha ta' gudikatura kriminali.

Semghet lil imputat jiddikjara fis-seduta tas-sitta ta' Ottubru 2006, li ma kellux oggezzjoni li l-kaz tieghu jigi trattat u deciz minn din il-Qorti fil-kompetenza taghha fuq riferita [fol 122].

Semghet lix-xhieda kollha prodotta mill-prosekuzzjoni, lil imputat jixhed minn jeddu b'mod voluntarju kif wkoll l-provi tad-difiza.

Semghet lil partijiet jittrattaw il-kawza fis-seduta tal-hmistax ta' Frar 2008.

Ikkunsidrat:

Illi nhar s-sitta w ghoxrin ta' Gunju 2006 **xehed s-Supretendent Peter Paul Zammit** [fol 13] fejn qal li ghal habta ta' Mejju 2006, hu kien gie mitlub mill-Kummissarju tal-Pulizija sabiex jevalwa diversi stanza u in partikolari d-diskorsi u kitbiet li saru mill-imputat Norman Lowell li dehru fuq s-*site* tal-*internet* bl-isem 'VivaMalta.org'. Sussegwentement hu dahal fuq l-imsemmija *site* li sa dakinhar kienet ghadha miftuha u fil-fatt hu hareg *printout* ta' tlieta w erbghin faccata li jidhru fuq l-istess *site*, liema *printouts* esibixxa bhala Dok. PPZ 1 [fol 18].

Qal li effettivament meta wiehed jara l-ewwel faccata tas-*site* jinduna li l-kliem u l-artikoli li hemm fuq in-naha tal-lemin estrem, huma neqsin ghax is-*site* qeghda miftuha hafna izjed. Hu esebixxa bhala Dok. PPZ 2, l-ewwel faccata ta' din is-*site* w ghamel referenza ghal dak li hemm fuq in-naha estrem tal-lemin u cioe ghal zewg siti msejjha 'Norman Lowell May Monday Clubs Beach', liema zewg *videos* hu nizzel minn fuq is-*site* w ikkopja fuq CD li esebixxa.

Minn fuq l-istess *site* nizzel ukoll kopja ta' l-artikolu li huwa iffirmat 'Imperium 0312' taht l-isem ta' Norman Lowell, liema artikolu huwa ntitolat 'Coming Cataclysmic Crises'. Fuq dan l-artikolu kif ipprintjat, jirrisultaw diversi kliem u paragrafi li huma *highlighted* u dan huwa il-perm partikolari tal-akkuzi odjerni.

Zied jghid li wara li ezamina l-artikolu intitolat 'Coming Cataclysmic Crises', li esebixxa bhala Dok. PPZ 4, rrizultawlu hafna referenzi u kliem li jammontaw ghal mibgheda razzjali, in partikolari bhala dak li huwa mmarkat bhala il-'Hero', persuna li fiha ssir ir-referenza diretta ghal Hitler u l-azzjonijiet tieghu. Huwa mmarka fuq dan l-istess dokument dak li fil-fehma tieghu kien jammonta ghal mibgheda razzjali. Fuq dan l-istess dokument hemm l-artikolu intestat 'The Tribe' li jaghmel

referenza ghall-istat t'Israel li huwa definit bhala stat terrorist, kif ukoll hemm xi kliem immarkat bhal '*the vipers then in the middle east when every international road end and retires'* kif ukoll li lill-istess Jews jigu msemmija bhala '*parassites*.'

In segwitu taht it-titolu 'War is Life' hemm mmarkat il-paragrafu partikolari '*War is self-overcoming . . . .*' u jispicca '*inferior races*' li huma l-bazi tal-artikolu kif dedott llum taht l-artikolu 82(a) tal-Kap 9.

Spjega li 'n segwitu ra wkoll il-*posting* minn fuq dan is-*site* li taghha esibixxa CD rigwardanti laqgha li saret fin-Nigret Night Club fit-tlieta t'April 2006, li tidher li hija *recording* ta' diskors li ghamel Norman Lowell lil diversi nies li seta' kien hemm presenti, fejn, fost id-diskors li ntqal, kien hemm dawn il-kliem partikolari '*viscious Sudanese*', '*Malta tintebah bin-Negri*', '*scuttle their boats*' u '*nkun jien li naghti l-ordni to shoot*' li fil-fehma tieghu huma l-bazi tal-artikolu 82(a).

In segwitu, kompla jghid ix-xhud, hu ra wkoll it-tieni *video*, dak li jirrizulta mis-*site* li sar fit-tmienja ta' Mejju 2006 gewwa l-istabbiliment Fra Ben. Qal li dan ukoll huwa *recording* ta' diskors li ghamel Norman Lowell. F'dan id-diskors kien hemm referenza ghall-President ta' Malta bhala President Dumumba u jghidlu '*you are a bloody good gardener but a lousy President.*' In segwitu kien hemm ukoll il-kliem li hu rrimarka bhala '*Afrikani mill-Katanga*', '*ipokriti Kristjani, Kristjani u Marxisti*', '*indahhlilhom il-froxxna bejn ghajnejhom*' u referenza ghal '*qarnita sewda b'ghajnejha hodor*.' Qal li f'dawn ic-cirksotanzi hass li kien hemm il-bzonn li jkellem lill-imputat Norman Lowell. Zied jghid li hu talab Mandat lill-Magistrat tal-ghassa, liema Mandat effettivament gie rilaxxjat, liema dokument gie esibit bhala Dok. PPZ 5.

Spjega li 'n segwitu, Norman Lowell gie arrestat w ittiehed id-Depot tal-pulizija fejn fis-sebgha ta' Mejju 2006 ttehditlu stqarrija li anke ghazel li jiffirma. Din l-istqarrija giet ukoll esibita bhala Dok. PPZ 6 u giet rilaxxjata wara li Norman Lowell inghata t-twissija. Giet ukoll ffirmata mill-istess

Norman Lowell, minnu u mill-Ispettur George Cremona, li kien presenti waqt it-tehid tal-istess stqarrija u fuqha gharaf il-firem tieghu, tal-imputat kif wkoll tal-Ispettur George Cremona. Wara, zied jghid x-xhud, hu kompla b'xoghol iehor u beda jara il-kuntest ta' dak kollu li sa dak l-hin kien irrizultalu, u hu u l-Ispetturi George Cremona u Angelo Caruana ppruvaw jikkjarifikaw xi punti ohra, u wara li ghalqu dawn l-investigazzjonijiet, ressqu dan l-kaz quddiem din il-Qorti.

In kontr'ezami, x-xhud Supretendent Paul Zammit qal li nonostante li f'kull stqarrija rilaxxjata mill-imputat hemm miktub li l-imputat ghazel li ma jiffirmax din l-istqarrija, qal li effettivament wara li qara din l-istess stqarrija, huwa kien ghazel li jiffirma, kif del resto jidher mill-ezami ta' l-istess stqarrija. Qal li bhala procedura huma dejjem jispiccaw l-istqarrija bil-kliem li huwa ghazel li ma jiffirmahiex peress li sa dak l-istadju ma jkunx ghadu ffirmaha u sussegwentement, meta dak li jkun jaghzel li jiffirmaha, huma jhassru l-kliem 'ma niffirmax' pero f'dan il-kaz ma hassarhomx.

Spjega li fid-Dok. PPZ 4, ghamel *highlighting* ta' dak, li fil-fehma tieghu huwa l-iktar car rigward l-akkuzi li gew moghtija fil-konfront ta' l-imputat odjern. Dak li jirrizulta mill-*videos* esebiti u cioe mis-CD, ukoll huma fl-opinjoni tieghu, l-iktar instanzi cari fejn l-imputat m'irregolax ruhu mal-ligi. Qal li hu sar jaf b'dawn il-laqghat li kellu l-imputat, minn *downloading* li ghamel mill-*computer* wara li gew nnutati lilu mill-Kummissarju tal-Pulizija.

Mistoqsi jekk il-post fejn saru l-laqghat, hux post privat, ix-xhud qal li le mhux, peress li kemm in-Nigret, kif ukoll il-Fra Ben huma postijiet miftuhin ghall-pubbliku u fil-fehma tieghu, ma humiex postijiet privati, izda huma postijiet pubblici. Mistoqsi jekk iccekkjax jekk dakinhar l-attivita in kwistjoni kienitx wahda privata tal-imputat u shabu, ix-xhud wiegeb fin-negattiv. Qal li l-imputat, fl-istqarrija li huwa rrilaxxja, kkonferma l-kontenut ta' dak li effettivament gara dakinhar f'dawn iz-zewg laqghat, kif ukoll dwar il-kitba tal-'Coming Cataclysmic Crises', [Dok. PPZ 4], kitba li effettivament kienet kitba tieghu. Zied

jghid li hu fl-ebda hin ma kien presenti ghal dawn il-laqghat. Mistoqsi jekk kienx il-Kummissarju tal-Pulizija li rreferih ghall-artikolu 'Coming Cataclysmic Crises', ix-xhud wiegeb li ma kienx cert minn dan. Qal li una volta dahlu fis-*site* ta' 'Viva Malta', bdew jaraw l-artikolu 'n kwistjoni.

Mistoqsi x'kien l-objettiv li hu ghazel il-granet u dati ndikati fl-akkuzi, x-xhud wiegeb li dak li jirrigwarda dak imsemmi fit-tielet akkuza, hija data li kienet tirrizulta mill-istess artikolu u mill-istqarrija tal-imputat u d-data li hemm fuqu nnifsu. Qal li s-sebgha w ghoxrin ta' Marzu 2006 hija l-ahhar data li deher, fil-fehma tieghu, li kien hemm xi tibdil fuq il-post fejn effettivament kien hemm dan l-artikolu 'Coming Cataclysmic Crises'.

Mistoqsi jghid x'ikkonferma l-imputat meta rrilaxxja l-istqarrija tieghu, wiegeb li hu ikkonferma d-domandi li sarulu u wara li kienu ghaddewlu kopja ta' l-istess artikolu li gie esebit il-Qorti u mmarkat bhala Dok. PPZ 4, kien hu stess li qalilhom li kiteb dan l-artikolu hafna zmien qabel ma gie *posted*. Fil-fatt, zied jghid x-xhud, l-imputat qatt ma stqarr li kien hu li ppostja dan l-artikolu. Mistoqsi jekk jafx min kienet il-persuna li gibdet il-filmat li esibixxa, ix-xhud wiegeb fin-negattiv.

Illi nhar l-erbatax ta' Gunju 2007 **rega' xehed s-Supretendent Peter Paul Zammit** (fol 187) fejn mistoqsi ghaliex effettivament wasal sabiex iressaq lill-imputat l-Qorti, spjega li huwa jokkupa l-kariga ta' Kap tal-Prosecuting Unit tal-Pulizija u hass li dan il-kaz kellu bzonn assistenza legali, molto piu meta tqis li r-reati addebitati lil imputat, huma relattivament godda fil-ligi taghna. Qal li l-kaz in kwistjoni spicca ghandu *through the normal channels* ghal investigazzjoni. Spjega li mill-investigazzjoni li ghamel rrizultalu mill-evidenza li kellu, li kien hemm bizzejjed provi biex iressaq lill-imputat fuq l-akkuzi li addebitah bihom hu.

Qal li lilu kienu mibghuta minuti kemm minn ufficini bhal Cyber, kif wkoll minn subalterni tieghu. Cahad dak li suggerit d-difiza li kien hemm struzzjonijiet politici, anzi qal

li kienu struzzjonijiet tas-superjuri tieghu, u cioe l-Assistent Kummissarju w il-Kummissarju. Spjega li c-CMRU hija *Community and Media Relations Unit* li tiehu hsieb, b'mod partikolari s-sentenzi tal-Qorti w affarijiet simili u referenzi ghal ittri li jiktbu n-nies fil-*press* fosthom dawk dwar *racial hatred*. Kompla jghid li s-CMRU huwa maghmul minn erbgha min nies, fosthom l-Ispettur Kenneth Haber w is-Surgent Fabri.

Ikkonferma li waqt l-ezami principali ta' dak li kiteb l-imputat, huwa ghamel sottolinear u *highlighting* ta' certu partijiet minn dak li qal l-imputat w irrizutlalu li a bazi ta' l-istess setgha jressaq lill-imputat il-Qorti w effettivament hekk ghamel. Qal li hu ma baghat ghal hadd li kien prezenti l-Buskett fis-sena 2006. Cahad li qatt baghat ghal xi persuni li kienu prezenti ghal xi laqgha ohra li saret.

Illi nhar s-sitta w ghoxrin ta' Gunju 2006 **xehed l-Ispettur George Cremona** [fol 81] li qal li fis-sebgha w ghoxrin ta' Mejju 2006, hu kien parti mill-investigazzjoni flimkien mas-Supretendent Peter Paul Zammit u bdew jinvestigaw l-allegazzjonijiet dwar xi reati dwar mibgheda razzjali u *contempt of the President*. Qal li sussegwentement ottjenew Mandat t'Arrest u fis-sebgha w ghoxrin ta' Mejju 2006 fejn l-imputat gie arrestat u mehud id-Depot, fejn huwa rrilaxxja stqarrija li huwa ghazel li jiffirma u f'wahda mill-mistoqsijiet huwa kkonferma li l-filmati li hemm fuq il-*website* 'Viva Malta' rigward il-*filming* tan-Nigret Club u tal-Fra Ben, huma riproduzzjoni fidila u *not altered*.

Spjega li sussegwentement wara nofsinhar, ittehditlu stqarrija ohra fuq liema x-xhud gharaf il-firem tieghu, tal-imputat Norman Lowell u tal-Ispettur Angelo Caruana u wara li l-imputat inghata s-solitu twissija, huwa ghazel li jiffirmaha. Sussegwentement imbaghad inhargu c-*charges* relattivi u tressaq il-Qorti.

Spjega li l-investigazzjoni li huma ghamlu bhala Korp tal-Pulizija, kien dejjem fuq il-*website* u cioe fuq il-kontenut taghha. Nies pero viva voce jitkellmu fuq dan is-suggett, huma ma semghux. Qal li l-imputat qatt m'ammetta

maghhom li kien hu li ghamel il-*postings* ta' dawn l-artikoli. Zied jghid li l-imputat ikkopera hafna maghhom tul din l-investigazzjoni.

Illi nhar s-sitta w ghoxrin ta' Gunju 2006 **xehed l-Ispettur Angelo Caruana** [fol 85] fejn qal li hu kien presenti ghat-tieni stqarrija li rrilaxxja l-imputat u cioe dik tas-sebgha w ghoxrin ta' Mejju 2006, wara nofsinhar. Qal li din l-istqarrija ttiehdet wara li l-imputat gie moghti s-solitu twissija w ittiehdet mill-Ispettur George Cremona u l-istess Spettur George Cremona kien taha kopja ta' din l-istqarrija lill-imputat sabiex jaqraha u wara li qraha, l-imputat kien ghazel li jiffirmaha. Ikkonferma li waqt li huma kienu qed jitkellmu mal-imputat, ikkjarifikaw xi kliem li qal, irrepeta l-istess kliem li kien qal iktar kmieni filghodu u qal ukoll li huwa jemmen f'dak il-kliem li kien qal, kemm fil-konfront ta' nies li ghandhom karnagjon differenti u kemm dawk il-kliem li qal fil-konfront tal-President ta' Malta. Spjega li waqt li kienet qed tittehidlu din l-istqarrija, huma dahlu fis-*site*, tellghu dan il-filmat u l-imputat ra dan il-filmat u talabhom biex jieqfu milli jkomplu jarawh w kkonferma li kien hu li kien jidher fih.

Mistoqsi jekk l-imputat kkonfermax li ma kienx hu li ghamel dawn il-*postings* tal-artikolu fuq il-*website*, ix-xhud qal li din il-kwistjoni qatt ma tqajjmet u ghalhekk la kkonferma u lanqas nnega, ghax qatt ma gie mistoqsi din id-domanda, almenu fil-presenza tieghu. Qal li waqt li kienu qed jaraw dan il-filmat l-imputat kien konxju tieghu u fil-fatt kien hu stess li qalilhom li l-*film* li kienu ser juruh ma kienx daqstant car. Qal li hu kien konxju taghhom. Kompla jghid li l-imputat ikkonferma wkoll li dawn il-laqghat u filmati kienu kwistjoni regolari ta' bejn il-hbieb jew segwaci tieghu. Qal li hu kien qal lil imputat li 'ghad inkun hemm' u hu kien irrispondih li kien *welcome* biex immur.

Mistoqsi jekk kienitx biss laqgha bejnu u bejn il-hbieb tieghu, ix-xhud qal li effettivament l-imputat kien qed jindirizza xi hbieb tieghu, pero ma kienx jaf jekk kienx hemm xi ohrajn li setghu kienu hemm ukoll. Mistoqsi jekk kienx presenti waqt li l-imputat rrilaxxja l-ewwel stqarrija,

ix-xhud wiegeb li kien hemmhekk pero diehel u hiereg fl-ufficcju, pero fit-tieni stqarrija u cioe dik esebita mill-Ispettur George Cremona, hu kien presenti il-hin kollu. Ghar-rigward l-istqarrija tas-Sur George Cremona, kompla jghid x-xhud, l-imputat kien ghazel li jiffirmaha w effettivament hekk ghamel fuq iz-zewg faccati taghha.

Illi b'digriet tas-sitta w ghoxrin ta' Gunju 2006, il-Qorti nnominat lil Doctor Steven Farrugia Sacco sabiex jaghmel *downloading* ta' dak kollu li jinsab inserit fid-Dok. PPZ 3 u jaghmel kull *transcript* ta' kwalsiasi *speech* li jirrizulta f'dan l-istess CD.

Illi nhar l-erbgha ta' Awissu 2006 deher **Dottor Steven Farrugia Sacco** [fol 106] u esibixxa r-relazzjoni tieghu li giet mmarkata bhala Dok. SFS. Din r-relazzjoni tikkonsisti fi *transcript* ta' dak kollu li ntqal fis-CD mill-imputat.

Illi nhar s-sbatax ta' Awissu 2006 **rega' xehed Dottor Steven Farugia Sacco [fol 110]** li qal li hu kien gie nominat b'digriet tas-sitta w ghoxrin ta' Gunju 2006, sabiex jaghmel *transcript* tal-kontenut ta' Dok. PPZ 3, konsistenti f'CD u esibixxa r-relazzjoni tieghu li giet immarkata mill-Qorti bhala Dok. SFS, kopja ta' liema hu ghadda lill-prosekuzzjoni. Qal li fost it-*transcripts* li hu ghamel, hemm xi kliem li hu ma fehmux w ghalhekk ghamel 'xxx' *in bold*.

Illi nhar s-sitta ta' Ottubru 2006 **rega' xehed Dottor Steven Farugia Sacco** [fol 123] li qal li hu fil-fatt nizzel kull dokument li kien hemm fis-CD li ghamel it-*transcript* tieghu. Jekk dak li kien hemm fis-CD kienx diga gie esebit jew le fil-process, ix-xhud qal li dak ma setghax jghidu ghaliex ma kellux access ghall-process. Qal li kien hemm certu parti li halla b'sottofond griz fit-*transcripts* ghaliex ma kienx konvint mija fil-mija minn dak li semgha. Kien hemm bicciet ohrajn li hu ma setghax jifhem il-kliem w ghalhekk hallihom *blank*. Qal li jekk mhux sejjer zball, mill-memorja tieghu hu ra zewg *videos*, u fihom kien hemm Norman Lowell qed jaghmel *speech* u ex admissis jghid '*and he was being cheered for what he was saying*.' Mistoqsi jekk kienx hemm balla nies madwaru, ix-xhud

wiegeb li hu ma setghax jghid jekk kienx hemm nies jew le ghaliex il-*camera* kienet biss iffukata fuqu. Qal li c-*cheering* huwa minn dak li semgha, mhux minn dak li ra. Qal li mid-*downloading* li ghamel irrizultalu li l-imputat kien speci qed jitkellem man-nies u fil-fatt semgha lil imputat fid-diskors tieghu, jindirizza lil xi hadd biex jaghlaq il-bieb u sussgwentement semgha bieb jinghalaq. Qal li hu nizzel id-diskors tal-imputat kelma b'kelma. Qal li setgha kien hemm xi persuna jew tnejn li telghu hdejn l-imputat waqt li hu qed jitkellem. Qal li hemm certu parti fid-diskors tieghu li gew *highlighted* minnu. Qal li dan kien kliem li dehrlu li ntuza pero jew minhabba ghajjat jew minhabba l-fatt li l-imputat biddel il-lingwa mill-Malti ghall-Ingliz u gieli ghal Latin u hekk, qal li ovvjament l-impressjoni tieghu kienet dik, pero ma setghax ikun cert.

Illi **nhar t-tmintax ta' Ottubru 2006 il-Qorti rat s-CD** esibita fl-atti sabiex tkun tista hija stess tikkonstata l-fatti u dan fil-presenza tal-Ufficjali Prosekuturi s-Supretendent Peter Paul Zammit, l-Ispettur Angelo Caruana, l-imputat u l-avukat difensur tieghu.

Illi dakinhar stess waqt l-istess seduta, l-Qorti vverbalizzat fil-presenza tal-partijiet koncernati, s-segwenti u cioe li "**waqt il-wiri tas-CD il-prosekuzzjoni ndikat fil-presenza tal-imputat, dik il-parti li fil-fehma taghha, tikkostitwixxi mibgheda razzjali. Il-prosekuzzjoni ghamlet referenza ghar-relazzjoni tal-espert Doctor Stephen Farrugia Sacco, a fol 22 [l-ahhar paragrafu] li l-Qorti, fil-presenza tal-partjiet kollha koncernati, qed timmarka b'highlighter. Dan il-paragrafu jibqa ghaddej ghal pagna 23. Il-prosekuzzjoni ndikat wkoll l-paragrafu sussegwenti a fol 23. Il-partijiet jaqblu li l-kelma nieqsa a fol 25, fejn hemm 'XXXOO' [hin 21.12.8], ghandha tinqara 'mia'. Il-prosekuzzjoni tiddikjara li l-ewwel sentenza fit-tieni [2] paragrafu ta' din l-istess faccata, tikkostitwixxi mibgheda razzjali. Issir wkoll referenza mill-prosekuzzjoni, ghal paragrafu 'C' f'nofs pagna 26, u z-zewg paragrafi sussegwenti, li jispiccaw a fol 27, li jispicca bl-isem "Etoal". Issir wkoll referenza mill-prosekuzzjoni, a fol 29, l-ahhar parti tal-ewwel paragrafu u nofs t-tieni, t-**

tnejn immarkati permezz ta' highlighter. Issir wkoll referenza mill-prosekuzzjoni, ghal paragrafu tan-nofs a fol 30, kif indikat w immarkat b'highlighter seduta stante. Issir wkoll referenza mill-prosekuzzjoni, a fol 32 li tispicca a fol 33, wkoll immarkata b'highlighter. Issir wkoll referenza mill-prosekuzzjoni, a fol 42, li wkoll hija highlighted. Issir wkoll referenza mill-prosekuzzjoni, ghal ewwel paragrafu a fol 44 b'referenza ghal ewwel [1] akkuza. B'referenza ghar-raba [4] akkuza, il-prosekuzzjoni tissottolinea bil-linka blue, dik il-parti li fil-fehma taghha, tikkostitwixxi ngurja lejn il-persuna tal-President ta' Malta. Il-prosekuzzjoni tindika wkoll z-zewg paragrafi ohra a fol 45 ai fini tar-raba [4] akkuza filwaqt li tindika l-ewwel paragrafu a fol 45, ai fini tat-tieni [2] akkuza. Il-prosekuzzjoni tindika a fol 46 u fol 47, ghal dik l-parti f'italics b'referenza ghal ewwel [1] akkuza. Il-prosekuzzjoni tindika wkoll l-paragrafu highlighted a fol 48, u dan rigward l-ewwel tlett akkuzi. Il-prosekuzzjoni tindika wkoll l-ahhar paragrafu a fol 56 sal-ewwel paragrafu a fol 57.
Issir wkoll referenza mill-prosekuzzjoni, ghas-sentenza f'nofs pagna 64 wkoll highlighted. Il-partijiet jaqblu li l-persuna li qed titkellem f'dawn iz-zewg laqghat li sehhew fin-Nigret nhar t-tletin ta' April 2006 u fi Fra Ben l-Qawra nhar t-tmienja ta' Mejju 2006, huwa l-imputat odjern. Il-partijiet jaqblu wkoll li f'dawn il-laqghat l-imputat kellu udjenza."

Illi nhar t-tmienja ta' Novembru 2006 **xehed l-imputat minn jeddu b'mod voluntarju** [fol 128] fejn, meta saritlu referenza ghall-istqarrija rilaxxjata minnu fl-ufficju tal-Ispettur George Cremona nhar is-sebgha w ghoxrin ta' Mejju 2006, liema stqarrija tinsab inserita fl-atti a fol 77 mmarkata bhala Dok. PPZ 6, qal li din l-istqarrija giet rilaxxjata minnu ghall-habta tal-hdax ta' filghodu. Ix-xhud, wara li regghet giet moqrija lilu mill-Qorti l-istess stqarrija, ddikjara li fehemha sewwa w ikkonferma l-kontenut taghha. Qal li meta fl-istqarrija semma il-hin, il-hdax, ridt infisser il-hdax ta' bil-lejl. Ikkonferma li hu *foreign member* biss tal-'Imperium Europa' u m'ghandu ebda kontroll ta' xejn fuq din il-*website*. Spjega li d-diskrezzjoni jekk

jittellghux *speeches* tieghu jew le fuq is-*site*, ma tiddependix minnu izda mill-amministrazzjoni, fil-fatt diversi *speeches* tieghu li jkunu tajbin mill-punto di vista ta' storja, ma jigux imtellghin fuq din l-istess *site* ghal ragunijiet ta' l-istess amministrazzjoni. Zied jghid li meta l-amministrazzjoni ticcensura xi *speech* tieghu u tiehu d-decizjoni li ma tippostjax dan l-*speech*, ma jiehu l-ebda pass kontra dan u dan ghaliex hu liberteran u tolleranti hafna.

Mistoqsi x'inhi d-differenza bejn 'Imperium Europa' u 'Viva Malta', ix-xhud wiegeb li bhala principju hu jemmen fid-*duality of nature*, li kollox huwa maskili u femminili bhall-univers. Qal li fil-politika ghandek dik li hija maskili li hija ideologija imperjali ta' faxxizmu u filosofiji politici li huma femminili li huma l-*excellance* fid-demokrazija. Zied jghid li fil-moviment taghhom ghandhom *the duality, male and female* u hu l-'Imperium Ewropa' li hu l-*leader* taghha, li hija strettament maskili.

Spjega li minn naha l-ohra hemm 'Viva Malta', li hu mhux l-kap taghha, li sa llum il-gurnata ma hemmx kap ghax rridu jiddeciedu, idealment tkun mara peress li din hija ideologija femminili. Ix-xhud taha ezempju bhal tazza tal-inbid fis-sens li tazza huwa l-'Imperium Ewropa' waqt li l-inbid ta' got-tazza huwa l-'Viva Malta'. Qal li l-Imperium jipprotegi in-nazzjon ta' Malta.
Fis-socjeta taghna, zied jghid x-xhud, l-individwu jista jaghmel dak li jrid, li jfisser li l-individwu huwa liberu totalment, jista jaghmel dak li joghgbu, basta pero ma jimpingix fuq id-drittijiet ta' ohrajn, ta' terzi. Qal li l-Imperium ma jindahalx fil-liberta tan-nazzjon acetto hames affarijiet biss, l-ispiritwalita, li hija l-antikresi tal-Kristjanezmu u dan ghaliex l-'Imperium' huwa maskili u mhux femminili. It-tieni wahda hija l-kultura gholja tas-socjeta, liema kultura hija infuza minn nazzjonijiet li ma jkollhomx nies bhal Jerry Springer u Peppi Azzopardi, fis-sens li jinvolvu lis-socjeta, t-tielet wahda hija razza, fis-sens li l-Imperium jkollu l-frontieri tieghu ssigillati u kull razza tghix skond il-kultura taghha u dan skond il-*genetic make up* ta' dik l-istess razza. Qal li importanti ghalih li jfakkar li l-Griegi kienu elfejn u hames mitt sena ilu, diga

kienu stabbilew d-distanza li hemm bejn *earth* u *the moon*. Ir-razza hija mporanti mill-punto di vista ta' civilta, kompla jghid x-xhud. Ir-raba wahda, zied jghid, hija *high quality* li jfisser li dak kollu li jikkoncerna l-'Imperium' u kwalsiasi haga ohra li tinsab barra l-fruntieri ta' l-istess 'Imperium' fic-cirkostanzi taqa taht 'Imerpium'. Qal li l-ahhar wahda hija dik tat-territorium, fis-sens li ma jkunx hemm lanqas pulzier cedut lil terzi, u dan ghaliex l-ispazju fejn wiehed jghix huwa importanti, u kull razza tizviluppa skond il-qies taghha. Qal li ghal dan il-ghan hemm zewg *sites* differenti, wahda hija 'ImperiumEwropa.org' u l-ohra hija 'VivaMalta.org' li hija miftuha ghall-poplu kollu.

Mistoqsi allura kif l-*speeches* li jaghti ghan-nom u fl-interess ta' 'Imperium Ewropa' jispiccaw *posted* fuq is-*site* ta' 'Viva Malta', ix-xhud wiegeb li hu m'ghandu l-ebda kontroll fuq dawk li jipproducu 'Viva Malta'. Qal li l-ahjar *speeches* tieghu ma gewx riprodotti. Pero nonostante kwalsiasi persuna jista jipposta dak li jrid fuq is-*site* ta' 'Viva Malta'.

Mistoqsi jispjega x'inhu ezattament 'Imperium Ewropa', ix-xhud wiegeb li din hija organizzazzjoni maghmula minn numru ta' nies. Qal li huma qed jaraw is-socjeta taghhom tisfaxxa fix-xejn, qeghdin jirribellaw kontra taghha, u dan billi jesprimu l-opinjoni taghhom tramite 'Imperium Ewropa'. Qal li huma jirribellaw permezz ta' battalja bil-kultura, li jfisser li r-ribelljoni taghhom, trid tkun tramite spiritwalita, li trid tkun wahda differenti w jbiddlu l-kultura, per ezempju anke l-vizjoni li Malta qed ssir *jungle of concrete*. Spjega li huma, fir-ribelljoni, qed jaraw *un'altra visione del'mondo*, *a new approach*, fis-sens hija battalja mill-politiku u kultura li jfisser li ma hemmx aggressjoni. Qal li hu qatt ma ried ifisser bil-kliem tieghu li xi hadd ghandu jmur joqtol jew jaghmel hsara lil haddiehor. Fil-fatt, wara kull *meeting* u dak ix-xoghol kollu, kulhadd jirritorna lura lejn daru b'mod pacifiku. Qatt ma kien hemm l-ebda incident t'aggressjoni jew haga ohra. Fil-fatt dawn l-affarijiet, anzi jikkrejaw hsara lilhom. Il-moviment 'Viva Malta' ghandu ftit mijiet ta' membri, pero ghandhom ukoll *a lot of silent support* u m'humiex strutturati apposta, u dan apposta, biex ma jghamluhiex facli ghal *tyrannical*

establishments li jakkuzawh illum ghax jkun jista jhabbatthom. F'kaz li hemm bzonn li jigu ristrutturati, jaghmlu dan f'temp ta' ghaxar minuti.

Mistoqsi min hi l-*establishment* li ressqitu lil hawn, ix-xhud ghazel li ma jwegibx din id-domanda ghaliex fil-fehma tieghu, din hija kawza politika. L-organizzazzjoni, zied jghid x-xhud, li hija *right wing* li hija l-Germanja u Franza u Ingilterra, tigi infiltrata minn *establishments* u mkissra bi glied intern u sussegwentement tispicca jkun hemm *split* u jiffurmaw partiti izghar ohra. Bhala ezempju ix-xhud qal li meta l-Ingilterra kien hemm in-*National Trust*, kellha eluf ta' voti, gie nfiltrat, sussegwentement dan il-partit gie maqsum u hadd minnhom ma tela'. Fil-fatt UKIP gie mahluq biex ikisser l-eredi ta' dan it-tron u hu ma jixtieqx li jigri hekk hawn Malta u b'hekk huma ma jridux jikkrejaw moviment. Qal li una volta l-pajjiz jigi *down the tube,* imbaghad f'qasir zmien l-*establishment* ma jkollux ic-cans biex ifarrak u jimplementa *his nefarious intention*.

Mistoqsi ghal liema raguni huma jzommu l-attivitajiet imsemmija minnu fl-istqarrija rilaxxjata minnu, ix-xhud qal li l-*club* taghhom huwa miftuh ghall-pubbliku u kwalsiasi persuna tista tattendi u fil-fatt l-atmosfera hija wahda amikevoli. Qal li fil-fatt hafna konviventi jigu biex jisimugh. Qal li l-ghan taghhom huwa *to reinforce* il-messagg taghhom u naturalment *to strengthen the bond of friendship* ezistenti bejniethom. Fil-moviment din tinghata importanza massima. Il-*bond of friendship* taghhom, zied jghid ix-xhud, tkun vertikali, mhux orizzontali u dan ghaliex hija rikjesta hekk minn natura taghhom stess.

Mistoqsi jekk 'Viva Malta' ghandhiex l-istess principji, ix-xhud wiegeb li hemm certu sottiletti u dan ghaliex huma *liberterians*. Il-BBQ u l-*annual meeting* jaqghu taht il-'Imperium Ewropa'. Dawn il-laqghat u *speeches* jsiru bil-ghan li huma jsahhu r-relazzjoni ta' bejniethom b'mod vertikali u li ma hemm l-ebda objettiv ta' theggig kontra hadd. Qal li hu hadd qatt m'oggezzjona ghalih u dan ghaliex hu persuna libera u jghid dak li jrid hu, naturalment dak li jemmen fih.

Ikkonferma li l-artikolu bl-isem 'Coming Cataclysmic Crises' deher fuq l-*internet* u kien hu li ppostjah fuq is-*site* 'Viva Malta' u kellu *coverage* mondjali *from Right Wing Intellectual Circle* u dan ghaliex hija tezi politika w inghata prominenza f'dan ir-*Right Wing Circle*. Jista jkun li kien l-incident tad-disgha ta' Novembru li mpingih jikteb dak l-artikolu u kiteb dak l-artikolu ghal vizjoni mondjali. Fil-fehma tieghu kien *tour de cours*. Qal li hu kellu quddiem ghajnejh *the pending collapse of Western Civilization*. Fil-fatt mill-punto di vista tal-kumpilazzjoni ta' dan l-artiklu din il-kwistjoni, meta kiteb dan l-artikolu ma kellu ebda ntenzjoni ta' mibgheda razzjali. Spjega li meta kiteb dak l-artiklu kien qed ifisser xejn inqas minn tezi politika. Rega' ghal darb'ohra rrepeta "*that we are heading for a big crises*." Fil-fehma tieghu, hu jemmen li fis-sena 2012 ser jkollna *a big Cataclysmic Crises*. Qal li ma dehrlux li kellu ghalfejn jistaqsihom ghalfejn bdew jistaqsuqh dawk id-domandi waqt l-interrogazzjoni tieghu.

Mistoqsi ghaliex jahseb li gie *depicted* dan l-artikolu fost dawk kollha li kiteb, wiegeb, '*never underestimate the stupidity of your contemporary, Bernard Shaw.*' Qal li jekk in realta jista jigi akkuzat fuq kollox, ma jistax jigi akkuzat fuq tezi politika, u dan ghaliex din hija t-tezi politika tieghu. Fil-fatt f'dan l-artikolu hemm biss it-tezi politika tieghu.

Wara li giet moqrija lilu t-tieni stqarrija li hu rrilaxxja fl-istess jum tas-sebgha w ghoxrin ta' Mejju 2006, liema stqarrija hu rrilaxxja ghall-habta tal-erbgha neqsin ghoxrin ta' wara nofsinhar u li tinsab inserita fl-atti mmarkata GC 1 a fol 83, meta gie mistoqsi jekk l-awtoritajiet ghamlux evalwazzjoni korretta ta' dak li qal hu fuq l-Eccellenza tieghu l-President ta' Malta, ix-xhud qal li f'postijiet iktar evoluti f'*sens ta' humour*, qed jigu mhallsa biex *they mock* il-presidenti taghhom u l-fatt li hu gie akkuzat li nsulenta lill-President juri *how childish* hu l-president stess. Qal li f'kaz li l-President ghamel xi kwerela u jekk kien hemm xi persuna li ppoppat sidirha biex minghaliha tiddefendieh, iktar in realta waqqghu ghac-cajt. Meta l-President li ghandna qara dawk l-insulenzi bhal per ezempju, meta

kien liebes in-*nappy* bil-labar tas-Super One u gabu ritratti tieghu fuq spallejn Zeppi l-Hafi, ma qal xejn. Din id-darba milli jidher ha ghalih ghaliex persuna bhalu, meta tghid li huwa mar *barbeque* ghand l-immigranti llegali fil-vesti tieghu ta' President tal-pajjiz, *he was giving the wrong message* u fil-fatt Maltin ma marrulux, salv il-Ministru ta' l-Intern l-Onorevoli Dottor Tonio Borg u martu.

Qal li fit-tieni lok, jemmen li huwa indahal fit-twemmin politiku tieghu u dan ghaliex fil-fehma tieghu, il-President mhux l-Attorney General u ma ghandux jindahal. Qal li hu kellu elf u tlett mitt vot *one's* u iktar minn tmint elef vot bhala *two's* u ghal hekk hadd minnhom ma kien qed jigi *persued*. Qal li ghalih, l-President jista jmur jixxejjer. Qal li darb'ohra '*I reiterate d-dritt tieghi li nesprimi ruhi b'mod politiku, ghax fil-fehma tieghi kienet kwistjoni kwerili hafna li jien gejt akkuzat b'hekk*'. Qal li fil-fatt hu ghamel paragun ma l-iktar president intelligenti ta' l-Afrika li warajh hemm universita imsemmija, Marunga. Qal li kien hu li hassu ingurjat b'li qal l-president, *we should be persued*.

Qal li dehrlu li fl-ewwel stqarrija hu kien kkopera mal-pulizija u dan ghaliex hu setgha ma tkellimtx, pero fil-fatt kien rrisponda d-domandi maghmula lilu. Qal li hu gie mizmum go cella minghajr affarijiet tieghu w ghalhekk hassu li l-fatt li regghu baghtu ghalih t-tieni darba fl-istess jum, kienet kwistjoni ta' motivazzjoni politika. Minhabba ragunijiet politici, hu hassu urtat li kien qed jigi trattat b'dan il-mod xejn felici.

Mistoqsi x'ridt infisser bil-kliem elfejn illegali, fl-ahhar paragrafu ta' l-istqarrija tieghu, ix-xhud qal li ried ifisser li l-ammont ta' nies, *illegal immigrants* jidhlu ftit wara ftit u jibqghu dehlin, u fil-fatt hekk gara. Tant hu hekk li l-Onorevoli Ministru tal-Foreign Policy llum il-gurnata qed inewwah li ahna gejna minsija mill-Ewropa dwar din il-problema. Fejn sab li kellu ragun politiku, fil-fatt zamm dawk l-immigranti erbatax il mil boghod minn xtutna. Qal li fil-fehma tieghu, ma dahlux iktar immigranti minhabba t-temp iktrah li kellna. Illum il-gurnata s-sitwazzjoni fil-kuntest imsemmi fl-ahhar paragrafu tat-tieni stqarrija

tieghu, zied jghid ix-xhud, pajjizna qed jiddeterjora minn xahar ghal xahar, mhux daqs kemm ippreveda hu minhabba min qed imexxi dan il-pajjiz u minhabba d-decizjonijiet pero purament biss minhabba fatturi meteorologici. Qal li hu kien qal li l-Gvern ser jitlef il-kontroll tas-sitwazzjoni rigwardanti d-dhul ta' immigranti llegali fix-xtut taghna u fil-fehma tieghu, llum li qed jigri huwa li l-Gvern qed jibghat suldati taghna 'l barra biex jigbru lil dawn in-nies u jdahhluhom fi xtutna. Ghalhekk fil-fehma tieghu tilef kontroll tas-sitwazzjoni. Qal li kien f'dan il-kuntest biss li uza dik il-frazi u li naturalment ma ridtx ifisser kwistjoni ta' kif qed jiggverna l-Onorevoli tal-pajjiz.

Mistoqsi fejn hu effettivament uza kliem ta' mibgheda u theddid jew abuzivi jew insulenti nhar it-tlieta t'April 2006 fir-Rabat, ix-xhud wiegeb li hu mhux konxju ta' dan. Qal li t-tlieta t'April 2006, ma jfisser xejn ghaliex hu jinsab f'battalja politika u jitkellem kuljum w ghalhekk ghalih it-tlieta t'April huwa jum fost l-ohrajn w ghalhekk ma jafx ghal x'hiex qed jirreferu l-prosekuzzjoni. Qal li fl-ebda diskors li ghamel ma kellu l-intenzjoni li jqajjem mibgheda razzjali. Qal li peress li huma partit *out of the main street*, ma jitkellmux bid-djalett taz-zewg partiti u li l-manjiera li jitkellmu huma forsi jinstema *a bit harsh* jew forsi ahjar jistona. Qal li ghalhekk l-intenzjoni tieghu huwa li jghaddi messagg biex iqajjem il-kunxjenza nazzjonali. Haga ohra li xtaq jghid, kompla jghid x-xhud u dan b'referenza ghad-data tmienja ta' Mejju 2006 fil-Qawra limiti ta' San Pawl il-Bahar, din id-data per se ma tfisser xejn ghalih.

Qal li hu kiteb l-artikolu 'Coming Cataclysmic Crises' darba u gie mifrux madwar id-dinja kollha u hu ma kellu ebda kontroll kif effettivament dan l-artikolu sussegwentement gie *posted* f'siti ohrajn. Gie ricevut tajjeb hafna *from the right wing party*. Qal li fil-fehma tieghu hu qatt ma qal xi kliem konsistenti f'ingurji jew insulti lejn l-Eccellenza tieghu l-President ta' Malta. Il-kliem li hu qal jaqghu taht *political licence* jew ahjar *humour* u dak li qal kien biss battuta politika fi sfond politiku. Qal li kull ma qal jikkostitwixxi *a humerous jive* fil-konfront tieghu.

Illi nhar s-sebgha ta' Dicembru 2006 **rega' xehed l-imputat** (fol 138) fejn spjega l-i*speech* tieghu li ghamel waqt li kien in-Nigret u dan b'referenza ghall-ewwel akkuza. Qal li l-laqgha taghhom n-Nigret hija '*one of our Monday clubs'*. Qal li huma kull xahar jiltaqghu biex politikament jikkummentaw fuq dak li jkun gara f'pajjizna dak ix-xahar u kulhadd huwa mistieden biex imur basta li jgib ruhu ta' nies. Naturalment, zied jghid, tkun udjenza pre-disposta u lesta ghal dak il-messagg. Qal li peress li l-*establishment* tieghu hija antipatika, hi taghmel minn kollox biex tohloqhom, ma jkunux sorprizi jekk fost l-*establishment* ikun hemm nies provokaturi w imbghad l-ghada fil-gazzetti jpenguhom bhala faxxisti, aggressuri u vjolenti.

Ikkonferma dak l-i*speech* tieghu u cioe tat-tlieta t'April 2006. Zied jghid li l-filmat li huma raw l-Qorti huwa l-istess filmat li kellhom dakinhar. Qal li fil-fehma tieghu, huwa messagg purament politiku, pero naturalment b'tonalita differenti mill-politici moderni ta' llum u dan ghaliex il-politici moderni ghandhom il-monopolju tal-istruttura f'idejhom, u huma jridu jiggieldu battalja estera fuq l-imhuh. Il-lingwagg irid ikun imqanqal, offensiv, dik hija d-differenza li hemm u dan sabiex iqajjmu kuxjenza nazzjonali, zied jghid x-xhud. Qal li hu kien konxju li possibilment ikunu jridu jiffilmjawh. Qal li hu m'ghandu xejn x'jahbi.

Qal li l-parlamentari taghna ghandhom assigurazzjoni, kemm tal-Gvern, kif ukoll ta' l-Opposizzjoni, nazzjon *buttoned up* peress li huma qeghdin appostu ghal hames snin, il-pajjiz dejjem angolat, jinvaduh, hadd ma jimpurtah, din ghalih hija sitwazzjoni naccettabbli. Ghalhekk, zied jghid, li huma jridu jkunu iktar intelligenti, emottivi sabiex il-poplu jirrealizza s-sitwazzjoni perikoluza ta' dan il-pajjiz. Apparti huma, ma hemm hadd li ha dan l-inkarigu sabiex jwassal dan il-messagg politiku. Qal li hu stenna ghoxrin sena sabiex bniedem intelligenti, artikolari u fakultuz iktar minnu fuq dan il-kalvarju li effettivament qed jiehu hu u peress li dan ma giex, ghamilha hu. '*Somebody has got to do the job'.* Qal li hu assuma din ir-responsabbilta a bazi

ta' l-esperjenza diretta tieghu. Qal li hu kien f'zewg pajjizi li tilfu, Rhodesia u South Africa u jaf xi tfisser meta bniedem jitlef poplu u pajjiz u din l-istess haga qed tigri hawn Malta. L-istess sforzi internazzjonali u l-estradiment tal-politici li qeghdin fil-parlament u naturlament il-knisja kattolika li holqot poplu w abbandunatu u deherlu li xi hadd kellu jaghmel xi haga u dan ix-xi hadd huwa hu. Zied jghid li hu jaghmlu mhux b'xi sens ta' kilba ghall-poter, qal li hu artist w awtur, jghix hajja ta' *fulfilment* fiz-zona tieghu u ma jistax jkun ihalli kollox ghaddej. Qal li qed jesprimi ruhu billi jaghmel id-diskorsi tieghu u dan ghaliex fil-fehma tieghu, il-milja taghhom hija maghluqa. Qal li l-uniku spazju li taghtihom, hija biex izzeblahom. Qal li hu jghix f'pajjiz suppost demokratiku w d-dritt t'assocjazzjoni u ta' *speech* huma salvagwardjati bil-kostituzzjoni w ghalhekk ihoss li ghandu dritt jghid li hu ma jixtieqx jiehu vantagg minn dan kollu pero ftakar li semgha dan id-diskors darb'ohra li l-milja tieghu hija wahda politika, u m'incita l-ebda mibgheda razzjali. Qal li sahansitra wara l-*speech*, lkoll jiehdu *drinks* flimkien.

Qal li lilu hadd ma qallu xejn dwar l-i*speech* li kien ghamel qabel m'effettivament gie l-Qorti. Anzi hu, kompla jghid x-xhud, kellu dejjem messaggi ta' kuragg biex ikompli ghaddej. Qal li hu qed jirrepeti dak li qal Powell fl-Ingilterra fin-1956, *take over of a country.* Qal li jaf li effettivament sahansitra kienu anke tefghulu l-gebel u kellu l-pulizija wara l-bieb. Zied jghid li llum fl-Ingilterra jghidu li Powell *was right*. L-*equation* hija, *if Powell was right why should Lowell be wrong* wara li hu qed jghid l-istess affarijiet dwar l-istess marda socjali *on the hindside* u mill-esperjenza li ghadda minnha in-nies ta' Powell. B'referenza ghal dak li qal l-Isqof ta' Chester, kompla jghid x-xhud, fejn qal li l-Kristjani xi gurnata ghad jkollhom jiddefendu ruhhom b'forza. Qal li l-i*speech* in kwistjoni tan-Nigret huwa xi sitta w erbghin minuta. Fil-fatt, kompla jghid, kif qal l-Imhallef Ingliz fil-kaz ta' Griffin, fis-sentenza tieghu li "*the free speech should include the irritable and the offence"*. Din qalha l-Imhallef *in a binding opinion* meta kien Prim Inhallef. Fl-istess hin jghid li l-Imhallef partikolari fis-sentenza ta' Griffin, '*you cannot take the speech and take all the words*' u dan meta kien qed

jindirizza lill-guri, '*you have to look at the speech as a whole and not that word to misinterpret the speech.*' Fil-fehma tieghu, kompla jghid x-xhud, m'hemm l-ebda parti mill-i*speech* tieghu li huwa nkriminanti.

Mistoqsi jekk kienx jaf li ser nitressaq il-Qorti minhabba l-i*speech* li ghamel in-Nigret, wiegeb li jahseb li iva. Qal li hija kontra n-natura taghhom li huma jaccettaw il-vjolenza u li huma m'ghandhom xejn kontra *la grande violenza* fissens li meta jkun hemm poplu li jqum biex jiddefendi lilu nnifsu bhal The French Revolution u The American Revolution li effettivament jikkommemoraw. Qal li huma li ghandhom huwa kontra *la piccola violenza* u meta hu ghamel referenza ghall-vjolenza meta kien qed jitkellem in-Nigret, kien qed jaghmel referenza ghal vjolenza *in its whole entirety*, inkluz il-vjolenza fuq il-klandestini.

Mistoqsi kif hu m'ikkundannax il-vjolenza u ma jikkundannax dak li effettivament jaghmel il-vjolenza, wiegeb li dak ma jikkundannahx ghaliex jifhmu. Qal li meta l-pulizija u l-armata jsiru il-*caniolini di saluto* tal-politikanti u jigu wzati sabiex iservu lil min dahal f'pajjizna llegalment bl-ikel u jahslulu, qed jigu umiljati, huma jkunu qed jigu ridotti fi stat ta' miskinita w ghalhekk ma tkunx f'posizzjoni li tistenna protezzjoni minghandhom. Fil-fehma tieghu, zied jghid, l-istruttura hija *rotten from top to bottom*. Fil-fehma tieghu, kompla jghid, il-pajjiz mhux f'postu, ghaliex il-barranin qed jiehdu l-*jobs* tal-Maltin bhal ezempju tal-*plasterers*, u b'hekk il-Maltin qed jaqbdu f'xulxin. Qal li hu jara ruhu bhala huta fid-dezert u anke jekk ikun wahdu, jibqa jghid dak li jemmen fih irrispettivament dak kollu li qed jigri. Qal li ghalhekk il-battalja trid tintrebah fuq livell politiku kulturali u mhux bil-vjolenza, kif effettivament qed jintrebhu battalji ohra.

B'referenza ghal page hmistax (15) tar-rapport ta' Dr. Stephen Farrugia Sacco, kompla jghid x-xhud, fejn hu qal li fil-Gvern Malti ma hemmx *leadership* u ma hemmx *rudderless* (tmun), hu ppercepixxi z-zminijiet li ghaddejjin minnhom illum. Meta jara li pajjiz bhal Malta qed jiffanfra meta per ezempju, pajjiz bhal-Lithuania accetta whud minn dawn l-immigranti. Ix-xhud qal li dawn il-fanfarunati

qed isiru ghal xejn, ghax fil-fehma tieghu, il-pajjiz huwa *rudderless* (bla tmun). Fil-fehma tieghu, kompla jghid x-xhud, Malta hija post sagru minn zmien il-qedem u dejjem kienet l-*architure* tac-civilta. Qal li Malta ghandha din l-ispiritwalita fis-sens tat-tempji li ghandha u ta' ohrajn li ghadhom mhux skoperti. Dan hu l-i*spritual focal point* ta' dak li jemmnu fih *the Coming Imperium* ta' l-Ewropa.

Fil-fehma tieghu, kompla jghid x-xhud, z-Zionisti ma kkalkulawhiex lil Malta, insewha ghal dawn l-ahhar erbghin sena u ma tawhiex importanza w ghamlu zball kbir, ghaliex f'Malta llum hawn din il-vuci ta' liberta' aperta. Il-vizjoni taghna hija li titqabbad din il-foresta bil-fjamma ta' liberta u indipendenza, *mondo capitalista finanziario*.

Rega' tenna ghal darb'ohra li Malta qed titlef il-liberta taghha. Ix-xhud esebixxa artikolu li deher fil-gazzetta lokali taghna 'The Times' nhar s-sitta ta' Dicembru 2006 fejn kien hemm Professur mill-Universita ta' Lincoln fejn qal li Malta qed titlef il-*liberty of speech* li gie mmarkat bhala Dok. Z. Qal li dan l-artikolu li esebixxa, kien *a rendition* u gibed ir-rimarki tal-gurnalista li kiteb dan l-istess artikolu, certu Simone Farrugia. *Rendition report* ta' l-Strickland Foundation. Qal li din il-persuna kienet pilotata mill-istess *foundation*. Qal li esibixxa dan l-artikolu minhabba l-battalja sottili legali li ghaddejja bhala tirranija fuq il-poplu. Qal li l-ligi sa issa taghtih l-ispazju li qed jiehu pjacir b'dak li hu jemmen fih. Qal li qed jirrispondi b'mod politiku ghaliex fil-fehma tieghu, dan huwa *political trial*. Effettivament meta ra fol 17, kompla jghid x-xhud, li kien diga tressaq fuq l-i*speech* li kien ghamel Hal Safi w ghalhekk meta ghamel referenza ghal 'nixhed', jigifieri jixhed il-Qorti f'dik il-kawza, u zied jghid li ghalhekk, meta ghamel din l-i*speech*, l-i*speech* li kien ghamel qabel Hal Safi *was at the back of my mind*, biex il-poplu jirrealizza li *he has been let down the garden paths*, bil-fors wiehed ried juza certu lingwagg u dan peress li fl-isfera politika taghna hemm *grey areas*.

Spjega li l-kelma 'prostituti' b'referenza ghall-partit politiku, hija kelma gustifikata u dan ghaliex dak li jaqbel partit politiku jaqbad u jghidu. Qal li llum politiku jghid haga u

gimghatejn wara jghid xi haga opposta. Qal li dak huwa the *modern politician*. Illum il-poplu ma ghandux vuci, ghaliex ghandek zewg partiti, id-di u d-do, *stereophonic* li jghidu l-istess haga, fis-sens li la ghandek Gvern u lanqas Opposizzjoni. Qal li dak li t-Taljani jghidu 'ammucchiata', jigifieri jarah, mhux artikolat u ma jrid jaghmel xejn dwar dan. Zied jghid li l-poplu huwa atomizzat u jrid vuci w huma l-vuci tal-poplu. Qal li l-importanti huwa, li huma taw importanza kbira lill-incidenti li graw dwar il-hruq meta effettivament kien hemm l-elezzjonijiet lokali ghaddejjin u fil-gazzetti lanqas taw referenza ghalihom. Dan fil-fehma tieghu, huwa zbaljat u dan ghaliex huma batew l-konsegwenzi ta' dan l-artikolu.

Qal li peress li hu jaghti vizjoni fuq kollox, huwa impossibbli li kulhadd jaqbel mieghu in toto. Qal li l-Gizwiti ser jkomplu jahdmu favur il-klandestini avolja s-socjeta w n-nazzjon huma kontra taghhom. Qal li meta tkellem dwar l-*arson attack* '*a chi gode',* kien qed jaghmel osservazzjoni tieghu, m'ghamel l-ebda akkuza. Qal li ghazel l-Ingilterra bhala ezempju, ghaliex l-poplu Ingliz, nazzjon, tilef l-indipendenza tieghu ghax gie nvadut u l-Inglizi jghidulek '*it is too late, nothing can be done*' w irrassenjaw ruhhom ghal dik il-qaghda. Rega' ghamel referenza ghal dik il-piccola vjolenza miskina li diga tkellem fuqha diversi drabi u qal li mhux huma biss qed jigu nvaduti.

Ix-xhud esebixxa d-Dokumenti 2, 2C, 2D u 3 u spjega li hawnhekk l-*intelligent services* ta' l-Ingilterra *cannot keep up* b'*terrorist plot* jghid li dan hu *back door terrorism*. Qal li dak li fisser fl-i*speech* tieghu hu li jekk ikomplu jhallu dawn in-nies dehlin f'pajjizna, ser jkollna l-istess terrorizmu li ghaddejja l-Ingilterra. Qal li Malta ghaddejja minn sitwazzjoni li ghaddiet bhala l-Ingilterra fejn il-vuci unika tal-gang tieghu tizdied ukoll u hu jikkompara l-vuci taghhom, ta' Norman Lowell ma' dik ta' BNP bl-unika differenza li huma ghadhom ma waslux f'dik is-sitwazzjoni daqstant allarmanti. *Siamo ancora a tempo*, kompla jghid. Fil-fehma tieghu l-ebda pajjiz fl-Ewropa ma hi qed tiehu dik id-decizjoni necessarja biex twaqqaf dan kollu salv u b'eccezzjoni ghall-Isvizzera u dan ghaliex hemm

demokrazija diretta u mhux finta. *They are repatriating them*.

Qal li darba minnhom hu kien Bugibba u kienet giet mara fuqu u qaltlu li t-tifla taghha kienet giet *raped* minn wiehed iswed w ghalhekk talbitu biex jikkummenta dwar dan il-kaz fil-programm li kellu fuq l-"Smash", pero peress li kellu biss sebgha minuti, ma kellux cans biex jaghmel dan. Qal li jahseb li Malta qed issir ezattament bhall-Ingilterra fis-sens li hemm '*places no-go*' ghall-Maltin. Qal li meta hu, b'referenza a fol 26 ta' dan l-artikolu qed jghid li hemm certu postijiet f'Malta fejn hemm iktar nies suwed milli bojod jghixu hemm, b'mod partikolari fejn uliedna kienu jilghabu fuq il-haxix il-*football*, illum tara Afrika zghira. Hawn l-affarijiet li hawn f'fol 26 u 27 hu qalilhom bhala osservazzjoni ta' dak li effettivament qed jigri f'pajjizna. Hu osserva dan fuq stat ta' fatt.

Meta saritlu referenza ghall-knisja Ta' Giesu, meta kien dahal xi hadd ta' karnaggjon iswed u kisser il-Kurcifiss, ix-xhud spjega li din hija osservazzjoni ta' dak li effettivament kien gara. Qal li ma jistax jikkummenta fuq telf tal-patrimonju taghna u jigi kalkulat bhala razzist, dak li qed jara hazin hu. Qal li dak li kellu f'rasu hu, hu li jikkummenta fuq it-telf tal-partimonju taghna w ghalhekk qal, fil-fehma tieghu, t- tradiment li l-knisja ghamlet mal-poplu taghha, issa qed tgawdi r-rizultat tieghu.

Qal li a fol 29, b'referenza ghal dak li hemm f'Sudaniz, mhux wiehed Sudaniz izda mijiet ta' Sudanizi u staqsa, kif jista l-Gvern jirripatrija dawn in-nies, mijiet taghhom, fuq ajruplani *when their applications have been turned down,* meta dawn huma nies vjolenti hafna u li huma *trained* ghall-gwerra. Qal li hija difficli hafna li jigu ripatrijati u jkun hemm bzonn ta' hames suldati Maltin ma kull Sudaniz. Qal li din hija l-opinjoni tieghu li qed jaghti. F'ghajnejh, zied jghid x-xhud, l-pulizija w s-suldati huma l-*guarantors* tas-socjeta w ghaldaqstant huma iktar importanti minn individwi cittadini li huma *guarantees* tas-socjeta. Qal li huma ma jahsbux li huwa gust w eku li suldati jmorru jnaddfu l-bjar, izda ghandhom kwistjonijiet ohrajn. Huma ghandhom jahslu u jservu lill-klandestini. Qal li s-'C'

Company li fiha mitejn suldat, m'humiex qed jigu utilizzati kif suppost u fejn hemm bzonn. Qal li l-vizjoni politika taghna f'sitt gimghat *we repatriate all illegal immigrants. Obviously there will be some squealing but this has to be done.* Qal li hu qed jitkellem bhala mexxej ta' moviment politiku u qed joffri soluzzjoni radikali ghal problema kankruza.

Ikkummenta bin-nuqqas ta' *coverage* tal-media dwar dawn ir-*riots*. Ghamel wkoll referenza ghac-censura li hemm fuqhom li ma gabu xejn dwar dak li jghidu huma salv u b'eccezzjoni ghall-gazzetta 'MaltaToday'. B'referenza ghal dik il-parti ta' l-*speech* tieghu fejn semma n-NATO, hu ried ifisser li din hija osservazzjoni politika pjuttost kkumplikata u hija spjegata ahjar fl-artikolu tieghu 'Coming Cataclysmic Crises', in-NATO kienet il-*private arm* tal-forzi oskuri nternazzjonali li ntuzat b'mod vergonjuz kontra Ewropew. Qal li kemm l-Amerikani fuq l-*aircraft carrier* ppakkjaw bombi go ajruplan sabiex *pilots* ta' *destroyer* jsuqu l-ajruplani u jimmumbardjaw.

Qal li bil-frazi 'incident tad-drenagg imxerrdin mad-dinja kollha' ried ifisser *financial capitalism* komposta esigwa mxerrda mad-dinja kollha. Qal li meta qal li Malta imtliet bin-Negri ried ifisser li billi nhallu lin-NATO jiehu *front*, dawn mhux ser jghinuna fl-operazzjoni ta' salvatagg billi nsalvaw in-Negri u ngibuhom Malta, sakemm ilestulhom id-*detention centres* barra minn Malta li ma jitlestew qatt. Ikkundanna l-agir tan-NATO u kif wkoll tal-Frontex u ta' kollox. Qal li l-problema rridu nsolvuha ahna *with the right people*.

Qal li a fol 33 et seq hu kien qed jaghti *the methodology of our movement, that we dont change, that we say exactly what we believe in* u mhux hafna ipokreziji u fil-fatt semma certu nies ta' *background* politiku u jghid li jalla jkomplu sejrin hekk, ghax jekk itellghu xi membru parlamentari taghhom jew tlieta, iwaqqfu l-kukkanja li ghaddejja u Malta tkun f'posizzjoni li tiehu *a good leadership position to rule*.

Qal li wara dan l-i*speech* hu jerga jhoss u jtenni li ma hemm xejn fih li qed jincita mibeghda jew vjolenza razzjali.

Qal li fl-artikolu li esebixxa presenzjalment li gie mmarkat bhala Dok. 1, hemm miktub minn Father Mintoff stess, li l-Knisja hija razzista w ghalhekk llum qed jistenna li l-pulizija tmexxi kontra l-istess Father Mintoff, mhux kontra tieghu biss, *all being equal under the same sun*. Qal li d-diskriminazzjoni li ghamlet il-pulizija fil-konfront tieghu turi ezattament l-intenzjoni tal-*establishment* li tipprocedi kontra tieghu.

Huwa jiddeskrivi lilu nnifsu billi jghid '*I am a racialist, not a racist'*, bniedem li jaf id-differenzi bejn ir-razzi, antropologija, biex tissalvagwardja l-genetika ta' razztu. Qal li hu ma jaqax taht it-terminologija ta' razzist w ghalhekk dawn il-proceduri ma messhom qatt gew inizjalati kontra tieghu.

Ikkonferma li d-data ndikata fil-komparixxi u cioe dik tat-tmienja ta' Mejju 2006 kienet id-data meta hu ghamel l-i*speech* tieghu f'Ta' Fra Ben. Qal li hu rega' semgha l-i*speech* u dan fil-bini tal-Qorti w ikkonferma li dak huwa l-i*speech* tieghu.

Mistoqsi jispjega kif effettivament hu qal li jaqbel mad-dati migjuba mill-pulizija fis-sens li wahda minnhom ggib d-data tat-tletin t'April u l-ohra tmienja ta' Mejju, ix-xhud wiegeb li meta kien l-Qawra nhar t-tmienja ta' Mejju, '*it was the first Monday in the month of May'*. B'referenza ghat-tmienja ta' Mejju peress li kien l-ewwel Tnejn tax-xahar, dik d-data hija korretta. Dwar t-tletin ta' April, kompla jghid x-xhud, hija probabbilment id-data meta telghet l-i*speech* fis-*site*. Qal li din tirreferi ghall-i*speech* li kien ta fl-ewwel Tnejn tax-xahar t'April. Qal li d-data tletin t'April ma hix id-data meta hu ghamel l-i*speech*. Qal li l-Monday Club fix-xahar t'April kien fit-tlieta t'April u dan ikkonfermah wara li hu kkonsulta d-*diary* tieghu. Qal li t-tletin t'April kien il-jum meta 'Viva Malta' tellghet l-i*speech*, w ovjament minn dak li kien qed jassumi. Ikkonferma biss b'certezza id-data meta huwa ta l-i*speech*. Qal li fit-tletin t'April, fir-Rabat hu ma ta ebda *speech*. B'referenza ghal pagni 39 u 42 ta' dak li rraporta Dottor Farrugia Sacco, hu kien qed jitkellem fuq il-problemi ekonomici tal-pajjiz specjalment dwar dik il-parti tal-festa tal-haddiem. Meta

hu fisser, '*the face of the enemy*' f'dawn it-tlett pagni, ridt ifisser il-kwistjonijiet legali u nazzjonali huwa l-*establishment* w il-pjan li semma diversi drabi u fosthom hemm ukoll gurnalisti w edituri. Il-globalizzazzjoni li warajha hemm qarnita nternazzjonali, bil-ghan sabiex titnehha in-nazzjonalita lil kulhadd u l-haddiem jigi tadama, ex admissis jghid '*nixtru t-tadam li jaqblilna, cioe inkeccu lill-Maltin biex nimpjegaw lis-suwed, kif ghamlet l-qarnita internazzjonali*'.

Qal li ftit qabel kien mar jara flat Tower Road u gie nfurmat li xoghol tal-*plasterers* li suppost Malti jigi offrut elf u hames mitt lira maltin biex jaghmlu, ghamluh llegalment nies ohra ghal prezz ta' sitt mitt lira maltin minn nies li kienu llegali suwed. Spjega li dan huwa l-kalvarju li ser jghaddi minnu l-bniedem Malti. B'dan l-artikolu ried ifisser li l-haddiem huwa komodita f'kull haga ohra *vegetable* jew tadama. Qal li l-vizjoni tal-haddiem hija haga differenti ghall-ahhar. Spjega li hu ghamel referenza ghal ANR ghaliex inqalghet fernezija li membru fl-ANR u membru taghhom dehru fuq programm televiziv. Analisti eminenti tkazaw kif thallew jidhru fuq *television prime time.* Ix-xhud qal li hu baqa sa l-ahhar, *extending the hand of friendship and corporation to them* u b'dan nonostante kollu ghalxejn u dan ghal ragunijiet ovvji li ma kienx hemm ghalfejn jidhol fihom f'dan l-isfond.

Qal li hu jhoss li l-President ta' pajjiz jirrapprezenta l-ewwel haga lil kulhadd, imma President ghandu jigi elett mill-poplu u mhux johrog mill-hama tal-partiti u minn Prim Ministru jsir President. Sostna li ma jkollokx ir-rispett tal-50% l-ohra li tkun ilek tiggieled maghhom ghal dawn l-ahhar ghoxrin sena. Qal li hu hass li ma kellux jagixxi ghalih b'dak il-mod u jghid dak il-kliem li '*dawn in-nies should be persued*.' Apparti minn hekk zied jghid x-xhud fil-fehma tieghu l-President kien qed jaghti messagg politiku zbaljat hafna meta mar ghal *barbeque* flimkien mal-klandestini. Fil-fehma tieghu, kien qed jghaddi messagg zbaljat hafna specjalment meta l-poplu, il-maggoranza tieghu huma kontra tieghu. Ix-xhud kompla jghid li qal il-kliem '*over my dead body*' b'referenza ghall-kliem uzati mill-istess President, meta huwa kien qed

jaghmel referenza ghal IVF fis-sens li jekk tigi mghoddija l-ligi fil-Parlament, huwa ma kienx ser jiffirma - '*Over his dead body'*. Qal li ma jidhirlux li President ghandu jitlef il-moralita ta' pajjiz, tac-cittadin. Qal li hu liberterian w l-liberta tal-individwu tigi *al di sopra di tutto*. Il-President jifforma parti mill-ghadu li hu ddeskriva w ghalhekk, huwa parti minnha. Irrileva t-theddida li ghamel fuq il-poplu Malti gejja minn kull strata tas-socjeta. Qal li meta ghamel referenza ghal din il-*freedom of speech* fl-i*speech* tieghu, ried jghid li fuq l-inqas haga ma tista tghid xejn hawn Malta ghax tispicca l-Qorti.

Qal li meta qal, b'referenza fuq il-Ministru, li kien liebes zukkarriera f'rasu, ried ifisser li meta huwa mar is-Sinagoga, kienet dik il-gurnata meta hu kien mar jiddefendi l-*freedom of speech* u li s-sottomissjoni hija fis-sens li kien l-i*spokesman* tal-Jewish Community Malta li ghamlitlu kwerela fuq ittra inokwa li tawh fuq is-*site*. Ghalhekk kompla jghid x-xhud, hu hassha mhux f'postha li l-Prim Ministru jmur is-Sinagoga b'din il-minoranza tieghu *behind these racial laws*. L-istil ta' dan kollu beda minn bniedem li jilbes iz-zukkarriera. Qal li hu, fil-fatt '*I am labelling the enemy as traitorous boss*.' Qal li huma jiehdu l-liberta biex jghidulu faxxist u nazzist u hu jghajjar lilhom '*traitoral boss*. *Tit for tat in English'*.

B'referenza ghal dik il-parti indikata fl-istess artikolu cioe ir-relazzjoni redatta minn Dottor Stephen Farrugia Sacco li tibda a fol 56 u tispicca a fol 58, ix-xhud qal li hemm attakk kulturali ghaddej fuq politika li ghamel iktar facli l-invazjoni ghaddejja minghajr ma jaghmel xi resistenza. Hemm attakk sfrenat li jinfetah f'konsegwenzi spjacevoli fuqu u shabu. Qal li fil-fatt Saviour Balzan ghamel referenza f'artikoli tieghu fejn qal li l-*walking stick* tieghu kien qisu xabla u fil-fatt meta kien gie nvestigat mill-pulizija l-Ispettur hadlu l-*walking stick* biex jiccekkjah. Ghalhekk qal li l-incident ta' Saviour Balzan kellu effett fuqu tant li fetah libell kontra Saviour Balzon ghan-nom tal-'MaltaToday' meta ra l-konsegwenzi ta' dan l-artikolu fuqu. Qal li dan l-artikolu tal-'MaltaToday' lilu effettwah ghaliex ta l-*image* li hu kien xi nazzist, meta nazzist mhux. Qal li l-media, ma hemmx dubbju li tinfluwenza l-

establishment. Qal li *the political establishment* naturalment taghti certi mpulsi lid-dipartimenti kollha fosthom lill-pulizija. Spjega li hu jiddeskrivi lilu nnfisu bhala *the sacrificial man*. L-awtoritajiet Maltin fil-fehma tieghu, jaqilghu l-attakki tal-media u jifformaw it-tezi taghhom fil-konfront taghhom u minn akkuza wahda, faqqsu akkuzi ohrajn.

Qal li dwar il-vista taghhom, Dottor Michael Frendo llum qed jilmenta li l-Libja mhix qed tikkopera u l-Ewropa mhix qed tghinna, jigifieri dak li kien qed jghid hu kien qed jigi accettat. Qal li meta hu qal li ma jridx lit-tfal taghna jimpikaw ma Daka Danga ried ifisser dak li qal l-Ministru ta l-Edukazzjoni u cioe jitfa lit-tfal ta' l-Afrika mat-tfal taghna biex jitghallmu l-kultura biex lit-tfal taghna jehdulhom l-ispina dorsale w imbaghad, una volta jehdulhom l-kultura taghhom, inridu naccettawhom b'mod ekonomiku w inbatu l-konsegwenzi.

Illi nhar d-dsatax ta' Jannar 2007 **rega' xehed l-imputat** (fol 164) fejn qal li x-xhieda tieghu ta' dakinhar kienet ser tkun relatata mad-dokument esibit mill-prosekuzzjoni Dok PPZ 4 a fol 63 bl-isem 'Coming Cataclysmic Crises'.

Qal li hu kiteb dan l-artikolu fix-xahar ta' Novembru 2003 meta fil-fehma tieghu, konna qed nghixu zminijiet f'qaghda fluwida mondjali wara l-attakk fuq t-Twin Towers. Qal li dehrlu li kellu jaghti perspettiva gdida fit-tul fejn kienet riesqa c-civilita, u wara baqa jizviluppa l-filosofija tieghu ta' lemin il-gdid. Spjega li l-intenzjoni primarja tieghu kienet li jaghti *dire warning* ta' dak li kien *imminently ahead of us* fis-sens tal-punent. Qal li l-artikolu kien miktub minnu u hu kien ghazel t-titolu tieghu. Qal li dak li ppreveda x'ser isir, meta kiteb l-artikolu fis-sena 2003, kien qed isehh u li fil-fehma tieghu '*we ain't seen nothing yet*'. Spjega li t-*topic* ta' dan l-artikolu huwa, fil-fehma tieghu, *a wide ranging* u jittratta dwar il-geo politika. Qal li fil-fehma tieghu hemm miljun Musulman li jobghodu lil Ewropej u fil-passat qatt ma kienu jobghoduhom u dan ghaliex fl-1967 kienu sahansitra anke jaghtu z-zejt b'xejn lil Ewropej. Qal li dan l-artikolu jittratta l-kawza u mhux l-effett taghha kif effettivment taghmel l-media.

Mistoqsi jghid minn huma '*we of the radical racialist right rrevolutionary reactionaries*' imsemmija fl-ewwel paragrafu ta'dan l-artikolu, qal li dan huwa grupp mibdi fl-1960 minn Alan De Benoit, li hu filosfu politiku maghruf u hu kien jigi mistieden wkoll biex imur. Qal li dan hu grupp li dik l-idea ta' *right wing* fossilizzata llum ma tregix. Qal li biex ma nsirux kollettivisti nridu nikkrejaw xi haga gdida fis-sens li nharsu 'l quddiem kif wkoll ghaliex ahna nittrattaw il-problemi taghhom ghaliex huma m'humiex razzisti, fil-fatt razzisti, il-*genetic differencies* bejn r-razzi kulur u kultura, ghaliex huma mhux *left* fis-sens kollettivista. Qal li lil individwu jrid jinghata nifs, *revolutionary*, ghaliex huma revoluzzjonarji. Qal li l-ideat taghhom huma godda ghaliex huma '*don't masticate chewed cud*', *reactionaries* ghaliex jirregixxu b'manjiera posittiva u dak li jikkoncerna r-razza, civilita w is-socjeta taghna. Qal li l-'Operation Take Over Europa', kienet dak li hu qal tlett snin qabel li kien qed isehh llum l-gurnata ezatt kif qal hu. Qal li kieku lahaq MP Ewropew ta' Malta, allura kien ikun jiddilja dan il-grupp li ftit zmien iehor kien ser jinbidel f'Nova Europa. Qal li dak li stqarr f'dak l-artikolu kien qed isehh u dan hu l-operation proprju '*take over Europe*'. Qal li llum il-gurnata huma qed jilghabu loghba demokratika. Spjega li dak li qal fil-paragrafu taht is-sub titolu '*Imminent Collapse*' fejn semma '*those internationally manipulated scattered throughout the globe*', hemm kien qed jaghmel referenza ghal forzi plutokratici li dawn iffinanzjaw r-revoluzzjoni komunista tal-1916. Qal li Lenin kien telaq mill-Germanja u mar f'villa f'Lugano. Marx kien telaq minn New York b'zewg miljuni '*in gold*' fil-bagalja u bdew r-revoluzzjoni komunista li kienet finanzjata mill-Varburgs li kienu sinjuri dak z-zmien, w ghalhekk kien hemm loghba bejn il-kapitalisti u l-komunisti li taparsai ghamlu *shadow boxing*. Qal li nies maghrufa bhal Morgan '*through the power of the purse*', bhal Disraeli, l-Prim Ministru Ingliz, immanipulaw liz-zewg nahat.

Qal li fejn fid-disgha paragrafu taht l-istess sub titolu hemm referenza ghal '*the same rodents*', din kienet referenza ghal l-istess nies, l-istess grupp ta' plutokratici fil-paragrafu miktub tlett sin qabel juri ezatt l-awtur fil-

present. Qal li llum il-gurnata hemm aktar bombi ghal fuq s-Sirja.

Dwar il-paragrafu a fol 66, *highlighted*, qal li l-Italja dejjem kienet il-mira centrali tal-Israel u dan ghaliex s-sopravivenza tal-Israel tkun distabbilizzata. Qal li dan ghaliex t-Taljani di natura huma nies prekocji u jafu x'hini l-vera politika. Qal li t-Taljani huma nies Latini li jaghtu hsieb lejn r-razza bajda u li c-civilita tal-punent tinghaqad. Fil-fatt diga ppruvaw biex jiddistabbilixxu l-Italja. Qal li llum l-'Brigate Rosse' *on one side* w it-terroristi fuq in-naha l-ohra kienu ttrenjati u manipulati w inizjarjament issusidjati w armati minn NATO *base* f'Udine. Fil-fatt *under interrogation*, t-tnejn interrogaw lil istess persuna. Fil-fatt fil-*kidnapping* ta' Aldo Moro, l-pulizija Taljana mill-ewwel kienu jafu ezattament f'liema blokk kien qieghed l-*perpetrator* u kien hemm diversi programmi fuq r-RAI dwar dan. Qal li din trid tara l-perspettiva taghha u mhux il-faccata taghha.

B'referenza ghas-sebgha paragrafu a fol 67, ix-xhud qal li bil-kliem '*we shall hellenise all the mediterranean islands*' ried ifisser li Cipru jerga jigi b'kultura Griega u hu xtaq bhala *geo politician*, li l-fruntiera naturali bejn l-Ewropa u l-Asja Minuri huwa l-Bosphorus. Qal li t-Torok ma setghux izommu dak li kienu hadu *by conquest* u cioe parti mir-Rumanija u kellhom jerghu jaghtu lura l-istrixxa u jersqu lura lejn l-Bosphorus. Qal li ghamel referenza ghat-Torok bhala nies *obdurate* w *obstinate* ghaliex dawn huma karatteristici taghhom.

Spjega li l-bniedem ghandu tracci tieghu bhal per ezempju l-*pit bull* u *pocket dog* ghandhom t-tracci taghhom differenti wkoll. L-istess huma n-nies bhal per ezempju n-negri, jew ahjar n-*negrids*, li ghandhom l-fumaturi taghhom w il-kelma antropologika tal-kelma 'negrid' hija 'kaffrid'. Qal li tant hi dispreggattiva specjalment mill-Gharab versu s-suwed jghidulu 'kaffrid' juza l-kelma 'negrid'. Qal li effettivament juzaha Baker tal-Antropological Department f'Oxford University. Qal li meta qal li t-Torok huma *obdurate* w *obstinate*, ghaliex dawn huma l-karatteristici taghhom, pero huma razza

mhallta bejn Semitici, Gharab u Mongoli. Originarjament gew mill-Atlas Mountains tar-Russja. Qal li din t-tahlita bejniethom harget dawn l-karatteristici ta' *obduracy* w ostinazzjoni. Fil-fehma tieghu, dawn in-nies ma jafux xi tfisser iccedi. Bhala ezempju qal li fil-Korean War, l-General McArthur, kien qed jiddefendi ruhu bi ftit suldati tal-United Nations bl-Inglizi, Germanizi, Taljani u kontingent Tork, ic-Cinizi ssorprendewhom u fil-Milied '*they overran the front line*' u kien hemm l-perikolu mminenti li jigu maqtula kollha, *the whole line*, McArthur taha '*telegraphic instructions to redeploy twenty kilometers*.' Il-kontingenti kollha rrtiraw ghoxrin kilometru w it-Torok avvanzaw ghoxrin kilometru. Qal li dan kien ezempju car ta' kif jahsbuha t-Torok.

B'referenza ghas-sub titolu 'The Tribe' a fol 70, fejn fl-ewwel paragrafu hemm l-kliem '*that vipers den in the Middle East that refuge where every international rodent retires to*', qal li din kienet referenza ghal l-istragi li kienu ghaddejjin minnha bhalissa, ta' krizi kataklizmika li gejja fuqna. Qal li din kienet il-kawza f'dak li qal mill-*punto di vista* politiku. Qal li l-linwagg kien qawwi u li din ma kienetx kwistjoni ta' *racial hatred*, izda kwistjoni ta' *racial love* ghac-civilizzazzjoni taghna. Qal li n-negru jista jghid '*white pigs*', u ma jsibx spetturi jigru warajh u jghidu li jridu w ahna rridu noqghodu ghal establishment taghna, li hu proprju manipulat minn dawn in-nies.

B'referenza ghal kliem '*we shall see whether the parasites can live without a home*', qal li meta jkollok pajjiz ta' erbgha minn nies li jircievu l-ostja, jiehdu l-belli miljuni kull sena minn kullimkien bhala reparazzjoni ta' reati li qatt ma sehhew sittin sena ilu u fantazija jekk meta tinqatalhom din il-kummiedja kollha l-istess nies jirnexxilhom bi storja taghhom ta' erbat elef sena, jirnexxilhomx jibnu pajjiz u socjeta vijabbli.

Spjega li fil-frazi li semma fl-ewwel paragrafu ta' dan is-sub titolu 'The Tribe', u cioe '*pace in tutto l mondo con Israele sotto terra*' hu kien qed jikkwota gurnalist Taljan li qalha *on prime time* tat-television Taljan, illum MEP ma Forza Italia u ried jghid li jekk Israel jispicca '*come entita*',

probabbli dawk s-Sefarzinji, li lhom jghixu mijiet ta' snin mal-Gharab, minghajr ma jimmolestaw lil xulxin, ikollna l-paci fid-dinja. Qal li sakemm l-Israel jibqa jigu fih nies li m'ghandhomx x'jaqsmu ma dik r-roqgha art, b'referenza ghal Amerikani, Pollakki, Russi u Germanizi, ghaliex Mose, erbat elef sena ilu ippromettilhom, allura jispiccaw f'realta gdida, bil-Palestinjani jghixu mal-Sefarnzinji, hu diskors politiku, mhux razzjali. Qal li dak kien qed jghidu ghaliex hemm min jaqbillu fejn ma joghgbux d-diskors, jattakka b'razzizmu biex jaghlaqlek halqek. Qal li bhala awtur, hu baqa purament fuq il-fatti b'mod li jekk wiehed jaqrah fil-fatt *andante* u mill-*punto di vista* artistiku, dan hu l-artikolu. Qal li l-intenzjoni tieghu kien messagg geo politiku ghas-salvagwardja ta' *western civilization*.

B'referenza ghal paragrafu intitolat 'War is Life' a fol 73, b'referenza ghal ahhar paragrafu tieghu, ix-xhud ghamel premessa li hu mhux kattoliku u m'ghandux moralita kristjana. Qal li l-paragrafu hu bazat fuq l-filosofija w ghamel referenza ghal '*the most decorated German soldier who was injured thirty times*' u li Mitterand mar izuru meta ghalaq mija u sena u kiteb diversi kotba. Qal li wahda mis-*sayings* tieghu famuzi hija 'war is life' il-hajja hija gwerra perpetwa, glieda kontinwa fil-hajja. Qal li *war is life* waqt li *life is death* u cioe l-hajja tal-bniedem modern ta' erbghin siegha xoghol.

Naturalment, kompla jghid ix-xhud, ahna nistghu nippromwovu l-gwerer kif ghamel l-Israel. Qal li bl-artikolu tieghu ried jibghat messagg ta' *survival* ghaliex ahna qeghdin nghixu hajja ta' Darwinian *universe* fejn il-moralita taghna ma tregix. Qal li kiteb dak l-artikolu u tellghu fuq l-web site ta' 'Viva Malta' u kellu resonanza kbira dwaru. Qal li meta kitbu, kellu s-socjeta in generali tal-West quddiemu. Hass li kellu jibghat messagg lil dawk l-*leaders* li jaraw aktar boghod minn ohrajn. Il-hsieb tieghu huwa ghal udjenza predisposta. Qal li zergha din z-zerriegha fejn tikber sigra dritta, kburija, u wahedha li tirrezisti l-irwiefen, l-*brambles* u l-*creepers* li jipruvaw inizzluha 'l isfel. Qal li ma kellu lil hadd f'mohhu u kellu biss intenzjoni ferma sabiex ipoggi lil Ewropa f'postha '*it's a question of survival*'.

Illi nhar l-erbatax ta' Gunju 2007 **xehed Jonathan Paul Cuschieri** (fol 187) fejn mistoqsi jekk jafx lill-imputat odjern, wiegeb li jaf li huwa Norman Lowell, peress li gieli mar ikliet u laqghat mizmuma minnu w eventwalment saru wkoll hbieb. Mistoqsi jekk marx ghal xi laqghat partikolari li jiftakar, wiegeb li kien hemm varji laqghat bhal Fra Ben u postijiet ohrajn. Qal li data partikolari u cioe t-tlieta ta' April 2006 kien jum it-Tnejn, kienet laqgha regolari li ssir kull l-ewwel Tnejn tax-xahar u kienet tigi riklamata go *website* u min ried setgha jmur. Qal li hu kien prezenti u sema' dak kollu li qal Normal Lowell u cioe dak li huwa rrapurtat fil-Qorti. Qal li kien hemmhekk li tqajjmulu emozjonijiet, pero affarijiet sensazzjonali ma semghax. Qal li r-reazzjoni tan-nies prezenti kienet simili ghal dik tieghu, wahda bi tbissima f'wiccu.

Mistoqsi jekk garax xi haga b'mod partikolari bhala rizultat tal-laqghat li zamm Normal Lowell ix-xhud wiegeb li hu ma jafx bihom, jekk effettivament graw. Qal li hadd ma qallu li kien hemm xi hadd li ddispajcih b'dak li sema'. Qal li lanqas sentiment ta' rabbja jew agressjoni jew xi emozjoni partikolari ma kien hemm.

Mistoqsi dwar l-atmosfera li kien hemm fil-laqgha li l-imputat zamm f'Ta Fra Ben, wiegeb li kien hemm inqas nies, pero r-reazzjoni tan-nies kienet l-istess. Qal li kulhadd jista jattendi ghax dawn huma reklamati fuq *webiste*. Spjega li hu kien fil-moviment 'Alleanza Nazzjonali' u hadd ma waqqfu milli jmur jisma lil imputat, anzi originarjament ma kienx hemm diffikultajtiet, mar u gie milqugh w ghalhekk dehrlu li kellu jkompli jmur. Qal li dak li qal fil-konfront tan-Nigret japplika wkoll ghal Fra Ben, fis-sens illi ma gara xejn fil-pajjiz relatat ma l-agir ta' l-imputat, aktar w aktar meta fil-kaz tal-Fra Ben kien hemm inqas nies. Fil-fatt f'dawn iz-zewg okkazzjonijiet, kulhadd jitlaq ghal rasu, kompla jghid x-xhud, kienet atmosfera familjari u kull min mar, kien mistieden. Qal li l-imputat tkellem di propju u qaghad jispjega l-ideat politici tieghu. Qal li sa fejn jaf hu, ghaqda formali ma hemmx. Qal li jaf li hemm zewg *websites*, wahda 'Imperium Europa' u l-ohra 'Viva Malta'. Qal li hu qara it-*transcripts* li

hemm il-Qorti u fid-diskors tal-imputat, hu semma kemm nies, kif wkoll entitajiet politici, kif wkoll pajjizi u nies li mexxew fl-istorja, minn kollox ssemma, xejn partikolari pero, *general knowledge*. Fisser li l-imputat qal l-opinjoni tieghu fuq avvenimenti storici li graw madwar is-snin kif wkoll semma dawk l-istejjer li kienu ghaddejjin fil-prezent. Qal li jaf wkoll li kien hemm certu referenza ghall-Eccellenza tieghu l-President ta' Malta. Qal li l-President ssemma fis-sens li kapaci jamministra certu affarijiet tajjeb, pero fil-fehma ta' min kien qed jitkellem, certu affarijiet, li huma daqstant importanti, ma kienux qed jigu immexxija sewwa, fis-sens li kien qed jigu traskurati. Qal li fil-fehma tieghu, l-imputat kellu ragun f'dak li kien qed jghid peress li dak li kien qed jghid l-imputat kien minnu u kienet kwistjoni serja, kienet tkun ahjar li tidhaq milli tibki. Qal li fl-ahhar mill-ahhar, hu ma hass xejn ghal din il-persuna lanqas. Qal li kulhadd jista jaghti l-opinjoni tieghu fuq haddiehor u ma ssemma xejn personali. Qal li hu familjari mal-*website* 'Viva Malta' u 'Imperium Europa'.

Mistoqsi jekk qattx qara l-artikolu 'Cataclysmic Crises' wiegeb li qrah kemm hu kif wkoll l-familjari mieghu. Spjega li l-artikolu 'n kwistjoni huwa miktub f'sens li mhux kulhadd jifhmu, hafna mill-affarijiet f'dak l-artikolu jappartjenu ghal sitwazzjonijiet ipotetik u mhux dejjem jispjega ghal liema nies kien qed jirreferi, peress li dan l-artikolu jhalli ghall-intelligenza ta' min ikun qed jaqrah, l-effett mhux ser jkun l-istess fuq kull qarrej. Qal li hu ma ha l-ebda reazzjoni sensazzjonali minnu u fehmu mill-aspettiva tieghu u jista jkun li l-affarijiet li fehem mhux necessarjament qed isiru peress li s-sitwazzjoni hija wahda ipotetika. Qal li ma kien hemm xejn li skandalizzah u ma kien hemm hadd li kellmu fuq dan l-artikolu b'xi sentiment differenti. Qal li dan huwa artikolu politiku w ghalhekk huwa miftuh u jista jkollu nterpretazzjonijiet varji u kien ghalhekk li probabbilment tqieghed f'dan il-*website*, sabiex wiehed jibni u jiddibatti l-kontenut tieghu u tinholoq aktar konversazzjoni dwaru. Fil-fehma tieghu, kompla jghid x-xhud, adirittura qisu oggett demokratiku. Zied jghid li l-ahhar li kien hemm in-Nigret kien hemm madwar mitt ruh jew hamsin, pero hu ma kienx ghaddhom w ghalhekk in-numru kien approssivament, filwaqt li Ta' Fra

Ben kien hemm inqas. Fil-fehma tieghu, zied jghid x-xhud, tax-xellug u tal-lemin m'ghadhomx zewg partiti separati, wiehed ghandu t-tajjeb fiz-zewg partiti w illum huwa *outdated* li tahseb f'kuntest *left* u *right* trid tipprova tigbor l-ahjar *policies* u temmen fihom. Zied jghid li hu ma marx dawn il-laqghat fil-vesti tieghu ta' *manager* ta' l-MTA, mar f'vesti personali. Qal wkoll li hu membru tal-*website* 'Viva Malta'.

Illi nhar l-wiehed u tletin ta' Lulju 2007 **xehed l-Kummissarju tal-Pulizija John Rizzo** (fol 197) fejn spjega li hu ntiz fl-akkuzi li hemm fil-konfront ta' l-imputat odjern ghalkemm ma kienx hu li nvestighom u spjega li bil-kelma 'ntiz' ried ifisser li hu jaf dak li kien gie rrappurtat lilu mill-ufficjali nvestigattivi f'dan il-kaz u cioe bl-investigazzjonijiet li ghamlu, ghalkemm ma kienx hu li nvestiga il-kaz. Qal li fil-fatt ghandu l-impressjoni wkoll li kien tahom ir-rakkomandazzjoni tieghu dwar il-proceduri odjerni w id-decizjoni sabiex jittiehdu passi kriminali fil-konfront ta' l-imputat ttiehdet mill-investigaturi u lilu infurmawh u hu kien qabel maghhom. Spjega li l-investigaturi f'dan il-kaz huwa l-ufficjali prosekuturi odjerni. Qal li setgha kien il-kaz li kien hemm xi hadd iehor min-naha tas-Cyber Crime sabiex jiffolowja dak li kien qed jigi rrapurtat fis-*site* pero hu ma kienx dahal fid-dettalji tal-kaz. Qal li ma kienx hu li nvestigah w ghalhekk ma kienx jaf li hemm kawzi u proceduri pendenti fil-konfront ta' l-imputat.

Spjega li fil-kaz in kwistjoni kien hemm hafna rappurtaggi w *e-mails* ta' dak li kien qed jigri u jigi cirkolat u hu kien ta struzzjonijiet sabiex l-istess rapporti jigu investigati, fl-ewwel lok sabiex jimmonitorjaw dak kollu li kien ghaddej fis-*site* ta' 'Viva Malta' u biex jaraw jekk dak li kien qed jigi rapportat, effettivament jikkosistitwix ksur ta' ligi. Qal li kull meta l-ufficjali tieghu hassew li kien hemm xi ksur ta' ligi, din giet investigata. Qal li l-imputat kien gie mitlub sabiex jaghti l-verzjoni tieghu tal-fatti u sussegwentement inhargu l-akkuzi relattivi. Qal li ghandu impressjoni li hemm xi akkuza kontra mibgheda razzjali ohra kontra l-President ta' Malta, pero ma kienx jaf jekk humiex maqsuma f'kawzi separati jew humiex kollha migbura taht kappa wahda. Qal li kien dak li qalet il-media u dak li gie

miktub fil-gurnali, li nstiga l-investigazzjoni odjerna. Fil-fatt, zied jghid x-xhud, ghaliex l-akkuzi kollha ma tressqux quddiem Qorti wahda biss, u fil-fatt huma divizi f'zewg Qrati, hu ma jidholx fiha peress li mhix diskrezzjoni tieghu u jhalli f'idejn l-ufficjali tieghi. Qal li hu ma dahalx fil-fond wisq f'din il-materja w ghalhekk mhux f'posizzjoni li jirrispondi d-domandi jekk effettivament dak li qara jammontax ghar-reat in kwistjoni ghaliex hu halla kollox f'idejn l-ufficjali tal-pulizija. Qal li hu mpossibbli li hu jmexxi kull kaz li jigi rrappurtat lill-pulizija w huwa ghalhekk li ghandu l-ufficjali tieghu sabiex jinvestigaw huma ghan-nom tieghu. Qal li ma kellu l-ebda *pressure* politiku sabiex jiehu azzjoni fil-konfront ta' l-imputat w infatti passi kriminali ttiehdu fil-konfront ta' Normal Lowell, ghaliex rrizultalu u hass fil-fehma tieghu, li kien hemm ksur ta' ligi f'dak li gie rappurtat.

Illi nhar l-wiehed u tletin ta' Lulju 2007 **xehed Lou Bondi** (fol 200) fejn li hu jahdem bhala gurnalist u direttur tas-socjeta 'Where's Everybody'. Mistoqsi jekk jafx lill-imputat odjern personali, wiegeb li kien iltaqa mieghu f'okkazzjoni meta tkellmu fit-tul, altrimenti ltaqghu kazwalment. Qal li potenzjalment din il-laqgha li kellu mal-imputat, kienet konnessa mal-hidma tieghu bhala direttur fil-media. Ftakar li l-kumpanija tieghu kienet ghamlet *filming* ta' l-imputat meta huwa kien ghamel diskors jekk aktarx qrib il-*barracks* ta' Hal Safi u wara kien gie mistieden ghal programm 'Bondi Plus', sa fejn kien jaf hu, qatt ma ffilmjawh. Pero kien hemm xi programm li huma rrappurtaw l-filmat ta' Norman Lowell u sahansitra anke kkwotaw xi siltiet minn tieghu. Qal li bhala medja, l-programm tieghu ghandu vizjoni ta' madwar sebghin elf ruh.

Mistoqsi x'kienet ir-raguni partikolari li hu hass li kellu jaghmel programm fuq Norman Lowell, wiegeb li huma jghazlu *topics* skond dak li jkun ghaddej fix-xena lokali u b'mod partikolari, Norman Lowell bhala personagg u bhala persuna ta' certu ideat, kien jigi dibattut estensivament. Qal li bhal ma jaghmlu f'kazijiet ohrajn, ddecidew li jaghmlu programm fuq dak li kien qal l-istess Norman Lowell. Qal li fil-fehma tieghu, Norman Lowell

huwa persuna li pubblikament esprima ideat dwar x'ghandu jsir b'immigranti llegali li hu kien ikklasifika bhala pjuttost estremi. Qal li l-imputat huwa persuna li esprima ideat fuq livelli iktar generali bhal distinzjoni ta' bejn persuni ta' razza differenti u l-imputazzjonijiet ghandhom l-istess razez fuq kulturi differenti. Qal li hu jzomm il-programm sabiex johrog dibattitu fuq dak li jkun ghaddej u mhux sabiex johrog jew jibghat xi messagg u hu jaghmel sett ta' domandi li fil-fehma tieghu jkunu qed jistaqsu n-nies u jpoggiehom lil dak li jkun. Qal li l-procedura li jsegwu huma, hi li huma jew xi hadd fit-*team*, jaghmlu proposti ghal temi diversi, jiddiskutuhom mal-PBS ghall-konfermazzjoni taghhom, u dan ghaliex huma l-edituri tal-programm u huma japprovaw. Qal li din hija procedura normali u anke fil-kaz ta' Norman Lowell huma hekk ghamlu, addottaw din l-istess procedura. Qal li b'dan ried ifisser li huma gabu l-approvazzjoni tal-PBS qabel ma gie mxandar il-programm u li naturalment l-PBS tathom din l-approvazzjoni, ghax kieku ma kienx jinzamm dan il-programm. Spjega li l-informazzjoni li uzaw ghall-programm, kien wiehed li uzaw l-*speech* li kienu ffilmjaw u cioe dak ta' l-imputat meta kien hdejn Hal Safi. Qal li fil-programm uzaw parti mis-siltiet tad-diskors ta' Norman Lowell u kien hemm persuni b'ideat konfliggenti ma dawk ta' Norman Lowell u kkrejaw dibattitu *ad hoc*.

Mistoqsi jekk kienx hemm xi konsegwenzi socjali dwar dak li effettivament qal Norman Lowell, ix-xhud wiegeb li ma kienx jidhirlu. Fuq livell personali, kompla jghix x-xhud, estremi kemm ikunu estremi l-ideat, jistghu jigu espressi u dan ghaliex hu kien jemmen f'socjeta demokratika. Qal li hu personalment ma kienx jaqbel ma l-ideat ta' Norman Lowell, pero bhala bniedem liberali kelllu kull dritt jesponi ruhu kif irid.

Mistoqsi jekk sarux xi referenzi ghal xi kitbiet jew xi laqghat ohrajn li saru f'postijiet ohrajn ix-xhud wiegeb li ma setghax jghid dan b'certezza. Qal li pero hu kien ircieva diversi inviti fejn l-istess Norman Lowell izomm *barbeques* u *pasta nights* pero kien gie nfurmat wkoll li f'dawn il-laqghat ma setghax jaghmel *filming*. Qal wkoll li kien hemm ukoll okkazzjoni partikolari fejn kien hemm

possibilta li jsir *filming* pero ghal xi raguni jew ohra, m'ghamlux.

Mistoqsi jekk ghamilx xi programm fuq diskors li ghamel Norman Lowell fin-Nigret, ix-xhud wiegeb li huwa zgur hu li ra filmati ohrajn ta' l-imputat barra dak li ghamel f'Hal Safi, pero jekk gewx imxandra jew le minnu ma jafx. Spjega li l-programm tieghu huwa ta' xi siegha w ghaxar minuti, jekk tnehhi r-riklami. Qal li ma kienx cert jekk dan il-programm kellux ripetizzjoni jew le peress li ilu xi tlieta jew erbgha snin. Qal li hadu bis-serjeta peress li kemm bhala personagg kif wkoll bhala ideat li huwa qed jesprimi u anke l-mod kif huwa jesprimi l-ideat, kien qed iqajjem dibattitu fil-pajjiz. Per ezempju frazi partikolari li qal fid-diskors biex huwa jiddeskrivi l-influss ta' l-immigranti hawn Malta kien qal '*lifa sewda tiela mill-parti ta' isfel 'l fuq*'.

Mistoqsi jekk kellux xi *feedback* fuq dan il-programm mill-pubbliku wiegeb li huma dejjem ikollhom *feedback* u primarjament ikun wiehed posittiv. Rega' nnega li l-ideat ta' Norman Lowell kienu qed jigu dibattuti u ma hasibx li kienu accidentali f'pajjiz bhal Malta li razzizmu huwa dibattut, ghaliex fil-fehma tieghu, fil-pajjiz hemm element qawwi ta' razzizmu. Qal li Norman Lowell kien qed jartikola kif jidher hu stess r-razzizmu w ghalhekk il-programm 'Bondi Plus' tratta s-suggett, u fil-fehma tieghu bl-iktar mod serju.

Mistoqsi ghaliex fil-bidu tad-diskors tieghu ix-xhud qal li Norman Lowell kien l-ewwel esponent ta' dan is-suggett ta' razzizmu f'Malta, wiegeb li ghaliex fil-fatt hekk hu u dan peress li dawn qatt ma kienu gew espressi qabel. Qal li hu ma jafx li kien hemm persuna ohra li espriet ruhha kif effettivament esprima ruhu Norman Lowell. Qal li s-soluzzjoni li Norman Lowell beda jghid ghall-immigranti llegali, hija li l-pulizija jew l-armata tohrog hemm barra u jergghu lura darba u jergghu lura tnejn u jaghmel mossa b'idejh l-isfel. Qal li xi hadd li jesponi ruhu u jassumi ruhu ma din l-idea, fil-fehma tieghu, qatt ma kien iltaqa ma persuna hekk.

Mistoqsi kif effettivament wasal ghandu d-diskors tan-Nigret ix-xhud wiegeb li ma kienx jafx u kien jaf biss li kien qed jiccirkola u kif effettivament wasal ghandu fuq il-*computer* tieghu ezatt ma kienx jaf. Qal li l-pubbliku Malti ghandu certu faxxinu lejn Norman Lowell, fil-fehma tieghu. Qal li meta effettivament hargu dan id-diskors fil-programm Bondi Plus, l-*feedback* li kellu kien li kien hemm kemm favur u kemm kontra dak li qal l-istess Norman Lowell.

Illi nhar l-wiehed u tletin ta' Lulju 2007 **xehed Joseph Scicluna** (fol 205) fejn li hu jahdem bhala *bank manager*. Mistoqsi jafx lill-imputat odjern wiegeb li jafu u dan f'attivitajiet mizmuma minnu peress li hu jattendi laqghat tieghu. Qal li sar jaf bil-laqghat tieghu kemm *by word of mouth* u gieli ghax jara riklami fuq l-*internet*. Qal li ma kien hemm ebda raguni partikolari ghaliex imur w jmur ghaliex irid imur. Ikkonferma li kien prezenti wkoll fil-laqgha u diskors li ta Norman Lowell fir-Rabat Malta. Qal li bhal laqghat simili, l-imputat ghamel id-diskors tieghu u kien hemm xi haga x'jieklu u wara jkun li l-imputat jaghmel id-diskors tieghu. Qal li ma jistax jghid li ma hassux komdu b'xi haga li sema' f'dak id-diskors ghaliex l-ambjent kien wiehed ta' fost il-hbieb w in-nies li kien hemm, kienu kosmopolitici.

Mistoqsi jekk kienx hemm xi reazzjoni fost il-gemgha nies li kien hemm dwar dak li qal effettivament Norman Lowell f'dik il-laqgha wiegeb li ma kien hemm ebda reazzjoni partikolari. Qal li lanqas jaf b'xi event iehor fejn tqajjmet xi reazzjoni ghal dak li qal Norman Lowell. Qal li hu attenda ghal diversi laqghat u qatt ma ra reazzjoni. Fil-fatt zied jghid li hu kien prezenti wkoll fid-diskors li sar fil-Fra Ben, fejn kien hemm laqgha fost il-hbieb, nies kosmopolitici attendew u ma tqajjmet l-ebda reazzjoni partikolari dwar dak li ntqal minn Normal Lowell.

Mistoqsi jekk hux familjari mal-kitbiet tal-imputat, wiegeb li pjuttost iva. Mistoqsi jekk qarax l-artikolu 'Coming Cataclysmic Crises', wiegeb li qrah. Qal li ghalih kien artikolu t'opinjoni forsi ta' dak li jista jigri fil-futur.

Mistoqsi jekk minn dak li qara, ndunax li kien qed jitqajjem xi sentiment kontra xi persuna, wiegeb li le, assolutament xejn minn dan, dan ma qajjem ebda reazzjoni fil-fehma tieghu.

In kontr' ezami, qal li kien hemm reazzjoni u capcip meta jitkellem l-imputat odjern, li hu haga normali bhal meta jkun hemm *speaker* u jkun hemm formazzjoni u jcapcpu bhala ringrazzjament ta' dak li jkun qal.

Illi nhar l-wiehed u tletin ta' Lulju 2007 **xehed Godwin Micallef** (fol 208) fejn li hu jahdem bhala *manager* go stabbiliment tal-*catering*. Qal li lill-imputat jafu peress li kien jattendi l-*meetings* tieghu, li kienu jsiru b'mod regolari darba fix-xahar fejn l-imputat kien jaghmel xi diskors. Qal li kien ikun hemm diversi nies minn oqsma differenti tas-socjeta u l-imputat kien jaghmel *speech* u wara kienu jieklu xi haga flimkien. Qal li kien imur bhala kurzita biex jara x'ghandu xi jghid l-imputat u wara li semgha l-ewwel diskors, interessa ruhu u baqa jmur. Qal li s-suggett li jitkellem dwaru l-imputat huwa suggett li jolqot lil hafna, huwa suggett kurrenti u jinteressah.

Mistoqsi jekk kienx ihoss xi reazzjoni ta' tqanqil jew jara nies madwaru imqanqla wiegeb li le. Mistoqsi jekk kienx prezenti ghal-laqgha tan-Nigret wiegeb fl-affermattiv. Qal li din kienet laqgha bejn il-hbieb minn nies gejjin minn oqsma differenti. Qal li l-imputat ghamel l-*speech* tieghu, wara kien hemm diversi capcip u kielu lkoll flimkien.

Mistoqsi jekk kienx hemm x'incidenti aggressivi, wiegeb li le u zied jghid li lanqas ma kien hemm xi reazzjoni jew konsegwenza negattiva. Qal li ghall-laqgha ta' Ta' Fra Ben pero, hu ma kienx prezenti.

Mistoqsi jekk hux familjari fuq il-kitbiet ta' Norman Lowell, ix-xhud wiegeb fl-affermattiv. Mistoqsi jekk qarax l-artikolu 'Coming Cataclysmic Crises', ix-xhud wiegeb li qrah xi zmien ilu. Qal li dak l-artikolu hadu bhala artikolu li kitbu awtur li kellu vizjoni tal-futur u bhala stat ta' fatt ma kellux opinjoni jew espressjoni li l-imputat kien perikoluz ghas-socjeta u lanqas kien hemm xi reazzjoni minn nies li

kienu prezenti fil-laqghat ghal xi reazzjoni fuq li qal l-imputat. Fil-fehma tieghu, huwa Norman Lowell li qed jigi insulentat ghaliex huwa persuna li ghandu dritt jesprimi l-opinjoni tieghu.

In kontr'ezami qal li fil-fehma tieghu qatt ma qajjem xi reazzjoni dak li qal Norman Lowell. Qal li d-diskors tieghu joghgbu ghax jerga jmur jisimghu darb'ohra.

Rat n-noti ta' sottomissjonijiet tal-partijiet ipprezentati fl-atti.

Ikkunsidrat:

Illi l-partijiet, inkluz l-imputat fix-xhieda tieghu, jitkellmu fuq l-liberta tal-espressjoni kif protetta mill-Kostituzzjoni ta' Malta u mill-Konvenzjoni Ewropeja, w ghalhekk il-Qorti thoss li hija fid-dmir li tghid xi tfisser il-liberta tal-espressjoni bil-limitazzjonijiet tal-istess dritt.

Illi d-dritt tal-liberta tal-kelma jew tal-espressjoni, hu llum wiehed li mhux biss jattira l-protezzjoni tal-Kostituzzjoni ta' Malta, izda hu wiehed li wkoll hu rinforzat mill-Konvenzjoni Ewropeja tad-Drittijiet Fundamentali tal-Bniedem, liema konvenzjoni hi addirittura, parti ntegrali mill-ordinament guridiku taghna.

Illi 'in effetti, l-principju baziku tal-essenzjalita ta' dan d-dritt f'socjeta demokratika, gie postulat bi precizjoni fil-kaz **Handyside vs Renju Unit *[1976]***, meta l-**Qorti ta' Strasburg** sostniet is-segwenti:

"Freedom of expression constitutes one of the essential foundations of [a democratic] society, one of the basic conditions for its progress and for the development of every man ... it is applicable not only to information 'or' 'ideas' that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb the state or any sector of the population. Such are the demands of that pluralism, tolerence and broadmindedness without which there is no 'democratic society'. "

Illi biex ghalhekk ikun jista jintlahaq dan l-ghan nobbli li hu meqjus tant essenzjali ghal armonija socjali, jinhtieg li jkollna gurnali u kitbiet, li tramite l-gurnalisti w il-kitbiet taghhom, jadoperaw l-isforzi taghhom mhux favur minn jalimenthom, izda biex jipplubblikaw 'informazzjoni ' jew 'idejat' fuq kwalunkwe materja t'interess pubbliku, ghaliex hu dan, u dan biss, li hu ghal gid komuni.

Illi ghalhekk f'kaz ta' konflitt, spetta ghal ordni gudizzjarja ndipendenti li ghandha l-oneru li tibbilancja, bi prudenza, b'ghaqal oggettiv u b'fermezza fejn mehtieg, l-interessi konfliggenti – f'dan il-kaz bejn l-imputat li jirritjeni li kellu d-dritt li jitkellem, kif effettivament tkellem, u l-prosekuzzjoni, li qed tizbanderixxi l-i*standard* tal-liberta tal-kelma.

Il-pubbliku ghandu d-dritt li ma jkunx offiz fil-persuna tieghu, fir-razza, fir-religjon u fil-kulur ta' karnaggjon. Ghandu dritt li r-reputazzjoni u drittijiet tieghu jkunu protetti u min jattakka din il-komunita ta' gid morali b'attribuzzjonijiet specifici, jrid almenu jipprova l-attribuzzjonijiet specifici li jaghmel, ghal inqas sostanzjalment, u jipprova l-allegazzjonijiet tieghu biex b'hekk ikun jista jehles mir-responsabbilitajiet tieghu quddiem l-ligi.

Illi 'n oltre, l-assorbiment ta' terzi innocent fl-artikolu sfrenat riskontrat, hu jghid kollox gratuwitu u kontra l-etika gurnalistika w ghalhekk jimmerita d-disprezz tal-qarrej oggettiv u ekwilibrat, anke ovvjament ta' din l-Qorti.

L-imputat, gia awtur u gurnalist, uza certi kliem infelici fid-diskors tieghu w illum l-gurisprudenza pjuttost kostanti tal-Qrati Maltin, meta si tratta ta' kliem li huma fihom nnifishom ingurjuzi, bhal dawk riskontrati fl-artikolu 'n dezamina 'Cataclysmic Crises', indirizzati fil-konfront ta' terzi li ghandhom twemmin religjuz differenti, twemmin politiku u idejat differenti, anke l-animo ingurjandi hu prezunt. [*Vide f'dan r-rigward is-segwenti decizjonijiet tal-Qorti tal-Appell – Onor. Professur John Rizzo Naudi v Felix Agius et tas-sebgha w ghoxrin ta' Gunju 2003, Avv. Dr. Louis Galea v Frans Ghirxi et tal-erbgha w ghoxrin ta'*

Settembru 2004 u Dr. Sandra Caruana v Joseph Mifsud wkoll tal-erbgha w ghoxrin ta' Settembru 2004.]

Illi 'n oltre, ghandu jigi ribadit wkoll kif jghid il-**Gatley *'On Libel and Slander'* – *Sweet & Maxwell [London] 1981 para 89 pg. 45-46:***

"The question is not what the defendent intended, but what reasonable men, the circumstance in which the words are published, would understand to be the meaning ... the question is <u>not</u> what the writer of an alleged libel means, but what is the meaning of the words he has used. It is not the defendent's intention, or the meaning in his own mind that makes the sense of the libel, but what is the meaning and inference that would naturally be drawn by reasonable and intelligent persons reading it."

Ghalhekk jinghad li mhux rilevanti li l-Qorti tara x'kellu f'mohhu l-imputat meta tkellem bil-mod li tkellem, izda huwa t'importanza kbira li l-Qorti tipprova tiddixxerni dak li cittadin t'intelligenza ordinarja u normali, jifhem meta jaqra l-artikolu nkriminanti jew jisma l-imputat fid-diskors li jaghmel.

Illi l-imputat principalment huwa akkuzat bir-reati li johorgu mill-Kodici Penali u jittrattaw fuq s-suggett li pprova jqajjem mibgheda razzjali bil-kliem li uza fiz-zewg diskorsi li ghamel fix-xahar t'April u Mejju 2006 u fl-artikolu intestat 'Coming Cataclysmic Crises' li deher fuq l-*internet*.

Illi ghalhekk isegwi li din il-Qorti trid tara xi tfisser t-tifsira 'mibgheda razzjali'.

Il-Kodici Kriminali taghna ma jaghti ebda tifsira ghalkemm tali reat huwa wiehed gdid fil-Kodici Penali u fil-fatt, gurisprudenza lokali fuq dan l-artikolu tal-ligi u cioe l-artikolu 82A(1)(2) hija skarsa.

Jinghad li l-*guideline* ghat-tifsira tal-kliem 'mibgheda razzjali', hija dik misjuba fl-"International Convention on the Elimination of all forms of Racial Discrimination" li tipprovdi s-segwenti:

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

F'din l-istess konvenzjoni nsibu spjegazzjoni tal-kelma 'racism' u cioe "*a system of beliefs, held consciously or otherwise, alleging the inferiority of members of one supposedly biologically different groups to those of one's own group. It is therefore prejudice or animosity against people who belong to other races*" w ghalhekk, il-Konvenzjoni tkompli tghid "*Racial discrimination is any action which treats people differently in any manner because of prejudice about race – it is therefore the action that stems from the beliefs and prejudice of racism*."

Illi ghalhekk, fid-dawl ta'dak li ntqal aktar 'l fuq, il-Qorti trid tezamina d-diskors tal-imputat biex tara jekk b'dak li qal, hu kienx qed jippregudika t-twemmin ta' terzi persuni li ghandhom razza differenti minn tieghu.

Illi l-ewwel akkuza si tratta fuq diskors li sar fit-tlieta t'April 2006 fin-Nigret. Dwar l-fatt li dan d-diskors kif jidher fid-dokument 'E' esibit mill-espert Dottor Stephen Farrugia Sacco, ma jidhirx li hemm xi kontestazzjoni mill-partijiet dwar dak li ntqal mill-imputat, meta kellu udjenza gewwa n-Nigret. Il-partijiet u cioe d-difiza w il-prosekuzzjoni ma jaqblux li dak li qal l-imputat fih jammonta ghal tixrid ta' kliem jew imgieba ta' theddid abbusiv jew insulenti li jqajjem mibgheda razzjali.

Minn ezami akkurata ta' dan d-diskors jirrizulta li l-imputat ihares lejn n-nies li ghandhom religjon l-istess bhala nies li jinstigaw t-terrorizmu. Jghid li l-Inglizi gewwa l-Ingilterra, jibzghu jmorru l-isptar pubbliku ghaliex l-infermiera w it-tobba huma Musulmani, u dawn in-nies taw in-nar lil *underground system*. Jghid fil-fatt li m'hemmx raguni l-ghala m'ghandhomx jinfettaw in-nies billi jpoggu velenu fid-*drip* taghhom, jikkontaminaw l-ikel fl-isptar u li

jraqqdhom b'anastesija – insomma fi ftit kliem jghid li l-pazjent jiddependi fuq l-hniena taghhom. Jenfasizza li r-religjon taghhom tghidilhom biex jobghodu lil ghadu taghhom.

Aktar tard jghid li qeghdin nitilfu l-pajjiz taghna ghaliex il-pajjiz hu bla tmun u bla rghaj. Jaghti ezempji koroh li sehhew f'pajjizi ta' reati kommessi minn nies li jinzammu fid-Detention Centre tal-Marsa u cioe kaz ta' serq ta' gizirana u ta' tfajla li giet stuprata minn ragel ta' karnaggjon samrani. Jaghmel referenza wkoll ghal fatt li t-tfal tal-Afrikani huma nfettati bl-AIDS u li t-tfal Maltin ser jigu nfettati b'din il-marda qerrieda wkoll. Isemmi l-incident meta barrani u cioe indikazzjoni ghal ragel mizmum fid-Detention Centre kien dahal fi knisja u kisser Kurcifiss.

Il-Qorti semghet s-CD esibita u fl-isfond semghet wkoll c-capcip ta' min kien presenti jisma dan d-diskors.

Jghid wkoll li hemm bzonn li nnaddfu lil pajjiz taghna u dan billi jkollna pajjiz li ma jkollux refugjati fih. B'hekk indika, jew ta x'jifhem, li l-pajjiz hu mahmug ghax ghandu dawn in-nies jghixu go fih. Il-hin kollu jghid li Malta ha tigi f'idejn in-Negri.

Illi ma hemmx dubbju li f'ghajnejn l-individwu b'intellett normali w ordinarju, dan il-kliem u referenzi jammontaw ghal imgieba ta' theddid abbusiv w insulenti li tqajjem mibgheda razzjali. Tqajjem kuxjenzi li huma differenza bejn r-razza Maltija u dik tal-barrani pero dan b'mod dispreggjattiv.

Illi t-tieni akkuza tittratta fuq diskors li sehh fit-tmienja ta' Mejju 2006 din d-darba f'San Pawl il-Bahar [Dok. F esibit minn Dottor Stephen Farrugia Sacco]. Il-Qorti semghet is-CD esibit mill-prosekuzzjoni u rat li l-imputat kellu udjenza waqt li qal dan l-istess diskors u fil-fatt l-imputat ma jichadx li dan d-diskors huwa tieghu u lanqas li kellu udjenzi. Fil-fatt huwa jipprova jiggustifika dak li qal mhux t-ton tal-kliem li uza izda c-cirkostanza ta' kif inghadu dan l-kliem. Huwa jitkellem fuq il-festa tal-haddiem u jghid li

ahma m'ghandniex niccelebraw din il-festa anzi hija festa falza, ghaliex minflok li ntejjbu l-kundizzjonijiet tax-xoghol, qeghdin nimpjegaw nies gejjin mis-Sahara fl-Afrika biex jghamlu xi xoghol tal-Maltin. Jipprova jirredikola lil Eccellenza Tieghu l-President ta' Malta billi jghid li huwa President tal-Afrikani. Jipprova wkoll jizzufjetta bl-addozzjoni ta' tfal mill-Afrika – jghid li ma jixtieqx li t-tfal tieghu jimpikaw ma tfal mill-Katanga u mill-Mozambique.

Illi ma hemmx dubbju li min isegwi dawn d-diskorsi, minnufih jinduna li l-imputat qed jipprova jirredikola n-nies li jigu mill-Afrika u certament jitfa dell fuqhom ghad-differenza tal-Ewropej. Zgur li dan t-trattament huwa wiehed razzjali u jaqa fil-parametri tal-artikoli tal-ligi moghtija mill-Avukat Generali.

L-imputat huwa akkuzat wkoll li xerred mibgheda razzjali fl-artikolu minnu citat bhala 'Coming Cataclysmic Crises', pero l-imputat jghid li huwa ma kellux l-intenzjoni li jaghmel hekk, izda li jaghti twissija ghal dak li kien ser jigri f'pajjizna u cioe l-invazjoni tal-Musulmani.

Illi l-imputat issejjah n-nies ta' twemmin Islam bhala 'rodents' – kelma dispreggjattiva ghal ahhar. Jghid li l-pajjiz tal-Israel kien qed jippromwovi l-infiltrazzjoni tal-immigranti llegali u nies mill-Afrika ta' fuq jidhlu fil-pajjizi Taljani u sahansitra jimmanipulaw t-terrorizmu u li gew mill-pajjizi tal-Gharab. Jghid li ghandna nippromwovu l-gwerrer kontra il-'*wags*' u mhux bejn in-nies bil-karnaggjon abjad [*whites*]. Jghid li ghandna ninstigaw il-guh u l-mard f'dawk il-pajjizi fejn ma hemmx nies bil-karnaggjon abjad. Jghid li l-gwerra ghandha tkun ezercizzju ghad-difiza bajda biex telimina d-debolli u l-fjakk fir-razza. Jghid li l-gwerra ghandha tkun '*clean up*' kontra r-razza nferjuri. Jghid ukoll li l-ispazju ghandu jkun riservat ghal bojod ghaliex hija razza *pioneering*.

Illi l-Qorti hija tal-fehma li dan l-artikolu ghalkemm veru jirrifletti l-vizjoni tal-awtur tieghu, u cioe tal-imputat li zgur hi vizjoni razzista w infelici kontra nies b'karnaggjon skur, jeleva lin-nies b'karnaggjon abjad ghad-detriment tar-

razzez l-ohra li hu jikkonsidra razzez inferjuri u li ghandhom jigu eradikati.

Ma hemmx dubbju li dan l-artikolu wkoll huwa wiehed li jirrifletti l-mibgheda razzjali li ghandu l-imputat.

Fl-ahhar, l-imputat huwa wkoll akkuzat talli ngurja jew insulenta jew maqdar lil Eccellenza Tieghu l-President ta' Malta f'San Pawl il-Bahar nhar t-tmienja ta' Mejju 2006.

Il-Qorti rat l-artikoli tal-ligi n' kwistjoni u cioe l-artikolu 72 tal-Kap 9 tal-Ligijiet ta' Malta u rat li l-kliem tal-ligi huma s-segwenti:

"Kull min juza kliem, eghmil jew gesti li jingurja, jinsulenta jew imaqdar lil persuna tal-President ta' Malta, inkellha jiccensura jew b'nuqqas ta' qima, jsemmi jew jirrapprezenta lil imsemmi President ta' Malta bi kliem, sinjali jew b'rapprezentazzjonijiet vizibbli, jew b'xi mod iehor mhux kontemplat fil-ligi tal-istampa ..."

Illi ma hemmx dubbju li dak li qal l-imputat fil-konfront tal-Eccellenza Tieghu l-President ta' Malta, ma jammontax ghal ingurja jew insulti jew tmaqdir kif sostniet il-prosekuzzjoni, izda jammonta ghal nuqqas ta' qima u rispett u dan meta l-imputat jghid li l-Eccellenza Tieghu l-President ta' Malta jippoza ghar-ritratti ma xi tfajjel li ser jigi addottat mill-Kenja jew Nigerja, ghaliex huwa ma jaqbilx mat-trattat tal-IVF. Jipprova wkoll iwaqqghu ghaz-zufjett billi jindikah bhala l-Eccellenza Tieghu l-President tal-Afrikani. Jghid wkoll li hu gardinar, ghaliex izomm l-gonna ta' San Anton fi stat tajjeb hafna. Dan il-kliem zgur li mhux xieraq u m'ghandhux jigi ndirizzat lejn il-kariga ta' President ta' pajjiz.

Illi l-prosekuzzjoni naqset li tesibixxi l-fedina penali tal-imputat w ghalhekk iil-Qorti ser tittratta mieghu bhala li *a first time offender*.

Il-Qorti tqis l-akkuzi 'n kwistjoni ta' Tixwix ghal mibgheda razzjali u Disprezz lejn il-President ta' Malta bhala dawk ta' natura serja hafna. Il-Qorti thoss illi ghandha tipprotegi r-razzez kollha li jinsabu f'pajjizna, anke dawk li jinsabu f'minoranza, u dan ghaliex hija ghandha tipprotegi kull cittadin tal-pajjiz, irrispettivament mill-kulur, razza jew religjon. L-akkuza kontra l-Eccellenza Tieghu il-President ta' Malta hija serja ghaliex tista tikkreja kaos w instabilita fil-pajjiz.

Illi r-reat kif dispost fl-artikolu 82 tal-Kodici Penali jgib piena, f'kaz li jirrizulta, ta' prigunerija minn sitt xhur sa tmintax il-xahar filwaqt li r-reat naxxenti mill-artikolu 70 jippreskrivi piena ta' bejn xahar sa tlett xhur, oltre l-multa.

Issa l-ewwel tlett akkuzi huma ddentitici, u cioe kollha naxxenti mill-istess Artikolu 82A tal-Kap 9 tal-Ligijiet ta' Malta, w ghalhekk huma nkorporati f'xulxin u japplika l-Artikolu 18 ghar-reati kontinwati u b'hekk il-piena tista tizdied bi grad jew zewg gradi.

L-artikolu 17(b) tal-Kap 9 tal-Ligijiet ta' Malta, jipprovdi wkoll li persuna hatja ta' zewg delitti jew izjed (kif inhu l-kaz odjern) li jaqghu taht pieni li jnaqqsu l-liberta personali, tigi kkundannta ghall-piena tad-delitt l-aktar gravi b'zieda minn terz sa nofs taz-zmien tal-pieni l-ohra kollha mehuda flimkien.

Ghalhekk, il-piena ta' tmintax il-xahar ghandha tizdied ma nofs il-piena l-ohra, u cioe xahar u nofs, sabiex b'hekk, il-piena twassal ghall-ghoxrin xahar u nofs, minghajr l-applikazzjoni tal-Artikolu 18. Bl-applikazzjoni ta' l-artikolu 18, il-piena, jekk tizdied bi grad, tlahhaq minn tmintax il-xahar sa tlett snin, u jekk tizdied bi zewg gradi, tlahhaq ghal piena ta' sentejn sa erba' snin.

Ghalhekk il-massimu li jista jinghata l-imputat, oltre l-multa, hija piena karcerarja ta' erbgha snin.

Kwantu ghall-aspett ta' piena, l-Qorti tosserva li storikament l-element tad-deterrent, flimkien ma dak tar-retribuzzjoni, huma kkusidrati fost l-iskopijiet principali tal-piena. Fil-fatt fis-seklu tmintax, studjuzi famuzi bhal **Cesare Beccaria** fl-Italja, **Jeremy Bentham** fl-Ingilterra u **PJA Von Feuerbach** fil-Germanja, tlett esponenti ewlenin fl-iskola tax-xjenza tal-kriminologija, bbazaw it-teorija taghhom ta' delitti u pieni, fuq il-kuncett ta' deterrent generali.

Kif jillustraha **Johanes Andeneus** (***Encyclopaedia of Crime and Justice***, Volume 2 taht il-voce Deterrence p 5592):

"The central idea was the threat of punishment should be specified so that in the mind of the potential law breaker, the fear of punishment would outweigh the temptation to commit the crime. The penalty should be fixed by law in proportion to the gravity of the offence."

Dawn l-istudjuzi, pero rarament ikkunsidraw l-aspett tal-effetti morali tal-ligi kriminali, mentri effettivament, dan l-aspett huwa wiehed minn dawk importanti, billi l-ligi kriminali mhux biss skala ta' dellitti u pieni f'sens astratt, izda hija essenzjalment espressjoni tad-disapprovazzjoni tas-socjeta ghal certa imgieba.

Fis-seklu li ghadda pero fl-ewwel parti ta' dan, spikkat l-importanza ta' dak li hu komunement maghruf bhala '*treatment and rehabilitation*' ta' min ikun kiser il-ligi. F'dan il-process, sfortunatament kien hemm ukoll minn beda jemmen li l-element tad-deterrent huwa ineffikaci, anki jekk effettivament ebda sistema legali m'abbandunat il-kuncett tad-deterrent bhala wiehed mill-aspetti nerenti ghall-piena fis-sistema penali. Illum, specjalment wara is-snin sittin, l-interess fl-aspett tal-piena bhala deterrent reggha beda jigi studjat u ricerkat u fil-fatt illum hemm l-iskola neo klassika fix-xjenza kriminologika, li taghti mportanza ghall-aspett tad-deterrent, ghalkemm fl-ebda hin ma gie accettat li huwa sewwa li jinghataw sentenzi ezemplari li aktar milli jistghu jservu bhala deterrent ghal

haddiehor, ghandhom effett li jippunixxu lill-hati b'certa severita li taht kull cirkostanza, ma tista hlief tigi kunsidrata ecessiva, precizament ghax trid issevi ta' ezempju ghal haddiehor.

In realta s-severita tal-piena ghal dk li huwa deterrent, hija espressa fil-mizura tal-piena li tistabilixxi il-ligi stess u fejn hemm minimu u massimu, dan qieghed hemm biex il-Qorti tuza u timmizura l-gudizzju taghha, tenut kont tal-fatti specie u gravita partikolari tal-kaz, tac-cirkostanzi relattivi ghall-hati, u ta' fatturi u cirkostanza ohra li, fix-xjenza kriminologika u dik ta' penologija, huma accettati bhala li ghandhom jindirrizaw lill-Qorti tiddecidi kif ghandha titratta mal-individwu li jkun instab hati.

Il-piena pero m'ghandhiex tkun mizurata b'mod illi il-hati jhallas b'piena akbar biex iservi ta' ezempju ghal haddiehor.

Illi ghalhekk, fid-dawl tas-suespost l-Qorti wara li rat l-artikoli tal-ligi partikolarment l-artikoli 18, 72, 82A(1)(2), 31, 32, 20 u 533 tal-Kap 9 tal-Ligijiet ta' Malta, tiddikjara li ssib lil imputat NORMAN LOWELL hati tal-akkuzi kollha kif addebitati fil-konfront tieghu u tikkundannah ghal piena karcerarja ta' sentejn pero bl-applikazzjoni tal-artikolu 28A tal-Kap 9 tal-Ligijiet ta' Malta qed tissospendi l-operat taghha ghal perjodu ta' erbgha [4] snin u b'hekk din il-piena ghandu jkollha l-effett ta' mannara sabiex l-imputat jifli l-kliem tieghu qabel ma jesprimi ruhu fil-futur.

Oltre dan tikkundannah ihallas multa ta' hames mitt euro (Euro 500).

Dwar t-talba tal-prosekuzzjoni sabiex, ai fini tal-artikolu 533 tal-Kap 9 tal-Ligijiet ta' Malta, l-Qorti tikkundanna lil imputat jhallas l-ispejjes inkorsi mal-hatra ta' periti w esperti, il-Qorti tilqa tali talba u tikkundanna lil imputat ihallas l-ispejjes involuti fil-hatra tal-espert Dottor Stephen Farrugia Sacco (fol 114) u dan fl-ammont ta' tmienja w tletin Euro [€38] u dan fi zmien xahar mill-lum u fin-nuqqas, tali somma

tigi konvertita fi prigunerija bir-rata ta’ gurnata habs ghal kull €11.65 dovuta.

Tordna li kopja ta’ din s-sentenza tigi notifkata lid-Direttur tal-Qorti Kriminali ghal dan l-ghan.

< Sentenza Finali >

----------TMIEM----------

Malta / Akkuza tal-Kap Esekuttiv ta' l-Awtorità tax-Xandir dwar il-Programm "Minibus" tal-15 ta' Gunju 2004

Subtitle	156/01
Inventory No.	CASE 94 1
Deciding body	Awtorita` tax-Xandir [Broadcasting Authority]
Date	Date of decision: 16.06.2004
Weblink	http://www.ba-malta.org/pressreleases/2004/m_pr1904.htm
Topic	Hate speech
Deciding Body	Specialised body
Keywords	Malta, Racial hatred, legal finding, court decision, Broadcasting
Abstract	Key facts of the case: On 16.06.2004, the Broadcasting Authority (BA) accused Smash Television of breaching Articles 13 of the Broadcasting Act and 82 A of the Criminal Code when it screened an interview with European Parliament elections candidate Mr. Norman Lowell. During the interview comments were made encouraging criminality which could lead to disorder and could be offensive to public sentiment. The BA imposed a fine of LM 150 on Smash Television. Main reasoning/argumentation: The Broadcasting Authority alleged that Smash Television breached a provision of the Broadcasting Act when it screened an interview with European Parliament elections candidate Mr. Norman Lowell. Authority Chief Executive Officer Dr. Kevin Aquilina said that during the programme 'Minibus' screened in June, Articles 13 of the Broadcasting Act and 82 A of the Criminal Code were breached when comments were made encouraging criminality which could lead to disorder and could be offensive to public sentiment. Similar comments were also broadcast on 29.04.2004, 06.05.2004, 01.06.2004 and 08.06.2004. The Broadcasting Authority imposed a fine of LM 150 on Smash Television for such violation. Key issues (concepts, interpretations) clarified by the case: An administrative body with quasi-judicial powers exercised its discretionary powers in a way conducive to creating a deterrent ensuring that comments do not lead to disorder and do not offend public sentiment. Results and most

important consequences, implications of the case: Smash Communications Limited filed a writ of summons (a civil lawsuit under Maltese law) against the Broadcasting Authority. It requests the First Hall of the Civil Court to annul the above-mentioned fine since it is seen as abusive, frivolous and vexatious, as violating Malta's Press Laws, EC Directives, the rules of natural justice, freedom of expression provisions under the European Convention on Human Rights and Fundamental Freedoms and other important provisions which have force of law in Malta. The case is currently pending. The government requested the Commissioner of Police to investigate Mr. Norman Lowell on the grounds that he incited racial hatred, and to institute criminal proceedings against him should there be sufficient proof of this. This was the only case in which a television station was fined for breaching Articles 13 of the Broadcasting Act and 82 A of the Criminal Code.

Related documents

- 00056551_m.pdf

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Public Policies

National Commission for the Promotion of Equality

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Journalist School Project

As part of the 'For Diversity, Against Discrimination' Campaign, an initiative was launched for all students at the University of Malta. The aim is to encourage University students to write researched journalistic features about the campaign's issues, namely diversity and discrimination. Such articles should be linked to the European context of fighting discrimination through European legislation, policies, programmes and projects and must focus on one or several of the following grounds of discrimination: racial / ethnic origin, religion or belief, disability, age, and/or sexual orientation.

Articles should be between 750 and 1,500 words and published between December 2010 and end of February 2011. For further information, contact FDAD National Correspondent for Malta on carmel.bonello@bpc.com.mt

'Strengthening Equality Beyond Legislation'

Final Conference

The National Commission for the Promotion of Equality (NCPE) concluded one of its EU co-financed projects entitled "Strengthening Equality beyond Legislation", aimed at reaching out to specific target groups to sensitise and stimulate specific action by stakeholders as their contribution towards a de facto equal environment.

The Final Conference of this project that took place on 1st December, outlined the various initiatives taken, namely the implementation of further legislation on non-discrimination through awareness raising, training, and research; the development of a national policy to combat discrimination and promote equality beyond legislation; and the dissemination of information on EU and national policy and legislation in the non-discrimination field.

From left to right: Ms Lara Bezzina, Dr Therese Comodini Cachia, Dr Romina Bartolo, Ms Francesca Dayal, Dr Matthew Zarb

For further information:

Press Release – English, Maltese

The European Commission's anti-discrimination campaign

FOR DIVERSITY AGAINST DISCRIMINATION
www.stop-discrimination.info

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1. **Equality Mark Awarding Ceremony**
2. **Cartoons for Diversity**
3. **Guidance on the Notification Procedure and the Publication of Data Associated with the Use of Gender in the assessment of risk for purposes of insurance and related financial services**
4. **Equal Opportunities Checklist**

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1. 1st Equality Mark Awarding Ceremony - Friday, 15 October 2010

The certified organisations: Betsson Malta Ltd; European School of English Malta; Foundation for Social Welfare Services; HSBC Malta plc; Medavia Co Ltd; Melita plc; National Statistics Office and Vodafone Malta, together with Hon Minister Dolores Cristina; Dr Romina Bartolo and Ms Therese Spiteri

Please click here to view the Press Release in English

Please click here to view the Press Release in Maltese

Please click here for further information

2. Cartoons for Diversity

The European Commission launched the third edition of "Cartoons for Diversity" competition and exhibition in Malta. This forms part of For Diversity, Against Discrimination campaign. Participants are invited to produce cartoons that explore the positive impact of diversity and the negative effects of discrimination in one or more of the following aspects: racial or ethnic origin, religion or belief, disability, age, sexual orientation and sex.

Selected entities will be displayed in an exhibition at St James Cavalier, Centre for Creativity, Valletta between 3rd and 20th February 2011. Deadline for submission – 14th January 2011.

Press release with further information

Application form for students

Application form for the general category

Rules and Regulations for students

Rules and Regulations for the general category

3. Guidance on the Notification Procedure and the Publication of Data Associated with the Use of Gender in the assessment of risk for purposes of insurance and related financial services

NCPE has continued working on the implementation of the Council Directive 2004/113/EC of 13 December 2004 implementing the principle of equal treatment between men and women in the access to and supply of goods and service. Guidelines have been prepared by NCPE as part of the implementation of Article 5 of this Directive which ensures that sex can only be used as a determining factor in the assessment of risk in insurance and related financial services, if it is based on relevant and accurate actuarial and statistical data, which is published and notified to NCPE in terms of Regulation 5 of Legal Notice 181 of 2008. These guidelines have been prepared following a consultation process which saw the participation of the Malta Financial Services Authority (MFSA), the Malta Insurance Association (MIA) and the Malta Insurance Managers Association (MIMA).

Please click here to download NCPE guidelines

Please click here to download presentation delivered by Dr Therese Comodini Cachia on the Notification Procedure emanating out of Article 5 of the Council Directive 2004/113/EC

Meeting for insurance service providers:
2 March 2010 | 1430hrs | Mediterranean Conference Centre

4. EQUAL OPPORTUNITIES CHECKLIST

Applications being submitted under various EU co-funded projects should demonstrate how they have considered equal opportunities throughout the different stages of the project (i.e. during design, planning, implementation, monitoring and evaluation of their projects). Steps should be taken to prevent any discrimination based on sex, racial/ethnic origin, religion/belief, disability, age, and sexual orientation.

In this regard, the National Commission for the Promotion of Equality has developed an equal opportunities checklist to assist all those who are interested in submitting a project proposal.

Please click here to access the equal opportunities checklist. Should you require further assistance please contact Ms Therese Spiteri, Manager - NCPE on equality@gov.mt .

European Commission against Racism and Intolerance
Commission européenne contre le racisme et l'intolérance

CRI(2008)22

Troisième rapport sur Malte

Adopté le 14 décembre 2007

Strasbourg, le 29 avril 2008

COUNCIL OF EUROPE CONSEIL DE L'EUROPE

Pour des informations complémentaires sur les travaux de la Commission européenne contre le racisme et l'intolérance (ECRI) et sur d'autres activités du Conseil de l'Europe dans ce domaine, veuillez vous adresser au:

Secrétariat de l'ECRI
Direction générale des droits de l'Homme et des affaires juridiques
Conseil de l'Europe
F - 67075 STRASBOURG Cedex
Tel.: +33 (0) 3 88 41 29 64
Fax: +33 (0) 3 88 41 39 87
E-mail: combat.racism@coe.int

Visitez notre site web : www.coe.int/ecri

TABLE DES MATIÈRES

Avant-propos

La Commission européenne contre le racisme et l'intolérance (ECRI), mise en place par le Conseil de l'Europe, est une instance indépendante de monitoring dans le domaine des droits de l'homme. Spécialisée dans les questions de lutte contre le racisme et l'intolérance, elle est composée de membres indépendants et impartiaux, qui sont désignés sur la base de leur autorité morale et de leur expertise reconnue dans le traitement des questions relatives au racisme, à la xénophobie, à l'antisémitisme et à l'intolérance.

Un des volets du programme d'activités de l'ECRI est son analyse pays par pays de la situation du racisme et de l'intolérance dans chacun des Etats membres du Conseil de l'Europe, analyse qui conduit à formuler des suggestions et propositions pour traiter les problèmes identifiés.

L'approche pays par pays de l'ECRI concerne l'ensemble des Etats membres du Conseil de l'Europe, sur un pied d'égalité. Les travaux se déroulent suivant des cycles de 4/5 ans, à raison de 9/10 pays couverts chaque année. Les rapports du premier cycle ont été achevés à la fin de 1998 et ceux du deuxième cycle à la fin de l'année 2002. Les travaux du troisième cycle ont débuté en janvier 2003.

Les rapports pays par pays du troisième cycle sont axés sur la « mise en œuvre » des principales recommandations contenues dans les précédents rapports de l'ECRI. Ils examinent si celles-ci ont été suivies et appliquées, et si oui, avec quelle efficacité. Les rapports du troisième cycle traitent également de « questions spécifiques », choisies en fonction de la situation propre à chaque pays et examinées de manière plus approfondie dans chaque rapport.

Les méthodes de travail pour l'élaboration des rapports comprennent des analyses documentaires, une visite dans le pays concerné, puis un dialogue confidentiel avec les autorités nationales.

Les rapports de l'ECRI ne sont pas le résultat d'enquêtes ou de dépositions de témoins, mais d'analyses basées sur un grand nombre d'informations émanant de sources très variées. Les études documentaires reposent sur un nombre important de sources écrites nationales et internationales. La visite sur place permet de rencontrer les milieux directement concernés (gouvernementaux et non gouvernementaux) et de recueillir des informations détaillées. Le dialogue confidentiel avec les autorités nationales permet à celles-ci de proposer, si elles l'estiment nécessaire, des modifications au projet de rapport en vue de corriger d'éventuelles erreurs factuelles contenues dans le texte. A l'issue de ce dialogue, les autorités nationales peuvent, si elles le souhaitent, demander à ce que leurs points de vue soient reproduits en annexe au rapport définitif de l'ECRI.

Le rapport qui suit a été élaboré par l'ECRI sous sa seule et entière responsabilité. Il rend compte de la situation en date du 29 juin 2007. Les développements intervenus après cette date ne sont donc pas couverts par l'analyse qui suit, ni pris en compte dans les conclusions et propositions qui y figurent.

Résumé général

Depuis la publication du second rapport de l'ECRI sur Malte le 23 juillet 2002, des progrès ont été accomplis dans un certain nombre de domaines abordés dans le rapport. Le cadre juridique et institutionnel pour lutter contre le racisme et la discrimination raciale a été renforcé. Des dispositions pénales réprimant les expressions racistes et les infractions à motivation raciste ou religieuses sont maintenant entrées en vigueur. Une loi contre la discrimination couvrant différents domaines de la vie sociale a aussi été introduite et la Commission nationale pour la promotion de l'égalité, dont le mandat a été élargi afin de couvrir les questions d'égalité raciale, est chargée d'en suivre l'application. Des efforts ont été faits pour loger et aider les migrants en situation irrégulière à leur sortie de rétention et pour améliorer certains aspects spécifiques de leur séjour en rétention. Depuis février 2007, une institution est spécialement chargée des questions relatives à l'intégration et au bien-être des demandeurs d'asile. Des initiatives d'éducation visant à promouvoir l'appréciation de la diversité ainsi que la connaissance et le respect des droits de l'homme ont été développées, notamment en coopération avec le secteur non-gouvernemental. Des normes définissant les standards et pratiques à respecter par les radiodiffuseurs afin de promouvoir l'égalité raciale ont été mises en place.

Cependant, un certain nombre de recommandations contenues dans le second rapport de l'ECRI n'ont pas été mises en œuvre ou l'ont été de manière incomplète. En raison des mouvements migratoires de la Libye vers l'Europe, un nombre de migrants en situation irrégulière correspondant à environ 0,5% de la population totale est arrivé à Malte chaque année depuis le second rapport de l'ECRI, ce qui a posé un grand nombre de défis. En réponse à ce phénomène, les autorités maltaises ont appliqué une politique de rétention systématique de tous ces migrants, ce qui a non seulement des incidences négatives sur le respect des droits de ces personnes mais contribue aussi à ce qu'elles soient perçues comme des criminels, en favorisant ainsi le développement du racisme et de la xénophobie parmi la population maltaise. Ces attitudes sont renforcées par le débat public – notamment le débat politique – sur l'immigration irrégulière qui ne fait pas en général une place suffisante à la question des droits de l'homme et de la dignité humaine. L'immigration irrégulière a aussi servi de plate-forme au développement de groupes organisés d'extrême-droite. Les migrants en situation irrégulière, les demandeurs d'asile, les personnes ayant obtenu le statut humanitaire et les réfugiés sont toujours exposés à la discrimination raciale dans l'accès aux différents services et à des abus sur le marché du travail où ils sont pour la plupart employés clandestinement. Les dispositions juridiques contre les expressions racistes, les infractions à motivation raciste et la discrimination raciale ne sont pas pleinement appliquées et les autorités sont encore peu sensibilisées au besoin de surveiller activement le racisme et la discrimination raciale afin d'identifier ces phénomènes et d'y répondre par des mesures adéquates. Malte continue à se considérer uniquement comme un pays de transit de l'immigration et ceci a des conséquences négatives sur la possibilité d'adoption par les autorités maltaises de mesures d'intégration de personnes qui peuvent pourtant finir par résider pendant une longue période dans le pays.

Dans le présent rapport, l'ECRI recommande aux autorités maltaises de prendre des mesures supplémentaires dans un certain nombre de domaines. Elle leur recommande de s'engager dans la voie de l'identification d'alternatives à la rétention des migrants en situation irrégulière et, tant que la politique actuelle de rétention sera appliquée, d'améliorer les conditions de rétention et de fournir aux personnes concernées des possibilités d'apprentissage. L'ECRI recommande aussi aux autorités maltaises de favoriser le développement d'un débat plus équilibré sur l'immigration qui prenne en compte la dimension des droits de l'homme de cette dernière. Elle recommande en outre aux autorités maltaises d'améliorer l'application des dispositions en vigueur contre le racisme et la discrimination raciale, notamment en adoptant des mesures de formation et de sensibilisation des juges et des policiers, en informant les victimes potentielles de la discrimination et en renforçant l'indépendance de la Commission nationale pour la promotion de l'égalité. Des mesures sont également recommandées dans un certain nombre d'autres domaines et notamment : la nécessité de ratifier le Protocole n° 12 à la CEDH, la nécessité de mettre en place un système de collecte des données afin d'établir l'ampleur des phénomènes de racisme et de xénophobie à Malte et la nécessité de lutter contre les abus à l'égard des catégories de personnes vulnérables sur le marché de l'emploi.

I. SUIVI DU SECOND RAPPORT DE L'ECRI SUR MALTE

Instruments juridiques internationaux

1. Dans son second rapport, l'ECRI a recommandé à Malte de signer et ratifier le Protocole n° 12 à la Convention européenne des Droits de l'Homme (CEDH) qui prévoit l'interdiction générale de la discrimination. Elle lui a également recommandé de signer et ratifier la Convention européenne sur la nationalité et la Convention sur la participation des étrangers à la vie publique au niveau local. L'ECRI note qu'aucun de ces instruments n'a encore été ratifié par Malte. Toutefois, la Convention européenne sur la nationalité a été signée en octobre 2003 et les autorités maltaises ont déclaré qu'elles examinent actuellement les conséquences juridiques d'une ratification de la Convention sur la participation des étrangers à la vie publique au niveau local.

2. Dans son second rapport, l'ECRI a aussi recommandé à Malte de signer et ratifier la Charte sociale européenne (révisée) et la Convention européenne relative au statut juridique du travailleur migrant. L'ECRI se réjouit de la ratification de la Charte sociale européenne (révisée) par Malte en juillet 2005. Elle note cependant que ni la Convention européenne relative au statut juridique du travailleur migrant, ni la Convention internationale sur la protection des droits de tous les travailleurs migrants et des membres de leur famille, qui est entrée en vigueur depuis le second rapport de l'ECRI, n'ont été signées par Malte. La Charte européenne des langues régionales ou minoritaires, qui avait déjà été signée par Malte au moment du second rapport de l'ECRI, n'a pas été ratifiée.

3. Depuis le second rapport de l'ECRI sur Malte, la Convention sur la cybercriminalité et son Protocole additionnel relatif à l'incrimination d'actes de nature raciste et xénophobe commis par le biais de systèmes informatiques ont été ouverts à la signature et à la ratification et sont entrés en vigueur. Ces instruments ont été signés par Malte respectivement en janvier 2002 et en janvier 2003. Cependant, Malte ne les a pas encore ratifiés.

Recommandations :

4. L'ECRI recommande aux autorités maltaises de ratifier le Protocole n° 12 à la CEDH le plus tôt possible. Elle leur recommande également de ratifier la Convention européenne sur la nationalité et la Convention sur la participation des étrangers à la vie publique au niveau local. Elle les encourage à ratifier la Convention européenne relative au statut juridique du travailleur migrant, la Convention internationale sur la protection des droits de tous les travailleurs migrants et des membres de leur famille et la Charte européenne des langues régionales ou minoritaires.

5. L'ECRI recommande en outre aux autorités maltaises de ratifier dès que possible la Convention sur la cybercriminalité et son Protocole additionnel relatif à l'incrimination d'actes de nature raciste et xénophobe commis par le biais de systèmes informatiques.

Dispositions en matière de droit pénal

6. Dans son second rapport, l'ECRI a pris note de l'entrée en vigueur imminente de modifications au code pénal introduisant des dispositions contre les expressions racistes. L'ECRI se félicite que ces dispositions maintenant contenues dans

l'article 82A du code pénal[1] couvrent les injures et menaces à caractère raciste ainsi que l'incitation à la haine raciale, conformément à sa Recommandation de politique générale n° 7 sur la législation national e pour lutter contre le racisme et la discrimination raciale.[2] Les autorités indiquent que, depuis son entrée en vigueur le 19 avril 2002, l'article 82A a été appliqué dans deux affaires portant toutes deux sur les propos tenus par des représentants d'organisations d'extrême-droite au cours de réunions publiques.[3] Toutefois, à la date de rédaction de ce rapport, aucun verdict de condamnation n'avait été rendu. L'ECRI croit comprendre qu'il y a aussi eu quelques affaires d'incitation à la haine raciale par le biais des médias, les procédures ayant été engagées dans ces cas notamment au titre de la loi sur la presse et de la loi sur les radiodiffuseurs.[4] Néanmoins, l'ECRI note que les cas d'incitation à la haine raciale ne sont pas toujours poursuivis, surtout lorsqu'ils sont commis par le biais d'Internet.

7. Dans son second rapport, l'ECRI a recommandé à Malte d'adopter une disposition faisant du caractère raciste d'une infraction une circonstance aggravante spécifique au moment de la détermination de la peine. L'ECRI note avec satisfaction que les amendements au code pénal adoptés en août 2006 renforcent la sanction prévue pour certaines infractions (notamment les délits de coups et blessures, de menaces, d'actes de violence, de harcèlement commis dans le privé et des délits contre les biens) lorsque ceux-ci présentent un caractère racial ou religieux aggravé.[5] L'ECRI note avec intérêt que la définition des infractions aggravées à caractère racial ou religieux couvre, par exemple, les infractions motivées « entièrement ou en partie » par l'hostilité à l'égard des membres du groupe en question et les infractions commises à l'encontre de personnes entretenant des relations avec les membres de ce groupe. Néanmoins, l'ECRI note que ces dispositions n'ont encore jamais été appliquées alors qu'un certain nombre d'infractions à caractère raciste visant des personnes appartenant à un groupe minoritaire ont été rapportées.[6] Cette situation semble découler, au moins en partie, d'une certaine réticence des personnes appartenant aux groupes minoritaires à déclarer les infractions dont elles sont la victime parce qu'elles pensent que cela n'aboutira à rien ou bien par crainte des répercussions négatives qui pourraient en résulter pour elles.

8. Plus généralement, les organisations de la société civile soulignent que les acteurs du système de justice pénale, en particulier les juges et les policiers, ne sont pas toujours bien au fait des dispositions en vigueur pour lutter contre le racisme, notamment les dispositions réprimant les expressions racistes et les infractions à caractère raciste, et qu'ils ne sont pas non plus correctement

[1] Article 82A : « (I) Quiconque emploie des propos ou adopte des comportements menaçants, injurieux ou abusifs, fait étalage de matériaux écrits ou imprimés présentant un caractère menaçant, injurieux ou abusif ou se conduit de manière à inciter à la haine raciale ou, au vu des circonstances, à provoquer la haine raciale est passible en cas de condamnation d'une peine d'emprisonnement de six à dix-huit mois. (II) Aux fins de la précédente disposition, « haine raciale » signifie la haine à l'encontre d'un groupe de personnes se trouvant à Malte et définies sur la base de leur couleur, de leur race, de leur nationalité (y compris leur citoyenneté) ou de leur origine ethnique ou nationale ».

[2] Voir Recommandation de politique générale n°7 de l 'ECRI, paragraphe 18 *a*, *b* et *c* (et paragraphes 38 à 40 de l'Exposé des motifs).

[3] Voir ci-dessous, Impact sur l'opinion publique du débat politique et public à propos de l'immigration - Extrémisme de droite.

[4] Voir ci-dessous, Médias.

[5] Loi XVI de 2006.

[6] Voir ci-dessous, Actes de violence à caractère raciste.

sensibilisés au besoin d'appliquer ces dispositions de manière vigoureuse. Les autorités maltaises ont toutefois souligné que les juges reçoivent régulièrement toutes les nouvelles lois et se tiennent au courant de toute nouvelle législation qu'ils mettent en œuvre dans l'exercice normal de leurs fonctions. Les autorités maltaises ont également informé l'ECRI qu'une information détaillant la portée des amendements introduits en ces domaines depuis le second rapport de l'ECRI a été diffusée auprès des policiers en exercice et des nouvelles recrues.

Recommandations :

9. L'ECRI recommande aux autorités maltaises d'améliorer la mise en œuvre des dispositions en vigueur réprimant les expressions racistes et les infractions à caractère raciste. Elle leur recommande d'intensifier leurs efforts pour s'assurer que tous les acteurs du système de justice pénale – juges, autorités de poursuite, police et avocats – ont une connaissance approfondie de ces dispositions et sont pleinement conscients de la nécessité de combattre de façon active et complète ces phénomènes sous toutes leurs formes.

10. L'ECRI recommande aux autorités maltaises de veiller à ce que l'incitation à la haine raciale soit dûment poursuivie dans tous les cas, y compris lorsque cette infraction est commise par le biais d'Internet ou de lettres publiées dans les journaux ou bien par des hommes politiques.

11. L'ECRI recommande aux autorités maltaises de travailler à améliorer la réponse institutionnelle aux infractions à caractère raciste. A cette fin, elle leur recommande de prendre des mesures pour encourager la déclaration par les victimes et les témoins des incidents racistes et d'améliorer l'investigation de ces incidents par la police. Elle les encourage vivement à s'inspirer à cet égard de sa Recommandation de politique générale n° 11 sur la lutte contre le racisme et la discrimination raciale dans les activités de la police qui fournit des orientations détaillées dans les deux domaines.[7]

12. L'ECRI encourage les autorités maltaises à réexaminer régulièrement la pertinence des dispositions de droit pénal en vigueur pour lutter contre le racisme. A cette fin, elle leur recommande de s'inspirer de la Recommandation de politique générale n° 7 de l'ECRI concernant la législation nationale pour lutter contre le racisme et la discrimination raciale qui contient une liste des différents types de conduite à incriminer.[8]

Dispositions en matière de droit civil et administratif

13. Dans son second rapport, l'ECRI a recommandé à Malte d'introduire une législation civile et administrative détaillée pour lutter contre la discrimination dans tous les domaines de la vie : emploi, éducation, logement et accès aux lieux ouverts au public. L'ECRI note avec satisfaction que, depuis, Malte a adopté une législation anti-discriminatoire pour transposer dans le droit interne les deux directives de l'Union européenne sur l'égalité de traitement.[9] En effet, par le biais

[7] Voir Recommandation de politique générale n°11 de l'ECRI, paragraphes 11, 13 et 14 (et paragraphes 65 à 67 et 72 à 75 de l'Exposé des motifs).

[8] Voir Recommandation de politique générale n°7 de l'ECRI, paragraphe 18 *d*, *e*, *f*, *g* et *h* (et paragraphes 41 à 44 de l'Exposé des motifs).

[9] Directive 2000/43/CE du Conseil de l'Union européenne relative à la mise en œuvre du principe de l'égalité de traitement entre les personnes sans distinction de race ou d'origine ethnique et Directive 2000/78/CE du Conseil de l'Union européenne portant création d'un cadre général en faveur de l'égalité de traitement en matière d'emploi et de travail.

de la loi 461/2004 sur l'emploi et les relations dans l'emploi et d'amendements ultérieurs, Malte a introduit des dispositions de lutte contre la discrimination fondée sur divers motifs y compris la race, l'origine ethnique ou la religion dans les domaines qui se rapportent à l'emploi. Ces dispositions ont été complétées en avril 2007 par l'ordonnance 85/2007 sur l'égalité de traitement des individus qui interdit la discrimination sur la base de la race ou de l'origine ethnique dans les domaines autres que celui de l'emploi.

14. L'ECRI se félicite de la prise en compte dans les nouvelles dispositions d'un certain nombre d'éléments inclus dans sa Recommandation de politique générale n° 7 sur la législation nationale pour lutter contre le racisme et la discrimination raciale. Cependant, d'autres aspects de cette recommandation n'ont pas été pris en compte. Par exemple, la nationalité (c'est-à-dire la citoyenneté) et la langue ne figurent pas parmi les motifs prohibés de discrimination et les autorités publiques n'ont pas été soumises à l'obligation juridique d'éliminer la discrimination et de promouvoir l'égalité dans l'exercice de leurs fonctions. L'ECRI note aussi que d'importantes fonctions des pouvoirs publics comme le maintien de l'ordre et le contrôle des frontières échappent au champ des nouvelles dispositions. Sur ce dernier point, l'ECRI notait déjà dans son second rapport que les autorités publiques sont soumises à l'interdiction de la discrimination énoncée à l'article 45 de la constitution. Néanmoins, l'ECRI constate qu'aucune affaire de contestation d'une décision d'une autorité publique n'a encore été portée devant les tribunaux sur la base de cet article. L'ECRI note également que la CEDH fait partie du droit interne maltais et qu'une personne lésée peut agir devant les tribunaux maltais sur la base des dispositions de la Convention, y compris l'article 14 (interdiction de la discrimination).

15. Les dispositions anti-discrimination introduites grâce à la loi sur l'emploi et les relations dans l'emploi et à l'ordonnance sur l'égalité de traitement des individus n'ont encore donné lieu jusqu'ici à aucune application en relation avec les motifs couverts par le mandat de l'ECRI. L'ECRI note une nouvelle fois que ce fait est difficile à concilier avec l'existence de cas rapportés de discrimination raciale dans différents domaines dont l'accès aux lieux ouverts au public, le transport et l'emploi.[10] L'ECRI espère cependant que la Commission nationale pour la promotion de l'égalité, comme on le verra plus loin[11], jouera un rôle essentiel dans l'amélioration de la mise en œuvre de ces dispositions.

Recommandations :

16. L'ECRI encourage les autorités maltaises à poursuivre leurs efforts pour s'assurer que les dispositions de droit civil et administratif fournissent une protection adéquate contre la discrimination raciale. Elle les encourage à réexaminer régulièrement la pertinence des dispositions en vigueur, en s'inspirant à cette fin de sa Recommandation de politique générale n° 7 concernant la législation nationale pour lutter contre le racisme et la discrimination raciale, en particulier sur les points suivants : 1) la nécessité de protéger les individus de la discrimination fondée sur la nationalité (c'est-à-dire la citoyenneté) et la langue[12] ; 2) la nécessité d'étendre le champ de la législation

[10] Voir ci-dessous, Accès aux services et Emploi.

[11] Voir : Organes spécialisés et autres institutions.

[12] Recommandation de politique générale n°7 de l'ECRI, paragraphe 1 (et paragraphe 6 de l'Exposé des motifs).

anti-discrimination à certaines fonctions que remplissent les pouvoirs publics[13] ; 3) la nécessité soumettre les autorités publiques à une obligation juridique d'éliminer la discrimination et de promouvoir l'égalité dans l'exercice de leurs fonctions.[14]

Organes spécialisés et autres institutions

- Commission nationale pour la promotion de l'égalité

17. L'ordonnance sur l'égalité de traitement des individus[15] a étendu le mandat de la Commission nationale pour la promotion de l'égalité – organe créé en 2003 pour promouvoir l'égalité entre les sexes – afin de couvrir les questions d'égalité et de non-discrimination sur la base de la race et de l'origine ethnique. Comme l'ECRI l'a recommandé dans son second rapport, la Commission s'est vue confier un rôle légal de surveillance du fonctionnement et d'aide à l'application de l'ordonnance. La Commission est par exemple habilitée à enquêter sur les cas éventuels de discrimination raciale à la suite d'une réclamation ou de son propre chef. Après enquête, elle peut transmettre une affaire à la police ou bien, lorsqu'il n'y a aucune preuve de l'existence d'une infraction pénale, appeler l'auteur de la discrimination à remédier à la situation et jouer un rôle de médiation entre les parties.

18. Comme indiqué plus haut, la Commission n'a encore traité aucune allégation de discrimination raciale ; toutefois, l'ECRI a appris qu'en juillet 2007, la Commission était en train de recueillir des informations sur un cas éventuel de discrimination raciale à l'encontre de deux Africains qui postulaient pour un emploi, affaire qui avait aussi été couverte par les médias. Les autorités maltaises ont souligné que les personnes qui considèrent avoir été victimes de discrimination sur la base de leur race ou de leur origine ethnique sont généralement réticentes à porter leur affaire devant les institutions publiques. L'ECRI considère à cet égard que le renforcement de l'indépendance de la Commission pourrait accroître l'efficacité du travail de la Commission et avoir des incidences positives sur la confiance que lui accordent les victimes de la discrimination. Les autorités ont également souligné que l'ordonnance sur l'égalité de traitement des individus n'est en vigueur que depuis quelques mois et que le public en général, y compris les victimes potentielles de discrimination raciale, n'est peut-être pas encore pleinement informé de l'existence de cette législation et de la possibilité de saisir la Commission pour faire valoir ses droits. Sur ce point, l'ECRI note que la nouvelle législation et les voies de recours qu'elle prévoit n'ont bénéficié de pratiquement aucune publicité de la part des autorités maltaises lors de l'adoption du texte et de son entrée en vigueur. L'ECRI se félicite par conséquent du lancement par la Commission d'une campagne publique d'information sur les possibilités offertes par la nouvelle législation dans le cadre d'une campagne plus générale de sensibilisation à la discrimination, y compris la discrimination raciale, à Malte.

[13] Recommandation de politique générale n°7 de l'ECRI, paragraphe 7 (et paragraphe 26 de l'Exposé des motifs).

[14] Recommandation de politique générale n°7 de l'ECRI, paragraphe 8 (et paragraphe 27 de l'Exposé des motifsf).

[15] Voir ci-dessus, Dispositions en matière de droit civil et administratif.

Recommandations :

19. L'ECRI recommande aux autorités maltaises de surveiller de près l'application de l'ordonnance sur l'égalité de traitement entre les individus et de prendre rapidement des mesures au cas où des insuffisances seraient détectées.

20. L'ECRI exhorte les autorités maltaises à prendre des mesures pour informer le grand public des dispositions en vigueur pour lutter contre la discrimination raciale et des moyens de recours existants pour obtenir réparation. Elle leur recommande vivement d'engager des efforts particuliers pour faire connaître aux victimes potentielles de la discrimination raciale les possibilités offertes par la législation.

21. L'ECRI recommande aux autorités maltaises d'envisager de renforcer l'indépendance de la Commission nationale pour la promotion de l'égalité. A cet égard, elle attire leur attention sur les orientations données dans sa Recommandation de politique générale n° 2 (Organes spécialisés dans la lutte contre le racisme, la xénophobie, l'antisémitisme et l'intolérance au niveau national) sur les moyens de garantir cette indépendance.[16]

- Bureau de l'Ombudsman

22. Depuis le second rapport de l'ECRI, le bureau de l'Ombudsman a poursuivi son travail dans les domaines intéressant l'ECRI, notamment à propos des conditions de rétention et du traitement des migrants en situation irrégulière retenus dans un certain nombre de centres de rétention en 2002 et dans un hôpital en 2004. L'Ombudsman a déclaré que 85% de l'ensemble de ses recommandations ont été prises en compte par les autorités publiques.

Recommandations :

23. L'ECRI recommande aux autorités maltaises de veiller à ce que les recommandations et conclusions de l'Ombudsman dans les domaines d'intérêt de l'ECRI soient suivies par les organes de l'Etat et les autres administrations publiques.

Education et sensibilisation

24. Dans son second rapport, l'ECRI a recommandé aux autorités maltaises de développer l'enseignement scolaire sur les religions, cultures et sociétés différentes. Les autorités maltaises ont indiqué que cet enseignement est intégré dans le programme des différentes matières. L'ECRI note qu'une organisation non-gouvernementale, le Service jésuite des réfugiés, a mis en place un programme visant à sensibiliser les élèves aux questions concernant les réfugiés et à promouvoir l'appréciation de la diversité culturelle à l'aide d'activités hors-programme organisées d'abord dans les établissements secondaires puis, depuis 2006, également dans les écoles primaires. L'ECRI note avec satisfaction que ce programme a été approuvé par le ministère de l'Education, de la Jeunesse et de l'Emploi qui a appelé instamment tous les établissements scolaires à organiser de telles activités.

[16] Recommandation de politique générale n°2 de l'ECRI, Principe 5.

25. L'ECRI note que les droits de l'homme ne sont pas enseignés comme une matière distincte dans les établissements scolaires maltais mais uniquement dans le cadre d'autres matières, notamment celle intitulée « Epanouissement individuel et social » (*Personal and Social Development*, PSD). Les autorités maltaises ont indiqué que des mesures avaient été prises pour former les enseignants aux droits de l'homme, en coopération avec le secteur non-gouvernemental. Amnesty International, par exemple, organise des cours de formation continue à l'intention des enseignants de PSD. L'ECRI note également que cette organisation gère un programme d'éducation des enfants aux droits de l'homme.

26. Dans son second rapport, l'ECRI a aussi recommandé l'adoption de mesures pour sensibiliser le public maltais au racisme et à la discrimination raciale. Depuis, le secteur non-gouvernemental a pris un certain nombre d'initiatives, souvent financées par le biais de programmes de l'UE et dirigées vers des composantes spécifiques de la société civile comme les jeunes. Comme indiqué ci-dessus à la fin de l'année 2007, la Commission nationale pour la promotion de l'égalité[17] a également lancé une campagne de sensibilisation contre la discrimination en raison de plusieurs motifs, y compris la discrimination raciale.

Recommandations :

27. L'ECRI recommande aux autorités maltaises d'intensifier leurs efforts pour apporter aux élèves un enseignement de nature à mettre en valeur la diversité et à promouvoir la compréhension des autres cultures et des personnes d'origine différente, notamment en relation avec l'immigration et les réfugiés. Elle attire leur attention sur sa Recommandation de politique générale n° 10 à propos de la lutte contre le racisme et la discrimination raciale dans et à travers l'éducation scolaire qui fournit des orientations sur les moyens de dispenser ce type d'éducation. Elle encourage aussi vivement les autorités maltaises à soutenir et à mettre à profit au maximum l'expertise acquise par le secteur non-gouvernemental dans ces domaines.

28. L'ECRI recommande aux autorités maltaises de renforcer leurs efforts en matière d'éducation aux droits de l'homme. Elle encourage vivement les autorités maltaises à poursuivre et intensifier leur coopération avec le secteur non-gouvernemental tant au niveau de la formation des enseignants qu'à celui de l'éducation des enfants. A long terme, cependant, elle est d'avis que les autorités maltaises devraient envisager de faire des droits de l'homme une matière obligatoire à la fois dans le primaire et le secondaire.

29. L'ECRI recommande vivement aux autorités maltaises de lancer une grande campagne de sensibilisation au racisme et à la discrimination raciale en cherchant à toucher le plus large éventail possible de secteurs de la société civile.

Accueil et statut des non-ressortissants

30. Dans son second rapport, l'ECRI a longuement traité de la situation des migrants en situation irrégulière et en particulier de leur accueil et des dispositions en place pour leur permettre de déposer une demande d'asile. Depuis, des changements importants sont intervenus à Malte dans ces domaines. Le nombre de personnes arrivant sur les côtes de Malte par bateau en tentant de traverser

[17] Voir ci-dessus, Organes spécialisés et autres institutions.

la Méditerranée entre la Libye et l'Italie a très fortement augmenté. Les autorités maltaises estiment qu'environ 9.000 personnes (ce qui correspond à peu près à 2,1% de la population de Malte) sont entrées dans le pays depuis le dernier rapport de l'ECRI. Pendant la seule année 2007, près de 2.000 personnes sont arrivées à Malte, la plupart en provenance d'Érythrée, de Somalie et d'Egypte mais aussi du Maroc et des pays d'Afrique de l'Est.

31. Les autorités maltaises ont mis en place des politiques et des pratiques pour répondre aux enjeux posés par cette nouvelle situation. Cependant, elles ont déclaré de façon répétée que la situation géographique de Malte, à mi-chemin entre la Libye et l'Union européenne, ainsi que ses ressources limitées et sa forte densité démographique font que le pays se trouve soumis à des contraintes disproportionnées auxquelles il n'est pas en mesure de faire face. Les autorités maltaises soulignent par conséquent qu'elles font tout ce qui est en leur pouvoir pour garantir la protection des droits fondamentaux des migrants en situation irrégulière mais qu'à leur avis, seule une aide significative de l'Union européenne, à la fois sous forme de soutien financier et de partage plus équitable des responsabilités en matière d'accueil, permettra de répondre adéquatement aux enjeux posés par les mouvements migratoires en cours dans la région.

32. Dans la présente section, l'ECRI examine certaines des politiques et pratiques mises en place à Malte pour répondre à ces enjeux. D'autres politiques et pratiques en la matière seront abordées dans la partie II.[18] L'ECRI est consciente des graves contraintes auxquelles les autorités maltaises se sont trouvées soumises depuis le second rapport concernant leurs efforts pour faire face à la nouvelle situation. L'ECRI souhaite également souligner ici l'importance cruciale qu'elle attache aux efforts concertés de la communauté internationale et, en particulier, de l'Union européenne pour répondre aux enjeux liés aux mouvements migratoires dans la région. Dans le même temps, l'ECRI souligne que la protection des droits de l'homme et de la dignité des migrants, y compris leur droit à être protégés du racisme et de la discrimination, ne doit se relâcher en aucun cas.

- ***Rétention des migrants en situation irrégulière***

33. Les autorités maltaises appliquent une politique de rétention de tous les migrants en situation irrégulière ; toutefois, les personnes faisant partie des catégories vulnérables sont libérées et logées dans des centres ouverts[19]. A la date de rédaction de ce rapport, environ 1.400 personnes étaient retenues dans les quatre centres de rétention du pays. Les migrants en situation irrégulière sont actuellement retenus pendant une période maximale de douze mois (s'ils ont déposé une demande d'asile mais n'ont pas encore reçu la décision finale à ce sujet) ou dix-huit mois (s'ils n'ont pas déposé de demande d'asile ou si leur demande a été rejetée en dernière instance). Cependant, avant l'adoption des politiques gouvernementales instaurant ces durées maximales, ils étaient retenus pendant des périodes plus longues.

34. La question de la rétention systématique en tant que telle, et aussi la pertinence de cette politique pour assurer le respect des droits de l'homme et promouvoir un climat moins favorable au développement du racisme et de la xénophobie, seront abordées dans la partie II de ce rapport. L'ECRI examine ici d'un même point de

[18] Voir : Criminalisation des immigrés sous l'effet de la politique de mise en rétention.

[19] Voir plus loin dans cette section.

vue certains aspects spécifiques de la politique de rétention systématique appliquée par les autorités maltaises.

35. Depuis le second report de l'ECRI, les conditions matérielles dans les centres de rétention maltais ont reçu une forte attention au niveau national et international. L'existence de conditions de rétention bien inférieures aux normes minimales, notamment en matière d'hygiène, d'entretien des locaux, de surpeuplement, de protection de l'intimité, d'alimentation et de soins de santé, a été mise en évidence dans de nombreux centres. L'ECRI note que, depuis son dernier rapport, des progrès ont été réalisés dans plusieurs domaines, en particulier récemment dans le domaine de l'alimentation et de l'accès aux soins de santé : des médecins privés se rendent maintenant par exemple dans certains centres de rétention cinq jours par semaine. Toutefois, d'une manière générale, les conditions de rétention sont toujours décrites comme très en-dessous des normes minimales.

36. L'ECRI est particulièrement préoccupée par l'absence totale d'activités organisées et, en particulier, de possibilités de formation et d'apprentissage pour les personnes retenues. Cette situation semble avoir des effets négatifs sur le bien-être mental de ces personnes. L'ECRI note qu'elle constitue aussi une véritable perte en matière d'opportunités d'intégration. Les autorités maltaises ont souligné de façon répétée que Malte n'est pas la destination finale des migrants et que, par conséquent, l'adoption de mesures d'intégration de ces personnes n'a pas jusqu'ici été considérée comme une priorité. L'ECRI note cependant que, dans la pratique, la plupart des personnes retenues sont en fin de compte libérées et qu'un nombre considérable d'entre elles obtiennent le statut humanitaire ou celui de réfugié. Il lui semble aussi que, tant que la politique de rétention sera maintenue pendant des périodes aussi longues que celles appliquées actuellement, la fourniture aux personnes retenues de possibilités d'apprentissage, en particulier linguistique, de formation professionnelle ou de connaissances générales sur le fonctionnement de la société devrait être considérée comme un minimum. A cet égard, elle note que l'Organisation pour l'intégration et le bien-être des demandeurs d'asile (OIWA)[20] a récemment commencé à mettre en œuvre dans les centres de rétention un projet co-financé par l'UE, en partenariat avec des organisations spécialisées dans les domaines de l'éducation, de l'orientation culturelle, du bilan et de la formation professionnels, ainsi que dans la recherche et le développement.

37. Comme indiqué plus haut, les personnes appartenant aux catégories vulnérables comme les familles avec enfants mineurs, les mineurs non accompagnés, les femmes enceintes, les mères qui allaitent, les personnes handicapées et les personnes âgées ne sont pas placées en rétention. Néanmoins, il a été rapporté que le processus d'identification et de libération des personnes faisant partie de certaines de ces catégories (en particulier celles dont la vulnérabilité n'est pas immédiatement apparente comme les mineurs non accompagnés ou les personnes atteintes de troubles physiques ou mentaux graves) peut prendre plusieurs semaines ou plusieurs mois. Les autorités maltaises ont indiqué qu'elles sont conscientes de la nécessité d'améliorations supplémentaires dans ce domaine et qu'elles ont soumis une demande au Fonds européen pour les réfugiés pour financer un projet à cette fin.

[20] Voir ci-dessus, Centres ouverts et mesures visant à promouvoir l'intégration.

38. Des inquiétudes ont été exprimées de façon récurrente quant aux restrictions imposées à l'accès des médias et, dans une moindre mesure, des organisations de la société civile aux centres de rétention. On a souligné que cette absence de transparence limite les possibilités d'améliorer les conditions dans les centres. L'ECRI est d'avis que cela restreint également la possibilité pour le public de se familiariser avec l'expérience des migrants et d'adopter ainsi une attitude moins hostile à leur égard. Les autorités maltaises soulignent que les centres de rétention appliquent une politique de la porte ouverte à l'égard des organisations non-gouvernementales. L'ECRI note qu'un certain nombre de ces organisations comme le Service jésuite des réfugiés, la « Emigrants' Commission », la Croix Rouge et le « Peace Laboratory », visitent régulièrement les centres de rétention et assurent aux personnes retenues des services très utiles. Elle note aussi cependant que d'autres organisations actives dans le domaine de la protection des droits des migrants, comme Médecins du Monde, se sont vues refuser l'autorisation d'assurer des services dans les centres de rétention. Dans le cas des médias, les visites peuvent être autorisées par le gouvernement dans certains cas exceptionnels et l'ECRI note qu'une visite a été organisée en mars 2006. Les autorités maltaises ont souligné que cette politique a pour but de protéger les réfugiés potentiels et leur famille ou leurs amis vivant encore à l'étranger et d'éviter les reportages à sensation. L'ECRI, tout en partageant le point de vue selon lequel la protection des réfugiés et de leur famille doit constituer une préoccupation majeure, est d'avis qu'il est possible de répondre à cette préoccupation sans porter atteinte à la transparence des politiques et des pratiques appliquées par les pouvoirs publics dans les centres de rétention.

39. Dans son second rapport, l'ECRI a recommandé aux autorités maltaises de veiller à ce que toutes les personnes travaillant dans les centres de rétention soient pleinement formées aux droits de l'homme et aux relations avec des personnes d'origine différente. Depuis, le Service de rétention (au sein duquel policiers et militaires sont placés sous une direction conjointe chargée des centres de rétention) a été créé en 2005. L'ECRI note que les autorités maltaises se sont engagées à remplacer le personnel policier et militaire par un personnel civil et que ce processus a commencé. A la date de rédaction de ce rapport, le Service de rétention comprenait 97 soldats, 25 policiers et 99 civils. Les autorités maltaises ont aussi indiqué que toutes les personnes travaillant dans les centres de rétention reçoivent une formation aux droits de l'homme. Néanmoins, l'ECRI a reçu des informations concordantes indiquant que l'accent reste placé de façon disproportionnée sur la sécurité et le contrôle, ce qui est particulièrement inadapté lorsqu'il s'agit de personnes qui ne sont pas des criminels. Il semble en outre que le personnel du Service de rétention ne respecte pas toujours les droits et la dignité des personnes retenues comme le montrent un certain nombre de rapports faisant état, par exemple, de cas d'utilisation par ce personnel de termes injurieux à caractère raciste n'ayant pas été traités ou n'ayant pas fait l'objet de sanctions adéquates.

40. La rétention n'est pas soumise à un examen judiciaire automatique. Les autorités maltaises soulignent que conformément à l'article 25 (A) 10 de la loi sur l'immigration, les personnes retenues peuvent saisir la Commission d'appel de l'immigration et demander l'examen de leur maintien en rétention. L'ECRI note cependant que la Commission est uniquement habilitée à statuer sur le *caractère raisonnable* de la rétention. Les organisations de la société civile considèrent que le moyen de recours prévu à l'article 25 (A) 10 de la loi sur l'immigration ne satisfait pas aux critères de l'article 5(4) de la CEDH qui exige l'examen judiciaire

de la *légalité* de la rétention.[21] Sur ce point, l'ECRI note qu'en juin 2006, la première chambre du Tribunal civil a décidé d'exercer ses pouvoirs en application de l'article 36 de la constitution de Malte (Protection contre l'arrestation et la rétention arbitraires) et de l'article 5 de la CEDH (Droit à la liberté et à la sûreté) et d'examiner la rétention d'un requérant, en arguant du fait que celui-ci ne disposait d'aucun moyen de recours approprié contre les violations alléguées de ses droits.[22]

Recommandations :

41. L'ECRI exhorte les autorités maltaises à améliorer les conditions matérielles de rétention dans les centres pour migrants en situation irrégulière et à assurer le respect systématique de normes de vie décentes dans tous les centres de ce type.

42. L'ECRI exhorte les autorités maltaises à fournir aux migrants retenus des possibilités d'apprentissage, en particulier linguistique, ou de formation professionnelle ainsi que des connaissances générales sur le fonctionnement de la société. Ceci est particulièrement important tant que la politique de rétention sera maintenue dans sa durée actuelle.

43. L'ECRI encourage les autorités maltaises dans leurs efforts pour que toutes les personnes appartenant aux catégories vulnérables, y compris les mineurs non accompagnés ou les personnes atteintes de troubles physiques ou mentaux graves, soient rapidement identifiées et libérées.

44. L'ECRI recommande vivement aux autorités maltaises de faciliter l'accès des médias et des organisations de la société civile aux centres de rétention.

45. L'ECRI encourage les autorités maltaises à poursuivre la mise en œuvre de leur projet de remplacement de l'ensemble du personnel du Service de rétention appartenant à la police ou à l'armée par un personnel civil. Elle leur recommande vivement d'intensifier leurs efforts pour former le personnel du Service de rétention aux droits de l'homme et, en particulier, à la non-discrimination, en lui apprenant à interagir avec tact avec des personnes d'origine différente. Elle les exhorte à veiller à assurer une réponse rapide et adéquate dans les cas où le Service de rétention traiterait les personnes retenues d'une façon contraire au respect de leurs droits et de leur dignité.

46. L'ECRI recommande aux autorités maltaises de veiller à ce que les personnes retenues dans un centre de rétention disposent de moyens de recours pour faire examiner la légalité de leur rétention, qui soient conformes à l'article 5(4) de la CEDH.

- Demandeurs d'asile

47. Le nombre de demandes d'asile a fortement augmenté depuis le second rapport de l'ECRI en relation avec l'augmentation du nombre de migrants en situation irrégulière. De janvier 2002 à mai 2007, le bureau du Commissaire aux réfugiés (l'organe national chargé de décider en première instance des suites à donner

[21] L'article 5(4) de la CEDH dispose: *« Toute personne privée de sa liberté par arrestation ou détention a le droit d'introduire un recours devant un tribunal, afin qu'il statue à bref délai sur la légalité de sa détention et ordonne sa libération si la détention est illégale »*.

[22] Tribunal civil (juridiction constitutionnelle), 20 juin 2007, requête n° 27/07JRM, *Tafarra Besabe BERHE vs. Police Commissioner as Principal Immigration Officer and Minister of Justice and Home Affairs*.

aux demandes d'asile) a traité 4.303 demandes d'asile portant sur 4.817 personnes. Environ 4% des demandeurs ont obtenu le statut de réfugié et le statut humanitaire a été accordé à près de 45% d'entre eux. Ces chiffres, bien qu'indiquant qu'environ la moitié des demandeurs d'asile a obtenu une forme de protection internationale, révèleraient aussi une tendance à accorder le statut humanitaire à des demandeurs qui, dans certains cas, rempliraient peut-être les critères requis pour obtenir le statut de réfugié. A ce sujet, les autorités maltaises ont souligné toutefois que chaque demande est pleinement examinée et de façon circonstanciée quant au fond. Elles ont également souligné que des formations continues sont suivies par tout le personnel du bureau du Commissaire aux réfugiés. L'ECRI note aussi que les personnes ayant obtenu le statut humanitaire sont autorisées à travailler et peuvent accéder à l'éducation et aux services médicaux. Cependant, ces droits sont accordés au titre de politiques gouvernementales et ne sont pas explicitement énoncés dans un texte de loi.

48. Dans son second rapport, l'ECRI a exprimé l'espoir que le bureau du Commissaire aux réfugiés parviendrait à améliorer la situation des demandeurs d'asile en réduisant le temps qu'ils passent en rétention à attendre l'examen de leur demande. L'ECRI note avec satisfaction que, depuis, le personnel du bureau a été fortement élargi et cette évolution devrait se poursuivre, notamment avec la nomination d'un Commissaire-adjoint aux réfugiés. Néanmoins, l'ECRI croit comprendre qu'à la date de rédaction de ce rapport, le délai de convocation d'un demandeur d'asile pour entretien au bureau du Commissaire aux réfugiés reste long, parfois de plusieurs mois. Cependant, les autorités maltaises ont également rapporté que, par exemple, des personnes arrivées en octobre 2007 ont été reçues pour un entretien et ont obtenu une décision avant décembre 2007.

49. Dans son second rapport, l'ECRI a souligné la nécessité de faciliter l'accès des demandeurs d'asile à l'aide juridique. Les demandeurs d'asile n'ont pas actuellement accès à l'aide juridique gratuite lors de la procédure en première instance devant le bureau du Commissaire aux réfugiés, bien qu'ils puissent être représentés par un avocat à leurs propres frais. Actuellement, le Service jésuite des réfugiés apporte, dans le cadre de projets financés par l'UE, une aide juridique gratuite aux demandeurs d'asile, y compris dans certains cas au niveau de la procédure devant le bureau du Commissaire aux réfugiés. Ces projets, cependant, ne parviennent à couvrir qu'une partie de la demande. Les demandeurs d'asile peuvent avoir accès à l'aide juridique gratuite de l'Etat uniquement lors de la procédure d'appel devant la Commission d'appel des réfugiés.

50. Dans son second rapport, l'ECRI a recommandé de mieux informer les migrants en situation irrégulière de leurs droits et, en particulier, leur droit à demander l'asile. Elle a aussi souligné la nécessité de faciliter l'accès aux services d'interprétation. L'ECRI note avec satisfaction qu'à leur arrivée, les immigrés en situation irrégulière reçoivent une brochure, disponible en trois langues, de la part des fonctionnaires de l'immigration. Le bureau du Commissaire aux réfugiés remet également plusieurs documents, y compris un questionnaire préliminaire disponible en plusieurs langues à remplir par la personne en question pour indiquer son intention ou non de demander l'asile. L'ECRI note également qu'une brochure d'information conçue par le Service jésuite des réfugiés est distribuée aux migrants retenus dans les centres de rétention. Elle croit comprendre que cette brochure est disponible en anglais, français et arabe et devrait être traduite dans d'autres langues si les fonds disponibles le permettent. Les progrès sont moins évidents en ce qui concerne l'accès des demandeurs d'asile à des

services professionnels d'interprétation et de traduction, ce qui peut avoir un impact négatif sur la possibilité de présenter pleinement leur cas.

Recommandations :

51. L'ECRI encourage les autorités maltaises dans leurs efforts pour veiller à ce que toutes les personnes pouvant prétendre au statut de réfugié obtiennent effectivement ce statut. A cette fin, elle leur recommande en particulier d'intensifier leurs efforts en matière de formation des agents du bureau du Commissaire aux réfugiés chargés de l'examen des dossiers.

52. L'ECRI recommande aux autorités maltaises d'expliciter dans la législation les droits découlant de l'obtention du statut humanitaire.

53. L'ECRI recommande aux autorités maltaises de prendre des mesures pour accélérer l'examen des demandes d'asile. A cette fin, elle leur recommande notamment de veiller à ce que le bureau du Commissaire aux réfugiés dispose à tout moment d'un personnel suffisamment nombreux pour traiter les dossiers en attente.

54. L'ECRI recommande aux autorités maltaises de permettre aux demandeurs d'asile d'avoir accès à l'aide juridique gratuite dès le début de la procédure de demande d'asile.

55. L'ECRI encourage les autorités maltaises à poursuivre leurs efforts visant à s'assurer que les migrants retenus sont informés de leurs droits et, en particulier, du droit à demander l'asile dans une langue qu'ils comprennent.

56. L'ECRI invite les autorités maltaises à prendre des mesures pour faciliter l'accès des demandeurs d'asile à des services professionnels d'interprétation et de traduction.

- Personnes secourues en mer

57. Du fait de sa situation géographique et de l'étendue de sa zone de recherche et de sauvetage – ou *zone de responsabilité SAR* (*Search And Rescue*) – qui couvre environ 250.000 km², Malte a réalisé fréquemment des opérations de sauvetage qui ont permis de sauver la vie à de nombreuses personnes qui tentaient de traverser la Méditerranée pour atteindre l'Europe. Récemment, toutefois, se sont produits des incidents dans lesquels le rôle joué par Malte lors du sauvetage de migrants en situation irrégulière dont la vie était en danger a attiré beaucoup d'attention et a suscité de vives critiques tant au niveau national qu'international. Tel est le cas, en particulier, d'un incident survenu fin mai 2007 qui concernait vingt-sept migrants africains ayant fait naufrage à l'extérieur de la zone SAR de Malte, dans les eaux sous juridiction libyenne.

58. Les autorités maltaises ont réitéré leur engagement à assurer des opérations de sauvetage à l'intérieur de leur zone de responsabilité SAR. Elles ont aussi déclaré n'avoir jamais manqué à leur obligation de venir en aide aux personnes ayant fait naufrage en mer ; pour autant, on ne peut exiger d'elles qu'elles assument la responsabilité des opérations de sauvetage en dehors de la zone SAR du pays. Elles ont en outre souligné plusieurs fois la nécessité absolue d'un partage des responsabilités entre les pays de l'UE à l'égard de telles opérations de sauvetage. Comme indiqué plus haut, l'ECRI est bien consciente des difficultés importantes auxquelles Malte est confrontées concernant les personnes cherchant à franchir la Méditerranée pour atteindre l'Europe. Elle

réitère qu'il est à son avis crucial que l'UE fasse des efforts pour soutenir Malte et trouve une solution appropriée à ce problème dans un esprit de solidarité. Dans le même temps, l'ECRI se doit de rappeler qu'aucune de ces considérations ne saurait prendre le pas sur l'obligation pour un Etat de protéger la vie humaine.

Recommandations :

59. L'ECRI appelle les autorités maltaises à continuer à protéger le droit à la vie des migrants en mer et à le faire dans toutes les circonstances où elles sont en mesure de faire en sorte que ce droit n'est pas mis en danger.

- Centres ouverts et mesures visant à promouvoir l'intégration

60. A leur sortie de rétention, les réfugiés, les demandeurs d'asile et les immigrés sont logés dans des centres ouverts gérés par les pouvoirs publics (ministère de la Famille et de la Solidarité sociale) ou par les organisations de la société civile (y compris la « Emigrants' Commission »). A la date de rédaction de ce rapport, ces centres accueillaient environ 2.000 personnes. Les conditions d'accueil dans les centres ouverts qui reçoivent les catégories vulnérables de migrants[23] sont décrites en général comme étant satisfaisantes. Cependant, dans les autres centres ouverts, les conditions sont variables. L'ECRI regrette qu'au moment de la rédaction de ce rapport, plusieurs centaines de personnes soient logées dans des tentes, dans des conditions totalement inadéquates, au centre ouvert de Hal Far qui est géré par l'Etat et se trouve directement en face du centre de rétention de Hal Far. Bien que les autorités maltaises aient informé l'ECRI qu'elles s'efforcent d'améliorer les conditions d'accueil dans ce centre, il semble que dans l'immédiat les personnes qui y vivent continueront à être logées dans des tentes. Les conditions d'accueil dans le centre ouvert de Marsa sont apparemment bien meilleures.

61. Dans son second rapport, l'ECRI a encouragé les autorités maltaises à aider les demandeurs d'asile et les réfugiés à trouver un logement et à leur apporter un soutien financier si nécessaire. L'ECRI note qu'outre le logement et l'alimentation, les résidents des centres ouverts reçoivent une allocation quotidienne (environ 4,60 € par adulte et 2,30 € par enfant). Elle note aussi que certains anciens résidents des centres ouverts ont trouvé un logement dans le secteur locatif privé, bien que de tels cas soient apparemment encore très rares[24]. Néanmoins, une fois qu'ils quittent le centre d'accueil, les anciens résidents ne peuvent y revenir et perdent leur droit à l'allocation. Certaines organisations de la société civile sont d'avis que ce système privilégie anormalement le maintien des immigrés à l'intérieur des centres et les empêche en général de parvenir peu à peu à l'autosuffisance, retardant ainsi leur intégration dans la communauté.

62. Dans son second rapport, l'ECRI a noté que Malte se considère comme un pays de transit pour les immigrés. Les autorités maltaises ont indiqué de façon répétée que cela est toujours le cas dans la mesure où les migrants en situation irrégulière ne considèrent pas Malte comme leur destination finale. Cependant, comme il a déjà été mentionné plus haut[25], l'ECRI note qu'en pratique la description de Malte comme étant un simple pays de transit ne reflète qu'en partie la situation réelle puisqu'un certain nombre de personnes peuvent finir par

[23] Voir ci-dessus, Accueil et statut des non-ressortissants : Rétention des migrants en situation irrégulière.

[24] Voir ci-dessous, Accès aux services.

[25] Voir : Accueil et statut des non-ressortissants - Rétention des migrants en situation irrégulière.

résider pendant un temps assez long dans le pays. L'ECRI considère que les autorités maltaises doivent réfléchir sérieusement à l'adoption de mesures pour favoriser l'intégration de ces personnes, qui incluent les réfugiés et les personnes ayant obtenu le statut humanitaire, dans la société maltaise. Bien que le gouvernement ait fourni gratuitement des soins, l'accès à l'éducation et aux prestations sociales depuis plusieurs années maintenant, les autorités maltaises sont peu impliquées et n'ont pas assumé de responsabilité générale pour les questions d'intégration dans la société des réfugiés et des personnes ayant un statut humanitaire. Jusqu'à présent, des initiatives isolées ont été prises dans ce sens essentiellement par des organisations de la société civile ou des professionnels. L'ECRI espère par conséquent que la création en février 2007 de l'Organisation pour l'intégration et le bien-être des demandeurs d'asile (OIWAS) marquera un pas dans la bonne direction. Dépendant du ministère de la Famille et de la Solidarité sociale, l'OIWA est maintenant chargée d'assurer l'accès des demandeurs d'asile au logement, à l'aide financière, aux services et à la formation.

Recommandations :

63. L'ECRI encourage les autorités maltaises à poursuivre leurs efforts pour fournir un logement aux réfugiés et aux demandeurs d'asile. Elle les exhorte à faire en sorte que les conditions matérielles d'accueil dans tous les centres ouverts soient conformes aux normes en matière de conditions de vie décentes.

64. L'ECRI encourage les autorités maltaises à examiner les moyens possibles pour adapter le système combiné de logement dans les centres ouverts et de soutien financier afin de favoriser le développement progressif de l'autosuffisance des résidents et leur intégration rapide dans la société. L'accès au logement sur le marché locatif devrait en particulier être encouragé.

65. L'ECRI recommande vivement aux autorités maltaises d'assumer la responsabilité des questions d'intégration des immigrés, des réfugiés et des personnes ayant obtenu le statut humanitaire à Malte. Elle leur recommande aussi, ce faisant, de soutenir et de mettre à profit l'expertise acquise par le secteur non-gouvernemental dans ces domaines.

Accès aux services

66. Dans son second rapport, l'ECRI a noté que la discrimination à l'égard des personnes appartenant à un groupe ethnique minoritaire à l'entrée des bars et des discothèques était fréquente à Malte et recommandé aux autorités maltaises de prendre des mesures pour remédier à ce problème. Depuis, on continue à faire état de cas de discrimination raciale dans l'accès à ce type d'établissements. Cependant, on note une fois encore que la plupart des incidents de cette nature ne font pas l'objet d'une déclaration formelle et, en règle générale, seuls ceux qui dégénèrent en violence parviennent à l'attention des autorités maltaises. Néanmoins, par rapport à la situation décrite dans le second rapport, le fait qu'ait été adoptée une législation (ordonnance sur l'égalité de traitement des individus)[26] couvrant clairement cette forme de discrimination constitue un progrès. Il semble cependant que les personnes impliquées dans la gestion et la sécurité de ces établissements soient encore très peu informées des dispositions juridiques en vigueur et de la nécessité de les respecter. L'ECRI

[26] Voir ci-dessus, Dispositions en matière de droit civil et administratif.

note à cet égard par exemple que le programme de formation des agents de sécurité privés ne couvre pas les questions de discrimination raciale.

67. L'ECRI a aussi été informée de l'existence de quelques incidents inquiétants de discrimination raciale dans l'accès aux transports publics tels que le fait pour des chauffeurs de bus de ne pas stopper aux arrêts où attendent des personnes d'origine ethnique minoritaire ou de ne pas laisser ces personnes monter dans le bus en prétextant à tort que celui-ci est plein. L'ECRI note ici une nouvelle fois que les dispositions juridiques en vigueur permettent maintenant de répondre et remédier à de telles situations.

68. Dans son second rapport, l'ECRI a indiqué avoir été informée de plusieurs cas de discrimination dans le secteur locatif privé. Comme indiqué plus haut[27], les migrants qui sortent de rétention sont en général logés dans un centre ouvert et il leur est très difficile d'accéder au marché du logement. Ces difficultés sont liées en partie à leur situation en matière d'emploi car ils occupent souvent un emploi précaire et/ou non déclaré.[28] Toutefois, il semble que la discrimination raciale joue aussi un rôle. Dans son second rapport, l'ECRI a recommandé aux autorités maltaises de mettre en place des moyens de recours juridiques en pareils cas. L'ECRI note avec satisfaction que l'ordonnance sur l'égalité de traitement des individus s'applique aussi à la discrimination raciale sur le marché privé du logement.

Recommandations :

69. L'ECRI recommande vivement aux autorités maltaises de prendre des mesures pour combattre la discrimination raciale dans l'accès aux lieux de divertissement, aux transports publics et au marché privé du logement. Ces mesures devraient comprendre la condamnation publique par les autorités maltaises de la discrimination, en indiquant clairement que ces formes de discrimination sont illégales et ne seront pas tolérées. Elles devraient en outre veiller à l'application effective de l'ordonnance sur l'égalité de traitement des individus, comme recommandé ci-dessus.[29]

70. L'ECRI recommande vivement aux autorités maltaises de prendre rapidement des mesures pour sensibiliser aux questions de discrimination raciale les personnes travaillant dans le secteur du divertissement, notamment les propriétaires et responsables d'établissements et le personnel de sécurité. Elle leur recommande aussi de prendre des mesures de sensibilisation similaires pour les personnes qui travaillent dans le secteur des transports publics et, dans la mesure du possible, des propriétaires privés.

Emploi

71. Dans son second rapport, l'ECRI a noté qu'un nombre important de non-ressortissants étaient employés illégalement et exposés en conséquence à des abus de la part des employeurs. L'ECRI a recommandé aux autorités maltaises de prendre des mesures pour s'attaquer à ce problème, notamment en sanctionnant de façon adéquate les employeurs qui ont recours au travail clandestin.

[27] Voir : Accueil et statut des non-ressortissants : Centres ouverts et mesures visant à promouvoir l'intégration .

[28] Voir ci-dessous, Emploi.

[29] Dispositions en matière de droit civil et administratif.

72. Depuis lors, un nombre croissant de non-ressortissants ont trouvé un emploi à Malte. L'ECRI note que les réfugiés et les personnes ayant obtenu le statut humanitaire reçoivent un permis de travail qui, depuis 2005, leur est délivré directement et n'est donc pas lié à un emploi spécifique. Elle note aussi que les demandeurs d'asile sont autorisés à commencer à travailler douze mois après le dépôt de leur dossier. Les autorités maltaises, en outre, ont indiqué qu'elles envisagent d'accorder un permis de travail de courte durée aux personnes qui sortent de rétention sans avoir obtenu le statut de réfugié ou le statut humanitaire.

73. L'ECRI note cependant qu'un grand nombre des détenteurs de permis de travail sont toujours employés illégalement, ce qui les rend plus vulnérables aux abus de la part des employeurs. Ces travailleurs semblent par exemple être non seulement beaucoup moins rémunérés que les autres mais, dans certains cas, les employeurs refusent tout simplement de les payer. L'ECRI note que les syndicats ont parfois dû intervenir pour que ces travailleurs soient payés. Il est aussi fait état d'heures de travail plus longues, de conditions de travail inadéquates et d'exposition à certains risques en matière de sécurité. D'autre part, bien que l'ECRI croie comprendre qu'aucune plainte n'ait encore été formellement déposée à cet égard, il y a eu des allégations de discrimination raciale au niveau du recrutement.[30]

74. Les autorités maltaises ont indiqué que l'inspection du travail enquête sur le travail clandestin sur la base des réclamations qu'elle reçoit et aussi de son propre chef et que ces enquêtes ont donné des résultats. Par exemple, le nombre constaté d'emplois clandestins de non-ressortissants est passé de 104 en 2000 à 148 en 2005 et représente près de 10% du nombre total d'emplois illégaux identifiés. Les autorités maltaises ont souligné qu'il n'existe pas de syndicat dans le secteur de la construction, qui emploie de nombreux immigrés. Néanmoins, les organisations de la société civile affirment que les autorités maltaises ne sont pas suffisamment déterminées à assurer l'emploi légal des immigrés. Elles indiquent aussi que, dans les rares cas où des immigrés acceptent de prendre le risque de dénoncer des abus, aucune action n'est engagée ou bien les amendes imposées aux employeurs sont extrêmement faibles. Les autorités maltaises ont informé l'ECRI qu'elles envisagent de relever le montant des amendes prévues en pareils cas.

75. L'ECRI note que, depuis son second rapport, des initiatives de formation ont été lancées à l'intention des réfugiés, des personnes ayant obtenu le statut humanitaire et des demandeurs d'asile. Une initiative récente menée dans le cadre du projet EQUAL financé par l'UE et coordonnée par le ministère de la Famille et de la Solidarité sociale vise à promouvoir l'intégration sur le marché du travail d'un certain nombre de demandeurs d'asile par le biais de la formation mais aussi de l'évaluation, de la validation et de la certification des compétences. Ce programme a généralement été bien accueilli, bien que l'on ait souligné que, pour en accroître l'efficacité, il serait souhaitable qu'il prenne mieux en compte la situation particulière des stagiaires.

[30] Voir ci-dessus, Dispositions en matière de droit civil et administratif.

Recommandations :

76. L'ECRI recommande vivement aux autorités maltaises de prendre des mesures pour combattre l'exploitation des réfugiés, des personnes ayant obtenu le statut humanitaire et des immigrés en s'attaquant à leur sur-représentation parmi les travailleurs clandestins. Elle les exhorte à s'assurer que l'inspection du travail intensifie ses efforts pour identifier les situations de ce type et y remédier. Elle leur recommande vivement de veiller à ce que le montant des amendes imposées aux employeurs qui recourent au travail clandestin d'immigrés soit véritablement dissuasif.

77. L'ECRI recommande aux autorités maltaises d'étendre le soutien aux initiatives de formation en direction des réfugiés, des personnes ayant obtenu le statut humanitaire et des demandeurs d'asile. Elle leur recommande d'évaluer ces initiatives conjointement avec les stagiaires et les institutions de formation concernées afin d'en accroître l'efficacité.

Groupes vulnérables

- ***Migrants en situation irrégulière, demandeurs d'asile, personnes ayant obtenu le statut humanitaire et réfugiés***

78. La situation de ces groupes de personnes, en majorité des Noirs africains, et la question de leur vulnérabilité à l'égard du racisme et de la xénophobie sont abordées dans d'autres parties du présent rapport.

- ***Musulmans***

79. Dans son second rapport, l'ECRI a noté que, même si aucune manifestation d'intolérance grave à l'égard des musulmans n'avait été rapportée, les membres de cette communauté étaient l'objet de préjugés et d'une certaine méfiance à Malte. Depuis, les manifestations d'islamophobie conserveraient un caractère non-violent, s'exprimant essentiellement sous forme de gestes et d'injures verbales et ne seraient pas, d'ordinaire, signalées aux autorités. Cependant, du fait des événements du 11 septembre 2001 et du contexte international lié à la lutte contre le terrorisme, les généralisations établissant un lien entre les musulmans et le terrorisme, l'intégrisme ou la violence sont devenues beaucoup plus fréquentes. L'ECRI note en outre que les Arabes ou les personnes perçues comme telles font partie des groupes les plus touchés par la discrimination à l'entrée des lieux de divertissement.[31]

Recommandations :

80. L'ECRI recommande aux autorités maltaises de surveiller de près les éventuelles manifestations d'islamophobie et d'intervenir lorsque de telles manifestations se produisent.

[31] Voir ci-dessus, Accès aux services.

Antisémitisme

81. Depuis le second rapport de l'ECRI, quelques manifestations d'antisémitisme ont été rapportées à Malte. Ces manifestations, qui seraient liées au développement des organisations extrémistes de droite, ont inclus la publication d'un article, qui selon les informations dont dispose l'ECRI aurait donné lieu à l'ouverture d'une procédure pénale en 2006, et la publication de matériel sur Internet.

Recommandations :

82. L'ECRI recommande aux autorités maltaises de surveiller de près les manifestations éventuelles d'antisémitisme et d'intervenir lorsque de telles manifestations se produisent. Elle attire leur attention sur sa Recommandation de politique générale n° 9 sur la lutte contre l'antisémitisme qui contient des orientations pratiques sur les mesures à adopter par les gouvernements à cette fin.

Médias

83. Comme l'ECRI l'a déjà noté dans son second rapport, certains journaux et programmes de télévision traitent du racisme et de la discrimination à Malte de manière responsable et équilibrée. Cependant, les images négatives des personnes appartenant aux groupes minoritaires et les nouvelles à sensation, en particulier à propos des migrants en situation irrégulière, seraient encore très fréquentes dans la presse écrite et les médias radiodiffusés maltais. L'emploi de termes inappropriés pour désigner les immigrés ou certaines catégories d'immigrés semble continuer et la nationalité de certaines personnes est encore parfois mentionnée sans raison, par exemple dans les informations sur la délinquance. Il n'a pas encore été réalisé d'étude pour obtenir une vue d'ensemble de la manière dont la presse écrite et les médias radiodiffusés traitent les questions de l'immigration et contribuent à éclairer les raisons des flux migratoires et les aspects de ces phénomènes qui touchent aux droits de l'homme.

84. S'agissant de la presse écrite, l'ECRI est préoccupée par le contenu de nombreuses lettres de lecteurs publiées dans les journaux. Ces lettres sont souvent contraires au développement d'un climat favorable au respect de la dignité de chaque individu et ne favorisent pas une présentation équilibrée de la situation des groupes minoritaires, d'autant plus que leur contenu est rarement contesté. Selon les organisations de la société civile, dans certains cas, les limites de l'incitation à la haine raciale ont été franchies.

85. L'ECRI est aussi particulièrement préoccupée par les exemples qui lui ont été rapportés d'incitation à la haine raciale sur Internet, notamment sur des sites liés à des mouvements ou organisations d'extrême-droite dont aucun n'a encore été poursuivi.[32]

[32] Voir ci-dessous, Impact sur l'opinion publique du débat politique et public à propos de l'immigration – Extrémisme de droite.

86. En ce qui concerne les médias radiodiffusés, l'ECRI se félicite de l'adoption par les autorités maltaises en avril 2007 de normes sur les standards et pratiques à appliquer par les radiodiffuseurs afin de respecter et de promouvoir l'égalité raciale.[33] L'Autorité de l'audiovisuel est chargée de surveiller l'application des ces normes. L'ECRI note qu'une amende a été imposée à une chaîne de télévision en juillet 2007 pour manquement à ces normes lors de la diffusion des opinions de représentants d'une organisation d'extrême-droite. Avant l'entrée en vigueur de ces normes, l'Autorité de l'audiovisuel avait imposé une amende à la même chaîne de télévision en 2004 pour diffusion des propos du chef d'un autre groupe d'extrême-droite au titre de l'article 13(2)(a) de la loi sur les radiodiffuseurs[34] lu conjointement avec l'article 82 A du code pénal.[35] L'ECRI croit comprendre cependant qu'il a été fait appel de cette décision et que la procédure n'est pas terminée.

87. L'ECRI se félicite du fait que les normes adoptées exigent des propriétaires de médias qu'ils sensibilisent les chefs de rédaction et les journalistes aux standards et pratiques attendus d'eux. Ces normes doivent aussi être incluses systématiquement dans la formation des journalistes. L'ECRI note aussi que l'Autorité de l'audiovisuel prévoit de former les radiodiffuseurs aux questions qui concernent l'égalité des sexes en coopération avec la Commission nationale pour la promotion de l'égalité et considère qu'il existe maintenant une réelle possibilité d'étendre cette formation à l'égalité raciale puisque le mandat de la Commission a été élargi en ce sens.[36]

Recommandations :

88. L'ECRI invite les autorités maltaises à faire comprendre aux médias, sans empiéter sur leur indépendance éditoriale, la nécessité de veiller à ce que le matériel qu'ils publient ne favorise pas le développement d'un climat d'hostilité et de rejet à l'égard des membres de groupes minoritaires vulnérables au racisme quels qu'ils soient et, en particulier, les migrants en situation irrégulière, les demandeurs d'asile et les réfugiés. Elle leur recommande d'engager un débat avec les médias et les membres des organisations pertinentes de la société civile sur les meilleurs moyens à employer à cette fin.

89. L'ECRI recommande aux autorités maltaises de s'assurer que l'incitation à la haine raciale est dûment poursuivie dans tous les cas, y compris lorsque celle-ci a lieu par le biais d'Internet, comme indiqué ci-dessus.[37]

90. L'ECRI recommande aux autorités maltaises de soutenir des enquêtes sur la manière dont les médias traitent les questions de l'immigration et contribuent à promouvoir l'acceptation de la différence au sein de la société maltaise.

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[33] « Requirements as to standards and practice on the promotion of racial equality », décret gouvernemental 413/2007, législation subsidiaire 350.26.

[34] L'article 13 (2) de la loi sur les radiodiffuseurs dispose: « l'Autorité est tenue de s'assurer, dans la mesure du possible, que les programmes radiodiffusés (…) satisfont aux critères suivants : a) les programmes ne contiennent aucun élément de nature à offenser le sentiment religieux, le bon goût ou la décence, à encourager le crime ou à inciter à la délinquance, à conduire au désordre ou à offenser les sentiments du public ».

[35] Voir ci-dessus, Dispositions en matière de droit pénal.

[36] Voir ci-dessus, Organes spécialisés et autres institutions.

[37] Voir ci-dessus, Dispositions en matière de droit pénal.

Conduite des représentants de la loi

91. Dans son second rapport, l'ECRI a noté que des rapports avaient fait état d'allégations de mauvais traitements infligés à des non-ressortissants par des policiers mais que les enquêtes officielles avaient établi qu'elles n'étaient pas fondées. Elle a recommandé de confier les enquêtes portant sur des allégations de fautes commises par la police à un organe distinct, indépendant des services de police et des autorités de poursuite.

92. L'ECRI note que depuis, les allégations de mauvais traitements de non-ressortissants, y compris des personnes placées dans les centres de rétention, par des policiers et des militaires ont continué. Des rapports font aussi état d'injures à caractère raciste à l'égard de ces personnes. Les autorités maltaises ont informé l'ECRI que, depuis son dernier rapport, des allégations de ce type ont donné lieu à une enquête dans trois cas : une affaire dans laquelle un policier était accusé d'avoir recouru à la violence à l'égard de migrants placés dans le centre de rétention de Ta' Kandja en décembre 2003 et qui a abouti à une suspension de trois jours du policier en question ; deux affaires séparées en 2005 portant respectivement sur des allégations de propos racistes et des allégations de propos insultants à l'encontre de migrants en situation irrégulière et qui ont abouti à l'acquittement des policiers mis en cause.

93. L'incident le plus grave depuis le second rapport de l'ECRI, cependant, a eu lieu dans le centre de rétention de la caserne de Hal Safi en janvier 2005, lorsque plusieurs migrants retenus dans le centre se sont mis à protester contre la durée de leur rétention. Après avoir tenté en vain de convaincre les protestataires de rentrer dans leurs chambres, un groupe de soldats a donné la charge et un grand nombre des protestataires ont été roués de coups. On rapporte également que certains soldats en encourageaient d'autres avec des invectives racistes. Vingt-six personnes retenues et deux soldats ont été blessés. Le Premier ministre a immédiatement chargé un juge à la retraite de diligenter une enquête sur ces incidents. L'ECRI note que le rapport de la commission d'enquête rendu public en décembre 2005 a conclu à un usage excessif de la force de la part des soldats mais en indiquant que la violence n'avait pas une motivation raciste. Les autorités maltaises ont déclaré que des sanctions disciplinaires avaient été prises à l'encontre des policiers concernés. L'ECRI considère que la publicité des mesures disciplinaires ou autres prises à la suite d'incidents de cette nature est un moyen essentiel et convaincant de signifier le rejet par les autorités de tels comportements et leur détermination à les éliminer. Toutefois, l'ECRI n'a pas l'impression que cela ait été fait dans ce cas, dans la mesure où les organisations de la société civile n'avaient pas connaissance des suites données à l'enquête.

94. Dans son second rapport, l'ECRI a recommandé aux autorités maltaises d'intensifier les initiatives de formation des policiers aux droits de l'homme et, en particulier, à la non-discrimination. Elle note avec satisfaction que, pendant les dernières années, une formation spécifique couvrant le rôle de la police dans la lutte contre le racisme et la xénophobie et l'impact de ces derniers pour le travail des policiers a été dispensée dans le cadre de la formation initiale des nouvelles recrues puis ultérieurement dans le cadre de la formation continue.

Recommandations :

95. L'ECRI exhorte les autorités maltaises à s'assurer que toute allégation de comportement abusif à motivation raciste de la part de membres des forces de police ou de l'armée donne lieu à une enquête effective et que les résultats de cette enquête bénéficient de publicité. A cette fin, elle attire leur attention sur sa Recommandation de politique générale n° 11 sur la lutte contre le racisme et la discrimination raciale dans les activités de la police, qui fournit des orientations détaillées à ce sujet.[38]

96. L'ECRI recommande aux autorités maltaises de poursuivre et d'intensifier leurs efforts pour apporter aux membres des forces de police et de l'armée une formation spécifique sur l'obligation de respecter le droit d'être protégé du racisme et de la discrimination raciale. Une telle formation devrait être dispensée à toutes les nouvelles recrues et à tous les policiers dans le cadre de la formation continue.

Suivi de la situation

97. Dans son second rapport, l'ECRI a recommandé aux autorités maltaises de mettre en place des systèmes visant à surveiller les manifestations de racisme et à mettre en lumière des formes éventuelles de discrimination raciale existant à Malte. Depuis lors, il semble qu'aucun progrès n'ait été fait en vue de l'application de cette recommandation. Les organisations de la société civile s'accordent pour dire que l'absence de données officielles en ces domaines est l'un des principaux obstacles qu'elles rencontrent dans leur travail quotidien de lutte contre le racisme et la discrimination raciale.

98. Dans sa Recommandation de politique générale n° 1, l'ECRI recommande aux autorités publiques de recueillir des données pour les aider à évaluer la situation des groupes particulièrement exposés au racisme et élaborer des mesures correctives. Elle constate qu'actuellement, il n'y a pas à Malte de collecte de données ventilées sur la base de l'origine ethnique ou nationale, de la religion, de la nationalité et de la langue qui permettrait de surveiller la situation des groupes minoritaires dans un certain nombre de domaines tels que l'éducation, l'emploi, le logement et la santé.

99. Comme elle l'explique dans sa Recommandation de politique générale n° 4, l'ECRI juge également important de recueillir des données sur les manifestations de racisme et de discrimination raciale en s'appuyant sur la perception des victimes potentielles de ces phénomènes. A ce jour, aucune enquête de ce genre n'a encore été réalisée, mais l'ECRI a été informée que la Commission nationale pour la promotion de l'égalité est prête à promouvoir ce type d'étude.

100. La question de la surveillance des incidents et infractions à caractère raciste a déjà été abordée dans d'autres parties du présent rapport, en relation avec le rôle de la police.[39] L'ECRI souligne ici que, pour obtenir un tableau détaillé de la réponse de l'ensemble du système de justice pénale aux incidents et infractions à caractère raciste, des données sur la mise en œuvre des dispositions

[38] Voir Recommandation de politique générale n°11 de l'ECRI, paragraphe 9 (et paragraphes 54-57 de l'Exposé des motifs).

[39] Voir ci-dessus, Dispositions en matière de droit pénal.

pertinentes par les autorités de poursuite et les tribunaux devraient être disponibles et facilement accessibles.

Recommandations :

101. L'ECRI recommande vivement aux autorités maltaises d'améliorer leurs systèmes pour surveiller le racisme et mettre en lumière des formes éventuelles de discrimination raciale à Malte.

102. L'ECRI recommande aux autorités maltaises d'examiner la possibilité de recueillir des données pertinentes ventilées sur la base de l'origine ethnique ou nationale, de la religion, de la nationalité et de la langue. La collecte de ces informations devrait s'effectuer dans le respect absolu des principes de confidentialité, de consentement éclairé et d'auto-identification volontaire par l'individu de son appartenance à un groupe déterminé. Elle devrait aussi être conçue en coopération étroite avec tous les acteurs pertinents, en particulier les organisations de la société civile, et prendre en considération la dimension de l'égalité entre les femmes et les hommes, particulièrement d'un point de vue de la discrimination double ou multiple.

103. L'ECRI recommande aux autorités maltaises de recueillir des données sur les manifestations de racisme et de discrimination raciale en s'appuyant sur la perception des victimes potentielles de ces phénomènes. Elle attire à cette fin l'attention des autorités maltaises sur sa Recommandation de politique générale n° 4 concernant les enquêtes nationales sur l'expérience et la perception de la discrimination et du racisme par les victimes potentielles, qui fournit des orientations détaillées sur les modalités de mise en œuvre de ce type d'enquêtes.

104. L'ECRI recommande aux autorités maltaises de veiller à ce que des données sur la réponse du système de justice pénale aux incidents et infractions à caractère raciste soient disponibles pour ce qui concerne tous les niveaux du système de justice pénale, de la police aux tribunaux en passant par les autorités de poursuite.

II. QUESTIONS SPÉCIFIQUES

Criminalisation des immigrés sous l'effet de la politique de mise en rétention

105. L'ECRI est préoccupée par le fait que les politiques mises en place par les autorités maltaises pour répondre aux enjeux posés par l'immigration clandestine dans le pays renforcent sérieusement la perception des immigrés comme des criminels et augmentent le racisme et la xénophobie dans l'ensemble de la population.

106. L'ECRI est d'avis que la politique de rétention systématique des migrants en situation irrégulière, qui se traduit par la rétention immédiate de toutes ces personnes, quelles que soient les raisons qui les ont conduites à Malte, contribue très fortement à asseoir dans l'esprit du public le lien entre immigrés et criminalité et leur image de danger pour la sécurité. Ce lien et cette image sont renforcés par le traitement que ces personnes reçoivent en rétention qui, malgré certains développements positifs soulignés par l'ECRI dans d'autres parties de ce rapport, présente encore un caractère essentiellement punitif. L'ECRI considère, par exemple, que le fait d'obliger les migrants en situation irrégulière à porter des menottes chaque fois qu'ils sortent d'un centre de rétention pour se rendre à

l'hôpital ne peut que renforcer l'association entre immigrés et criminalité dans l'esprit du public.

107. Dans son second rapport, l'ECRI a souligné que, même lorsqu'elles considèrent leur demande injustifiée, les autorités ne doivent pas pour autant traiter les demandeurs d'asile comme des délinquants et recommandé de faire en sorte que toute mesure adoptée les concernant reflète cette ligne de conduite. Dans ce même rapport, l'ECRI a aussi exprimé l'opinion que le maintien en rétention des demandeurs d'asile devrait être évité le plus possible et que des efforts devraient être faits pour garantir leur liberté de mouvement lorsque cela est possible. L'ECRI regrette que les politiques et les pratiques développées à Malte depuis le second rapport suivent en fait une direction opposée à celle indiquée dans ces recommandations.

108. L'ECRI a abordé certains aspects spécifiques de la politique de rétention dans d'autres parties de ce rapport. Elle y formule des recommandations visant non seulement à assurer le respect des droits des personnes placées en rétention, en améliorant leurs conditions de rétention, mais aussi à combattre la perception faisant un lien entre les immigrés et la criminalité à travers un traitement plus humain de ces personnes. Elle aimerait cependant remettre en cause ici le principe même de la rétention systématique, compte tenu à la fois des implications de cette politique en termes de droits de l'homme et de son impact sur l'opinion publique.

109. L'ECRI a pris note de la position exprimée plusieurs fois par les autorités maltaises selon laquelle il n'existe pas actuellement à Malte d'alternative à la rétention systématique. Plusieurs raisons ont été avancées par les autorités maltaises à cet égard, en particulier la nécessité d'appliquer les procédures d'enregistrement, de contrôle médical et de sécurité, de faciliter le rapatriement des immigrés, de protéger le tissu social et un marché du travail peu capable d'absorber un afflux disproportionné d'immigrés et de dissuader de nouvelles entrées illégales dans le pays. L'ECRI est néanmoins d'avis qu'aucune de ces raisons ne justifie la mise en œuvre d'une politique de rétention systématique comme celle qui est aujourd'hui appliquée à Malte. Elle considère qu'il existe des alternatives qui permettraient à Malte de répondre aux enjeux posés par les mouvements migratoires actuels d'une manière plus conforme au respect des droits des immigrés et bénéfique pour Malte. Elle note par exemple que les autorités maltaises ont déjà mis en place des alternatives à la rétention pour les personnes qui se trouvent dans des situations vulnérables et pour les demandeurs d'asile remis en liberté au bout de douze mois, alternatives qui semblent donner des résultats satisfaisants dans beaucoup de cas.

110. L'ECRI est convaincue que seule une politique fondée sur une véritable reconnaissance de l'égalité de tous les êtres humains et le respect fondamental de la dignité humaine peut espérer enrayer de façon durable la progression du racisme et de la xénophobie dans l'ensemble de la population.

Recommandations :

111. L'ECRI réitère sa recommandation de ne pas traiter les demandeurs d'asile comme des criminels et de faire en sorte que toute mesure prise à l'égard de ces personnes reflète une telle approche. Elle appelle les autorités maltaises à engager un processus d'identification et de mise en œuvre d'alternatives à la rétention et à ne recourir à celle-ci que lorsque cela est rendu strictement nécessaire par des circonstances particulières dans un cas individuel.

Violence à caractère raciste

112. L'ECRI est préoccupée par l'augmentation des actes de violence à caractère raciste à Malte depuis son dernier rapport. Ceux-ci incluent des actes de violence dirigés contre les immigrés eux-mêmes et contre les individus ou organisations impliqués dans la lutte contre le racisme et pour la protection des droits des immigrés ou ayant dénoncé et critiqué publiquement l'existence d'attitudes racistes au sein de la société maltaise.

113. Seuls quelques cas de violence dirigée contre des immigrés sont parvenus à l'attention des autorités maltaises. Des incidents de violence à caractère raciste ont parfois été couverts par les médias. Cependant, les organisations de la société civile soulignent qu'en général, les immigrés ayant été victimes de comportements violents ne signalent pas ces actes aux autorités parce qu'ils pensent que cela n'aboutira à rien ou craignent les répercussions négatives qui pourraient en résulter pour eux.[40]

114. En revanche, on dispose d'informations bien documentées sur les agressions contre des individus ou des organisations anti-racistes ou ayant dénoncé publiquement le racisme. L'ECRI est gravement préoccupée par une série d'attaques de cette nature en 2005 et 2006 avec notamment l'incendie criminel de biens appartenant aux organisations jésuites anti-racistes en novembre 2005 et mars 2006 et des biens d'individus travaillant pour ces organisations en avril 2006. Les maisons de plusieurs personnes qui s'étaient exprimées publiquement contre le racisme ont aussi été la cible d'incendies criminels : en mars 2006, la maison d'un écrivain qui venait de publier un livre de poésie comprenant des textes sur le racisme et l'immigration ; en mai 2006, la maison du rédacteur en chef d'un hebdomadaire qui avait publié peu avant un éditorial sur le racisme et l'immigration ; et en mai 2006 également, la maison d'un journaliste qui avait pris position contre les mouvements maltais d'extrême-droite et écrit sur le racisme et l'immigration. Dans ce dernier incident, les incendiaires ont mis le feu à cinq pneus remplis d'essence devant une porte située à l'arrière de la maison et répandu du verre brisé et de l'essence devant la maison, apparemment pour empêcher la famille du journaliste d'échapper à l'incendie et retarder l'intervention des secours.

115. L'ECRI note avec satisfaction que ces actes ont été unanimement condamnés à Malte et que les autorités maltaises à l'échelon le plus haut ont condamné ces agressions et exprimé leur solidarité avec les victimes. Des enquêtes ont été immédiatement ouvertes dans chaque cas. Elle note néanmoins qu'aucune inculpation n'a encore eu lieu en relation avec ces actes.

Recommandations :

116. L'ECRI exhorte les autorités maltaises à traduire en justice sans retard tous les auteurs d'actes de violence à caractère raciste et à faire en sorte qu'ils soient punis de manière adéquate.

117. L'ECRI réitère à cet égard les recommandations formulées plus haut[41] sur la nécessité de renforcer l'application des dispositions pénales réprimant les infractions à caractère raciste.

[40] Voir ci-dessus, Dispositions en matière de droit pénal.

[41] Voir ci-dessus, Dispositions en matière de droit pénal.

Impact sur l'opinion publique du débat politique et public à propos de l'immigration

118. L'ECRI est préoccupée par les tendances négatives dans le ton du débat public, et en particulier politique, sur les questions de l'immigration à Malte. L'ECRI est particulièrement préoccupée par les retombées de ce débat sur le climat de l'opinion dans les domaines couverts par le mandat de l'ECRI.

119. La question de l'immigration clandestine et des politiques à adopter pour y remédier est apparemment l'une de celles sur lesquelles les partis politiques maltais défendent des points de vue à peu près identiques. L'ensemble des forces politiques usent aussi semble-t-il d'arguments et d'un discours similaire lorsqu'elles traitent de cette question. Les organisations de la société civile impliquées dans la lutte contre le racisme et la xénophobie et la défense des droits des immigrés soulignent que, de ce fait, le grand public a rarement l'occasion d'entendre des points de vue différents ou d'autres types de discours sur l'immigration mettant en avant les droits de l'homme et la nécessité de s'opposer au développement du racisme et de la xénophobie. En fait, les prises de position publiques contre le racisme et la xénophobie ou en faveur du respect des droits de l'homme des immigrés suscitent parfois l'hostilité et ont même suscité la violence dans certains cas[42].

120. Le discours politique sur l'immigration clandestine a tendance à présenter les immigrés comme un danger dans différents domaines, comme le montre l'emploi d'expressions comme celle de « tsunami humain ». Par exemple, les immigrés sont décrits comme une menace pour l'économie en ce qu'ils viennent « prendre les emplois » des Maltais, ne versent pas de cotisations sociales puisqu'ils sont employés illégalement ou bénéficient d'un traitement préférentiel et d'une générosité excessive qu'ils ne méritent pas. Ils sont aussi souvent présentés comme un danger pour le maintien de la culture, des traditions et de l'identité maltaises et pour la santé avec la diffusion des maladies infectieuses. Outre ce type de discours général, l'ECRI note que, dans certains cas, des hommes politiques ont proposé l'adoption de mesures spécifiques manifestement discriminatoires, comme par exemple récemment la mise en place de bus séparés pour les migrants en situation irrégulière sur certaines lignes.

121. Ce type de discours a évidemment un impact très fort sur l'opinion publique et affecte l'attitude de la population à l'égard des immigrés. Sur ce point, l'ECRI note qu'un certain nombre d'enquêtes menées dans l'ensemble de la population font apparaître un niveau élevé d'hostilité à l'égard des groupes minoritaires et en particulier des Arabes et des Africains, bien que la validité de certaines de ces enquêtes ait été remise en cause. L'ECRI note cependant que l'emploi d'insultes à connotation raciste semble malheureusement assez fréquent dans la rue à Malte, ainsi que les manifestations de racisme ou de discrimination dans des domaines tels que les transports publics et l'accès aux lieux de divertissement.

- Extrémisme de droite

122. L'ECRI est également préoccupée par le fait que, depuis son dernier rapport, l'immigration irrégulière a servi de plate-forme au développement de partis et mouvements politiques d'extrême-droite à Malte. Il existe aujourd'hui un parti politique et deux mouvement dont les représentants ont exprimé des opinions violemment hostiles aux immigrés et ont recouru à une propagande de type

[42] Voir ci-dessus, Violence à caractère raciste.

raciste et xénophobe. L'ECRI note que les seules fois où les dispositions incriminant l'incitation à la haine raciale ont été appliquées, cela a été pour poursuivre des représentants de ces organisations en relation avec des propos tenus dans des réunions publiques ou dans les médias radiodiffusés[43]. Néanmoins, certains cas d'incitation à la haine raciale commise par des sympathisants de ces groupes par le bais d'Internet n'ont jusqu'ici pas été réprimés[44].

123. On souligne parfois que ces partis ne disposent pas d'une influence politique réelle. On rapporte en outre que le soutien apporté à certains de ces groupes a baissé à la suite de la série d'agressions dirigées en 2005 et 2006 contre des individus et des organisations engagées dans la lutte contre le racisme et pour la protection des droits des immigrés.[45] L'ECRI considère néanmoins que les autorités maltaises se doivent d'accorder la plus grande attention à ces développements.

Recommandations :

124. L'ECRI recommande aux autorités maltaises de montrer l'exemple et d'introduire dans le débat public sur l'immigration et le droit d'asile la dimension droits de l'homme de ces questions. Elle leur recommande en particulier de mieux informer le public des situations auxquelles les immigrés et les demandeurs d'asile cherchent à échapper.

125. L'ECRI souligne que les hommes politiques doivent résister à la tentation d'aborder les questions relatives à l'immigration et au droit d'asile sous un jour négatif. Les partis politiques devraient aussi prendre fermement position contre le racisme, la discrimination raciale et la xénophobie sous toutes leurs formes. L'ECRI recommande la tenue d'un débat annuel au parlement sur la question du racisme et de l'intolérance auxquels doivent faire face les personnes appartenant aux groupes minoritaires à Malte.

126. L'ECRI recommande aux autorités maltaises d'adopter des dispositions juridiques visant de manière spécifique l'emploi d'un discours raciste ou xénophobe par les représentants de partis politiques, y compris par exemple des dispositions juridiques autorisant la suppression du financement public des partis politiques dont les membres sont impliqués dans des actes de nature raciste ou discriminatoire. A cet égard, elle attire l'attention des autorités sur les dispositions pertinentes de sa Recommandation de politique générale n° 7 concernant la législation nationale pour lutter contre le racisme et la discrimination raciale.[46]

[43] Voir ci-dessus, Dispositions en matière de droit pénal et Médias.

[44] Voir ci-dessus, Dispositions en matière de droit pénal et Médias.

[45] Voir ci-dessus, Violence à caractère raciste.

[46] Recommandation de politique générale n°7 de l'ECRI, paragraphe 16 (et paragraphe 36 de l'Exposé des motifs).

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Cette bibliographie fournit la liste des principales sources d'informations publiques ayant été utilisées durant l'examen de la situation à Malte : elle ne doit pas être considérée comme une liste exhaustive de toutes les sources d'informations mises à la disposition de l'ECRI durant la préparation du rapport.

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ANNEXE

L'annexe qui suit ne fait pas partie de l'analyse et des propositions de l'ECRI concernant la situation à Malte.

L'ECRI rappelle que l'analyse figurant dans son troisième rapport sur Malte est datée du 14 décembre 2007, et que tout développement intervenu ultérieurement n'y est pas pris en compte.

Conformément à la procédure pays-par-pays de l'ECRI, le projet de rapport de l'ECRI sur Malte a fait l'objet d'un dialogue confidentiel avec les autorités de Malte. Un certain nombre de leurs remarques ont été prises en compte par l'ECRI, qui les a intégrées à son rapport.

Cependant, à l'issue de ce dialogue, les autorités de Malte ont demandé à ce que leurs points de vues suivants soient reproduits en annexe du rapport de l'ECRI.

Reply by the Government of Malta to

ECRI's Third Report

CONTENTS

Strasbourg, 4 March 2008

Executive summary

ECRI's third report shows disregard of Malta's vital national interests and disrespect towards its democratic institutions, including parliament, the judiciary and the free press.

The report falls short of accepted standards of impartiality and is unconvincing in its claim that it "was drawn up by ECRI". For example, it criticises the detention centres at length and in detail, even though the ECRI mission did not take up an offer to visit them.

A close and attentive reading indicates that ECRI did not independently verify second-hand information provided by a few militant NGOs.

The report makes more than 30 references to anonymous sources ("it has been reported that …") and unnamed NGOs ("civil society organisations have stressed …"). It contains numerous errors and allegations which are unsupported by evidence. These are identified in the present reply.

In contrast, this reply includes (Section III) the testimonies of the Commander of the detention centres, the Refugee Commissioner, the Executive Director of the National Equality Commission, a psychotherapist and the Chairman of the Refugee Appeals Board. They correct and contradict many statements made in ECRI's report.

Parts of the report are confrontational, patronizing or moralizing in tone. Most of the recommendations (which cover 52 paragraphs) do not fit Malta's particular circumstances.

The Maltese Government regrets that such a blatantly biased and superficial report cannot serve any constructive purpose.

I. General comments

Disregard of Malta's vital national interests

1. In its report, ECRI fails to focus on the root cause of the crisis Malta is facing as a result of illegal immigration, namely, the illegal departure from Libya of boats carrying migrants from North and sub-Saharan Africa intending to enter Italy illegally and settle in mainland Europe. **Their desired destination is often the former colonial power of the country of origin.** Some end up in Malta after being rescued by Maltese military personnel, when in distress or feigning distress, or as a result of some accident. Sometimes traffickers in human beings travel in a large vessel and at night offload small boats with about 27 persons each. More than 90 per cent of arrivals are young men. Annual arrivals have equalled 0.5 per cent of Malta's population. The country's density of 1250 inhabitants per square kilometre is the highest in Europe and one of the highest in the world. Unless stopped, the inflow will be unending. Legal constraints inhibit the transfer of illegal immigrants to other countries.

2. Malta has a sovereign right and the government has a duty to protect the country's borders. The vital necessity of border control is not mentioned at all in ECRI's report. Malta has to some degree obtained the European Union's help to patrol its borders, also the EU's southernmost borders. The northbound flow has been somewhat moderated by FRONTEX patrols which have only recently been launched and not yet reached their full potential. Southern European states hope FRONTEX will in time attain its declared purpose of keeping migratory flows within the bounds of the law. Indeed, Malta welcomes the agreement Italy and Libya announced in December 2007, providing for patrols off the Libyan coast, and looks forward to concluding soon a Search and Rescue agreement with Libya. **ECRI's report fails to commend efforts by Malta and the EU to strengthen border controls and stem the problem at its source.** This failure is particularly glaring as the report makes a large number of recommendations, most of them inapplicable in Malta's particular circumstances.

3. International law recognises the right of each state to determine which foreign nationals may enter and remain in its territory, and to return those it refuses to their countries of nationality, but the report fails to consider the option of the illegal immigrants' repatriation. In addition, most of these countries have an ad hoc duty to take back their nationals under agreements with the EU. It is difficult to enforce the corresponding rights when immigrants destroy their documents and their countries refuse to issue new ones to evade their obligations. It is, therefore, deplorable that ECRI **fails to commend the legal option of return and to urge the countries of origin to comply with their international legal duties.** This is particularly serious as many laws are cited by the report to highlight Malta's real or supposed obligations.

4. In addition, the report is lukewarm in supporting Malta's appeal to other countries to share the burden of illegal immigration. In paragraph 31 it describes burden-sharing as the position of the Maltese authorities; in paragraphs 32 and 60 it describes as crucial efforts by other countries to support Malta. But at no point does

it make any recommendations regarding burden-sharing. In addition, **the report does not condemn UNHCR's opposition to Malta's demarches to other EU countries to include refugees from Malta in annual quotas agreed with UNHCR. In view of the above considerations, the Maltese government regrets that ECRI's report shows serious disregard of Malta's vital national interests.**

Disrespect towards Maltese democratic institutions

5. The Maltese people have a strong sense of ownership of their deep-rooted democratic institutions. At the last general elections in March 2008, 93 per cent of voters went to the polls. The two main parties – representing the Government and the Opposition – together obtained 98 per cent of valid votes cast and all the seats in the House of Representatives. The Constitution provides for the separation of powers and guarantees fundamental rights and freedoms. **In view of this, the Maltese government deplores the disrespect that the report shows towards Parliament, including both Government and Opposition; the independence of the judiciary; the police; press freedom** … The only institutions which seem to find favour with the report are NGOs, which in most cases are not identified.

Parliament

6. The report remarks that "irregular immigration and policies to meet the challenges posed by it are … issues on which political parties in Malta hold substantially identical views" (paragraph 121). Political parties agree that this is a national problem which has reached crisis proportions and they realise the need for a national consensus to face up to it. The report conveniently omits to state that Malta's policies on illegal immigration have the overwhelming support of the electorate. Parliament and the Government represent and execute the electorate's will. There is, therefore, no room for the report's patronizing and moralizing tone in paragraphs 107-128 where it tells the Maltese authorities how to govern. The Government takes exception to the sweeping and gratuitous statements made therein and does not think ECRI should advise it to go against the will and interests of the Maltese. It can guarantee that Maltese governments will always safeguard the interests of the people, as expressed in free, fair and democratic elections.

7. The report appropriates the right to recommend what subjects should be debated by Parliament (paragraph 127) and claims to know better than the Maltese authorities what would be "more … beneficial for Malta" (paragraph 111). Referring to equal treatment legislation (paragraph 18), it states: "ECRI notes … that virtually no publicity has been given by the Maltese authorities to such legislation …" This is an unacceptable judgement on the legislative process which took its course as in all other cases. Without citing the official record and apparently only on the basis of press reports, the report criticises a speech made by a Member in Parliament (paragraph 122). The freedom of speech of Members of Parliament is protected by the House of Representatives (Privileges and Powers) Ordinance.

The judiciary

8. The report states: "… civil society organisations have underlined that those working in the criminal justice system, and notably judges and the police, are not always conversant with the provisions in force … nor are they adequately aware of

the need to apply these provisions vigorously" (paragraph 8). This judgement, attributed to anonymous NGOs, is not supported by evidence and in any case it should not be ECRI's role to echo the view about the "need" to apply provisions "vigorously". The recommendation in the second sentence of paragraph 9 is unacceptable because it unjustifiably expresses lack of trust in the judiciary, the police, lawyers and the execution of the law. The recommendation in the Executive Summary in favour of "training and awareness-raising measures for the judges" is similarly baseless.

9. Referring to cases still before the courts, the report remarks: "However, there have been no final convictions at the time of writing" (paragraph 6). The report interferes with the independence of the judiciary by indicating that it favours "convictions". In the same paragraph, it states: "ECRI notes that instances of incitement to racial hatred are not always prosecuted, especially when they are committed on the Internet." This statement is objectionable because the "instances" are neither specified nor cited and, as a result, no reason is given why they should be "prosecuted" according to the law.

Press freedom and freedom of speech

10. The report repeatedly criticises the level of freedom of speech and press freedom recognised by law and enjoyed in Malta. It states: "As concerns the print media, ECRI is concerned at the content of many readers' letters to the editor … According to civil society groups, in some cases, the boundaries of incitement to racial hatred have also been crossed" (paragraph 86). ECRI does not cite any one of the "many" published letters. It hides behind allegations by anonymous "civil society groups" that "in some cases" (obviously not cited) the law has been violated. It recommends a reduction of freedom of expression in the case of "the Internet, letters to the editor published in newspapers, or by politicians" (paragraph 10) without citing instances which could justify being "duly prosecuted" under the law.

11. ECRI also recommends that the outcome of investigations into "allegations" of racially-motivated misconduct by police and army personnel be "given publicity" (paragraph 97). Shifting standards, it then takes the liberty to "encourage the Maltese authorities to impress on the media" (paragraph 90) the need to publish only material compatible with ECRI's own bias and alleges that "inappropriate terms to qualify immigrants or certain categories of immigrants are reportedly also still used" (paragraph 85), without citing any reports or cases. **The Maltese government would like to assure ECRI that it does not have any intention of issuing instructions to the press or introducing press censorship.**

12. Furthermore the report expresses concern "at negative tendencies in the tone of public, and notably political, debate surrounding issues of immigration" (paragraph 120) and refers to "tendencies in political discourse around irregular immigration" (paragraph 122) which do not meet with its satisfaction. The Government wishes to emphasise that public and political debate in Malta will continue to be conducted in full respect of freedom of speech, as defined by the law. In this regard, it is absolutely untrue that "the general public has little exposure to alternative views or different types of public discourse on immigration" (paragraph 121) as anonymous "civil society organisations … have stressed". All NGOs, including those mentioned in the report, benefit from the same level of freedom of speech and make use of it. They also seem to have particularly good access to the press and like-minded international institutions. The general public may not be receptive to their message,

but that is not a good enough reason to stifle and censor the views of others as long as the law is respected. **The Maltese government and parliament have always been, and will continue to be, particularly attentive to maintaining the proper balance between freedom and responsibility as safeguarded by the Constitution.**

Anonymous sources: pervasive bias

13. In Malta NGOs are free and encouraged to contribute to public life through their specialised knowledge, dedication and enthusiasm. In 2007, parliament unanimously passed a law providing for the recognition of NGOs and their access to public funds. But no democratically elected government can abdicate its duties and responsibilities to NGOs, which specialise in a limited area of public life, represent small numbers of people and do not benefit from the same legitimacy and good governance (including transparent elections) as the government. The report reveals a lack of confidence in the ability of the government to govern in the interests of the people and seems to expect it to take orders from NGOs. **No government in Malta will ever abdicate its constitutional responsibilities.**

14. The report makes no mystery of its reliance on some NGOs as sources of information, but there is an all-pervasive and deliberate lack of transparency. In Section II - Detailed Comments (below) we cite eight statements or judgements attributed to unidentified "civil society organisations". This anonymity is hard to explain since the NGOs' and ECRI's credibility would gain if they were named. Indeed, the report does name some of them on rare occasions in terms laced with praise or self-praise: the Jesuit Refugee Service in paragraphs 24, 38, 49 and 51; Amnesty International in paragraph 25; the Emigrants' Commission in paragraphs 38 and 62; and the Red Cross and the Peace Laboratory in paragraph 38.

15. In addition, in the Detailed Comments we cite more than 20 unsubstantiated statements, allegations or judgements, many wrapped in words like 'reports', 'reported' and 'reportedly'. The Government would have been ready to accept any of them, if they were substantiated by precise facts, citations or sources. As they are not, it has to deplore this systematic and deliberate opacity which is unnecessary and unjustified in Malta where criticism (especially of the government) is regular, frequent and an expected part of the democratic process. **Failure to disclose sources would have been understood if limited to a few delicate or confidential cases, but practised on a thorough and systematic scale it seriously undermines ECRI's professionalism and credibility.**

16. In addition if, as seems likely, the anonymous sources are the same unnamed NGOs, the Government has to express its doubts about the report's real authorship. **Indeed, what is the meaning of the assurance given in the Foreword that the "report was drawn up by ECRI" if we do not know which parts are the result of ECRI's own findings and which others are the product of cut-and-paste report writing?**

17. Systematic lack of transparency extends to the bibliography which notes: "This bibliography … should not be considered as an exhaustive list of all sources of information available to ECRI during the preparation of the report". What is ECRI's interest in hiding its sources? The bibliography cites (item 39) the ENAR Shadow Report 2006 – Racism in Malta, October 2007. It fails to mention its author's name, Jean-Pierre Gauci, first described as affiliated to Amnesty International Malta and

then to ENAR on ENAR's own website. The ECRI report fails to specify which parts have been copied from the ENAR report which, in its turn, contains more than 120 references to NGOs, whether unidentified or named as the Jesuit Refugee Service, Amnesty International Malta or some other. **An attentive reader of these reports cannot help noticing that they keep using each other as sources to create a virtual world serving their authors' agenda. ECRI is a willing partner in this game**.

18. In an inadvertent indication of its sources, the report frequently calls for a transfer of authority from the elected government and parliament to "civil society organisations". The following self-serving cases can be cited:

*Paragraph 28***:** "It strongly encourages the Maltese authorities to continue and reinforce its co-operation with the non-governmental sector, as concerns both teacher training and actual provision of education to children".

Paragraph 40: "Civil society organisations consider that the remedy provided for …"

Paragraph 67: "In so doing, it [ECRI] recommends that they [the Maltese authorities] support and make the most of existing expertise in the non-governmental sector in this field"

Paragraph 90: "ECRI recommends that the Maltese authorities engage in a debate with the media and members of other relevant civil society groups …"

Paragraph 104: "Collection of such information should be elaborated in close co-operation with all the relevant actors, including civil society organisations …"

ECRI can rest assured that the Maltese Government will always carry its constitutional responsibilities in accordance with the mandate given by the electorate and in the people's best interests.

19. The report's pervasive bias repeatedly emerges from other omissions and loaded phrases. Malta obviously accepts its "obligation to protect human life" (paragraph 60), but it cannot accept such an obligation worldwide and without any geographical delimitation. This obligation is carefully defined by international treaties and conventions to which Malta and other sovereign states are parties. Furthermore, it is hard to understand the objective meaning of paragraphs 107-108 and the words: "associations" (twice), "image", "perceptions" (twice), "compounded" and "imagery". The Maltese authorities reaffirm that handcuffing illegal immigrants outside detention centres is necessary because many of them escaped or tried to escape while on visits to hospital. They then try to cross over to Sicily in violation of the law.

Major lapses in ECRI's draft report

Detention services

20. The detailed section 'Detention of irregular migrants' (paragraphs 33-46) contains many errors. According to our records, during the meetings on 17 and 18 July 2007 the ECRI mission did not request to visit the detention centres. During the meeting at the Ministry for Justice and Home Affairs on 17 July, an ECRI member asked whether they would be allowed to visit the centres if they made such a

request. The head of the Maltese side replied that that would not be a problem if they submitted an official request in writing. **The ECRI mission did not follow this up and did not request to visit the centres, either verbally or in writing.**

21. It is, therefore, inexcusable that the report should rely on anonymous informers: "have been highlighted" (paragraph 35); "are still reported" (paragraph 35); "is reported" (paragraph 36); "it has been reported to ECRI" (paragraph 37); "ECRI has received consistent reports" (paragraph 39); "is also reported" (paragraph 39); and "reported instances" (paragraph 39). Indeed, how can ECRI affirm that "since its last report progress has been made" (paragraph 35) if it did not visit the detention centres either while preparing its last report or the present one? The report also refers to concern at limitations on access to the centres, adding: "It has been stressed that such lack of transparency limits the opportunities to improve conditions in the centres" (paragraph 38). It is cynical, to say the least, that the ECRI mission did not take up the offer of transparency and visit the centres if only to help "improve conditions" there.

22. ECRI recommends that the Maltese authorities improve access to the centres by the media and civil society organisations (paragraph 44). In his testimony (see Section III – Testimonies, below) the head of the centres names eight NGOs which regularly visit; he reveals that Amnesty International Malta never requested to do so. Furthermore, the report is incorrect in saying that Medecins du Monde were "not authorised to provide services in detention centres" (paragraph 38). Medecins du Monde refused all the alternatives that the centres' authorities offered them for establishing their medical practice. The testimony further shows that many comments in the report do not correspond to the truth, namely, on hygiene, maintenance of facilities and healthcare (paragraph 35); mental well-being (paragraph 36); and training of detention centre personnel and treatment of detainees (paragraph 39).

23. In addition, the last sentence of paragraph 39 ("The treatment of detainees … adequate punishment") and paragraph 94 ("Racist abuse of these persons is also reported to have taken place") are unsubstantiated and contradicted by the document 'Report on the three-day seminar with Detention Officers' on stress management by psychotherapist Dr Charles Cassar (see Section III – Testimonies, below). The report, presented in parliament and available on www.parliament.gov.mt/information/Papers/6453.pdf, states in particular:

"The immigrants are hostile towards the officers and threaten them continuously. They work under constant abuse by them. This abuse is both verbal and physical and the officers are instructed not to react to such provocations … Moreover the detention officers are very concerned about the chance of getting infected by contagious diseases by the immigrants … The detention officers see the necessity of wearing gloves and masks when doing ward rounds … They also feel that the system in which they work is more respectful towards the illegal immigrants than towards them …"

The Depasquale Report

24. ECRI's report (paragraph 95) refers to the incidents at Hal Safi detention centres in January 2005. The only authoritative document on the subject is the **Report of a Board of Inquiry** (97 pages), known as the Depasquale Report after the former judge who carried out the inquiry. ECRI ignores some of its key findings (section 15, pages 65-67):

"… the detainees had been preparing their protest for at least three days…";
"this protest was not spontaneous … it was premeditated and organised in all its details";
"on the day of the protest they decided to go against the centre's regulations with violence (though not considerable violence) … and escaped from the confines laid down for them. Their behaviour was certainly against the regulations and therefore illegal";
"Although the protesters were unarmed … the protest was certainly neither peaceful nor legitimate".

25. It also ignores the following conclusions of the Depasquale Report:

" The Board, having examined in detail the times that were reported, drew the impression that the first cameraman knew about the protest almost as soon as this was starting or perhaps even before …" (page 24);

" journalists did not reply to questions about who had informed them to go to Hal Safi and felt they had to invoke their professional secret … This … contributed to the idea that some outsiders knew very well what was going on … ***When one compares the times, one does not conclude that journalists got to know about the protest only after it had started"*** (page 25);

" in the days after the incidents some NGOs … interviewed many [detainees] who gave their version…; the Board would have liked to have a copy of these interviews … The NGOs told him that they would give him these … but did not because they could not find them" (page 4).

Asylum seekers

26. When the phenomenon started, NGOs tended to speak of refugees and asylum seekers. It became obvious with time that most of the persons concerned are not refugees but economic migrants (see Section III – Testimonies, below, Analysis by the Chairman of the Refugee Appeals Board). Many apply for refugee status, sometimes encouraged and helped by NGOs, in the full knowledge that they do not qualify. The Refugee Commissioner has to face a large number of claims based on false or fabricated information. Systematic abuse has not contributed to the good reputation of the asylum system.

27. Several statements in the report are rebutted by the Maltese authorities. It is untrue that figures "reflect a tendency to grant humanitarian protection to applicants who, in some cases, may qualify for refugee status" (paragraph 47). The report gives no source for the statement, apart from saying "reportedly", and no figures, apart from referring to a "tendency". This leads to its recommendation (paragraph 52) where "ECRI encourages the Maltese authorities in their efforts to ensure that all persons entitled to refugee status actually secure this status" – which implies that some do not, which is untrue. Furthermore "to this end it recommends … that the Maltese authorities intensify their efforts to train the caseworkers …" This implies that some are denied refugee status because caseworkers lack training which is doubly untrue.

28. The report also states: "ECRI understands that at the time of writing it takes still a long time for an asylum seeker to be called to an interview" (paragraph 48). It omits to state that the process is often lengthened because asylum seekers fail to

turn up for appointments. In some countries, but not in Malta, missed appointments lead to the abandonment of the claim.

National Equality Commission

29. The report's section on the National Commission for the Promotion of Equality contains a typical instance of judgement by insinuation. In paragraph 18: "ECRI considers that strengthening the independence of the Commission could enhance the effectiveness of the Commission's work and impact favourably on the trust accorded to it by victims of discrimination." Taking its imagination for reality, it proceeds in paragraph 21 to turn "could" into a recommendation "that the Maltese authorities *consider strengthening* the independence of the National Commission". Indeed, it is so convinced of its advice that the Executive Summary repeats the recommendation of "*strengthening* the independence of the National Commission". In her testimony (see Section III), the Executive Director of the National Commission objects to the implication that the Commission's independence is inadequate and needs strengthening. She also notes that ECRI's statement is unsubstantiated: no evidence is given to support the insinuation that victims of discrimination do not accord it trust.

Unsuitable recommendations

30. An ECRI report is meant to be read by the general public, as well as lawyers. The present report does not claim that ECRI's general policy recommendations have the force of law, but their character is not defined clearly enough for a reader not versed in law. This is a significant omission since the report contains eleven references to six general policy recommendations reflecting ECRI's own bias (paragraphs 11, 12, 14, 16, 21, 27, 84, 97, 101, 105 and 128). **It would have been fairer to the reader if each reference were preceded by a statement clarifying that the recommendation does not have the force of law.**

31. The report's recommendations, spread over 52 paragraphs, call for the following comments.

(i) Some recommendations are based on incorrect or unsubstantiated information.

(ii) Others are divorced from Malta's reality, including its size, geographical location, history, population density and level of economic development.

(iii) Many do not attempt to draw a comparison with practice in other member states of the Council of Europe, which very often falls far short of Maltese practice.

(iv) The recommendations in paragraphs 41, 42, 45, 55, 58, 65, 66, 78, 79, 92, 98, 103, 104 and 105 involve additional expenditure. ECRI does not suggest how their implementation could be financed.

II. Detailed comments

Unsubstantiated statements, allegations and judgements

The following citations contain gratuitous statements or judgements or allegations not substantiated by references to precise facts or sources and try to hide this inadequacy by words or phrases like: 'reports', 'it is reported', 'understands' and so on. The italics have been added to show the objectionable words. The list is not exhaustive.

Paragraph 6: "ECRI *understands* that there have also been some *cases* of incitement to racial hatred … ECRI *notes* that *instances* of incitement to racial hatred are not always prosecuted…"

Paragraph 15: "ECRI notes that this situation is in contrast with *reported instances* of racial discrimination…"

Paragraph 37: "However, it has been *reported* to ECRI …"

Paragraph 38: "It has been *stressed* that…"

Paragraph 39: "ECRI has received *consistent reports* according to which …"
"The treatment of detainees … is also *reported* to not always respect … as illustrated by *reported instances* …"

Paragraph 47: "… they also *reportedly* reflect a tendency …"

Paragraph 62: "conditions … are *reported* to be good … are *reported* to be … better."

Paragraph 68: "… *reports* of racial discrimination …"
"… there is *reported* to be at present very little awareness …"

Paragraph 69: "ECRI has also received some disturbing *reports* …"

Paragraph 70: "… racial discrimination is also *reported* to play a role."

Paragraph 75: "… not only is remuneration *reported* to be considerably lower … Longer working hours … have also been *reported*… there have also been *allegations* of …"

Paragraph 83: "Such manifestations, which are *reported* to be connected …"

Paragraph 85: "negative portrayal … are *reported* to be still widely present in the Maltese print and broadcast media. Inappropriate terms … are *reportedly* also still used …"

Paragraph 94: "… *reports* of ill-treatment of non-citizens have continued …"
"Racist abuse of these persons is also *reported* …

Paragraph 121: "… are *reported* to be … All political forces are also *reported* to use …"

Paragraph 125: "It has been *stressed* … It has also been *reported* …"

Paragraph 7

"ECRI notes that so far there have been no cases of the implementation of these provisions, a situation which is at variance with *reported instances* of racially-motivated offences ... This situation *appears* to reflect, at least in part …"

This is a gratuitous allegation: no information whatsoever is given about the "reported instances". Then a subjective conclusion ("appears to reflect") is drawn from the unproven allegation. The report tries to excuse the absence of evidence by alleging some intimidation for which, again, it provides no evidence. The Recommendation in the first sentence of paragraph 9 is therefore baseless.

Paragraph 81

"… manifestations of Islamophobia are *reported* to have remained …"

Which manifestations? Which reports?

"However, the events of 11 September 2001… resulted in a considerable increase in generalisations and associations"

Not one instance of these "generalisations and associations" is cited and no attempt is made to show that there has been a considerable increase and a causal nexus with the events of 11 September 2001. This is likely to be an extrapolation from other countries.

Paragraph 123

"ECRI notes that a *number* of *attitude surveys* … although the *validity* of some of these surveys has been *questioned*."

Which surveys? Who has questioned what? What is the value of citing an unknown number of unidentified surveys if the validity of an unknown number of them is questionable?

"ECRI notes, however, that racist name-calling in the street is unfortunately *reported* not to be uncommon in Malta… and manifestations … are also *reported*."

No information is given about the reports or the sources.

Statements and judgements attributed to unidentified organisations

Paragraph 8

"More generally, civil society organisations have underlined that those working in the criminal justice system, and notably judges and the police, are not always conversant with the provisions in force …"

This statement is attributed to anonymous organisations and not supported by any evidence.

Paragraph 40

"Civil society organisations consider". Which organisations?

Paragraph 76

"However, civil society organisations have consistently *expressed the view* that there is not enough *dedication* on the part of the Maltese authorities … They also *report* …" Which organisations? What is the meaning of "not enough dedication"?

Paragraph 86

"According to civil society groups…" Which groups?

Paragraph 95

"civil society organisations were unaware of the follow-up …"
Which organisations were aware and which were unaware?

Paragraph 99

"civil society organisations consistently report …" Which organisations?

Paragraph 115

"civil society organisations have stressed …" Which organisations?

Paragraph 121

"… civil society organisations … have stressed …" Which organisations?

III. Testimonies of various Authorities

Comments by Lieutenant Colonel Brian Gatt,
Commander Detention Service

DS/1001/000

Headquarters
Detention Service
The Yellow House
Safi Barracks
Safi

Tel: 21640401 Ext: 382

Ambassador Joseph Licari
Permanent Representative of Malta
Council of Europe

28th February 2008

THIRD REPORT ON MALTA BY THE EUROPEAN COMMISSION AGAINST RACISM AND INTOLERANCE

Please refer to the Draft third report on Malta by the European Commission against Racism and Intolerance and particularly the section on Detention of irregular immigrants (paragraphs 33 – 46).

I took part in the meeting between the Maltese official side and the ECRI mission team on 17 July 2007. The ECRI mission did not request to visit the detention centres during the meeting. They did not make any such request to me, either formally or informally. In fact they did not visit the detention centres at all, neither did the ECRI mission in 2002.

As regards the text of the draft report:

Paragraph 35

Hygiene: at all centres, every month immigrants are given cleaning materials to keep their accommodation clean. Cleaning materials include 8 litres of bleach liquid for the sanitary facilities, and 12 litres of floor disinfectant for every 70 persons. Other items include the necessary buckets, mops and squeezers with which immigrants are expected to clean their accommodation. Unfortunately, the majority of immigrants do not feel that they should contribute towards keeping their accommodation up to the desired hygienic level.

Maintenance of facilities: The Detention Service carries out maintenance at the centres on a daily basis to ensure that essential services are functioning. However, vandalism and lack of interest by immigrants contribute towards the degradation of the physical conditions within the centres. For instance, in all centres most immigrants dispose of their waste in the drainage systems of their sanitary facilities,

instead of in rubbish bins or skips. This causes blockage of the drain systems leading to overflow of waste water in the toilets and showers, thus resulting in the degradation of hygienic levels within the immigrants' accommodation area. Another malpractice is the constant tampering with the electrical installation of the accommodation leading to over-loading of the electricity system, as well as permanent damage to electrical equipment.

Major refurbishment projects are carried out every year. In fact in 2007, two compounds, each capable of accommodating 200 immigrants, were totally refurbished. Sanitary facilities are also refurbished during winter/spring period when the number of immigrants in detention is low.

Healthcare: Provision of healthcare is of paramount importance at the centres. At Safi and Lyster, the larger of the detention centres, healthcare is provided by a medical team of a doctor and a nurse at each centre, five times a week. During weekends and at night immigrants are taken to the nearest health centre or hospital if they complain of an ailment. At Ta' Kandja a doctor visits the centre twice a week but any immigrant who requires medical attention, any time of the day or night, is taken to the nearest health centre or hospital.

Paragraph 36

Mental well-being: There are no reports of immigrants suffering from mental health problems, except those cases that would be expected to be found within a community of 1400 immigrants. In fact, the number of cases of immigrants requiring mental health treatment is well below the national average.

Paragraph 38

Access to detention centres: The Detention Service has adopted an open door policy with respect to NGOs which would like to visit immigrants in detention. This policy has been in place since the establishment of detention centres. Indeed, a number of NGOs visit the centres on a regular basis. These include the Jesuit Refugee Service, the Emigrants Commission, the Red Cross, the Peace Laboratory, SOS Malta, Jehova Witnesses, Evangelists and Baptists. In 2007 Medicins du Monde requested to establish medical practice in the centres but, although alternatives were given where such practice would be most effective, Medecins du Monde refused this offer. They were never refused entry to visit the centres. Amnesty International has never requested to visit the detention centres.

Access by ECRI: It is interesting to note that ECRI has never submitted a request to visit detention centres in Malta.

Paragraph 39

Training of detention centre personnel*:* All personnel of the Detention Service receive training on humanitarian law and the treatment of asylum seekers and immigrants in custody. This training is structured in such a way as to achieve a balance between the requirements for the humane treatment of the immigrants and the security and safety of the personnel responsible for their custody. Experts from humanitarian based NGOs (such as the Jesuit Refugee Service), as well as from government departments usually participate as lecturers.

Treatment of detainees: The Detention Service adopts a policy of zero tolerance towards violence, whether such violence is perpetrated by its own personnel or by the immigrants themselves. Over the past couple of years reports on violence in the centres have been investigated resulting in disciplinary action taken against Detention Service personnel. Furthermore, Detention Service personnel must adhere to a code of conduct which lays down the rights of immigrants in custody and the responsibilities of Detention Service staff in respect of the same immigrants.

More recent, the Board of Visitors for Persons in Detention has been set up to monitor detention centres and to investigate any claims of maltreatment made by immigrants.

(signed)
B GATT
Lieutenant Colonel
Commander Detention Service

29th February, 2008

Considerations made by the Office of the Refugee Commissioner

RE: ECRI Draft third report on Malta, adopted on 14 December 2007

The Office of the Refugee Commissioner is limiting its considerations to remarks made about the same Office and its operation.

Paragraph 47: "they also reportedly reflect a tendency to grant humanitarian protection to applicants who, in some cases, may qualify for refugee status".

The Office of the Refugee Commissioner has already strongly and vehemently rebutted this unsubstantiated allegation and it is appreciated that Refugee Commissioner's position is also included in the draft report. This Office cannot but reaffirm its policy and practice of invariably examining each case in full and deciding according to each case's particular merits.

Paragraph 48: "at the time of writing, it takes still a long time, sometimes many months, for an asylum seeker to be called for an interview with the Office".

The Office of the Refugee Commissioner has already showed with facts that it is also true that many cases are decided in less than three months after the date of arrival in Malta. This is in fact reflected in the ECRI draft report. When cases take longer this is usually due to circumstances which may be beyond the control of this Office or created by the asylum seekers themselves who render themselves unavailable for the interview. It is not the practice in Malta to consider missed appointments as leading to abandonment of the asylum claim but to the eyes of the uninformed person the delay so caused may seem unjustifiable. No efforts are being spared to ensure that all are interviewed in the shortest period of time possible. One last remark is that one must also bear in mind the fact that almost all arrivals of asylum seekers are concentrated in the summer months and this necessarily creates a waiting list.

First recommendation: "ECRI encourages the Maltese authorities in their efforts to ensure that all persons entitled to refugee status actually secure this status. To this end, it recommends in particular that the Maltese authorities intensify their efforts to train the caseworkers of the Office of the Refugee Commissioner".

It is the opinion of this Office that this recommendation is not in synchronization with paragraph 47 of the report. The way it is presented appears to reflect the opinion that actually there are persons who should be recognized as refugees and who are not, and that this is due to the lack of proper training of the caseworkers. This Office notes that this recommendation is based on the 'reportedly reflect' of paragraph 47, and although it is a very serious insinuation it is not substantiated by the 'reporting' body. The Office of the Refugee Commissioner is always more than happy of receiving feedback, suggestions and constructive criticism.

Mario Friggieri
Commissioner for Refugees

NCPE

National Commission
for the Promotion
of Equality for
Men And Women

Kummissjoni Nazzjonali
għall-Promozzjoni
ta' l-Ugwaljanza
għall-Irġiel u n-Nisa

Considerations by the National Commission for the Promotion of Equality on
Draft third report by ECRI

March 2nd, 2008

The National Commission for the Promotion of Equality [NCPE] is mentioned in paragraphs 17 to 21 of the report.

Paragraph 17 seems to be a summary of the law, though NCPE came into being in 2004 and not 2003 as stated. However, its remit was extended to cover for race and ethnicity by Legal Notice 85 of 2007.

Paragraph 18 contains two sentences starting 'The Maltese Authorities' and 'The Authorities' – the source must be the meeting held between the Maltese official delegation and the ECRI visiting mission. The first sentence states that 'ECRI understands' without giving the basis of its understanding.

Paragraph 18 further states that *'ECRI considers that strengthening the independence of the Commission could enhance the effectiveness of the Commission's work and impact favourably on the trust accorded to it by victims of discrimination*.'

NCPE would like to object to the implication of this statement that its independence is inadequate and needs strengthening: no evidence is provided to support the insinuation that victims of discrimination do not accord it trust. Therefore, NCPE cannot support the recommendation contained in paragraph 21 unless substantiation of this statement is forthcoming.

Sina Bugeja
Executive Director

Analysis by Professor Henry Frendo,
Chairman, Refugee Appeals Board, since 2001

(*The Malta Independent*, 31 December 2007 and 2 January 2008)

The changing faces of asylum appellants in Malta (1) by Henry Frendo

Talk of illegal immigrants, asylum-seekers and refugees in the local media since 2002 has usually been couched in emotional, impressionistic rhetoric, often starting by the misleading confusion of all three categories as "refugees", given that human news stories often tend to be intrinsically sensational.

This general profile here is from original sources regarding asylum appellants in Malta during 2006. It is a follow-up to my graphically illustrated findings for 2005 carried as a centre page spread in The Sunday Times entitled "Malta's changing immigration and asylum discourse" (29 January 2006, pp. 46-47). It is an empirical reflection of the concern with "freedom" on one hand and "security" on the other in the EU's ongoing "Challenge" project of which I am a research partner, which in 2005 held a conference in Malta comparing situations on the Southern and the Eastern borders of the Union; and largely based on data archived at the Refugee Appeals Board.

In addition to an analytical, illustrated breakdown by category compiled for appellants mainly during the calendar year 2006, this review seeks to offer some comparisons of the prevailing situation as this has been shifting and changing during the past two years or so, as illegal arrivals by boat continued apace, at the same time that many applied and then appealed after their tourist visas had expired.

The situation is somewhat less static than it seems, although Libya remains the main conduit for human trafficking. Changes continue into 2007, prompting new investigative categories in the case of appellants having a criminal background and, more recently, for those who specifically state that they choose to come to Malta or left their own country in order to do so, giving reasons for that. The very appearance of such a category, however small, is noteworthy. From the reasons given, it would seem that their intentions are motivated to a greater or lesser extent by the following five factors: the existence of democracy and human rights in Malta; Malta's membership of the EU and therefore an obligation to help them; the ready provision of board and lodging as well as other forms of material assistance; the government's policy generally not to send back failed asylum seekers (for example from West Africa) or an inability to do so; and the fact that appellants allegedly have "no one left" (relatives, friends, etc) in their own country of origin, thus implying that they however now have contacts on the island of Malta.

For the first time, therefore, a breakdown is given here of the "reasons for requesting asylum" in Malta; this will be further elucidated in due course. I only had this additional field of systematic inquiry introduced in dossier analyses towards the end of 2006; so the figures covered here, in so far as this new category is concerned, for the time being relate only to the period from November 2006 to May 2007. Other figures and percentages relate to

total numbers of cases which the Refugee Appeals Board adjudicated from 1 January to 31 December 2006. These comprise: the real or alleged country of origin; the country of last departure and the length of stay there (months, years, etc); formal education if any; gender; legal or illegal entry; religion; age group; and, as already mentioned, the reasons given for claiming asylum. In the past two years it was only in a few cases that recommendations made in the first instance were overturned and refugee status granted; the rest were manifestly unfounded or otherwise ineligible as Convention refugees.

Rising number of appeals

The total number of appeals received during 2006 from asylum-seekers who had been turned down at first instance or who – the majority of applicants – had been granted a temporary humanitarian protection, was 732. In accordance with the general trend since 2001/2, the number of appellants has been generally on the rise.

This is mainly because NGO assistance, facilitating recourse to both applications and appeals, has steadily consolidated, with fill-in-the-blank forms being made available to anyone who could benefit from the prospect of asylum. Equally, however, appeals over the last two years, particularly ones that may be adjudicated, have increased considerably thanks to an improvement in the provision by the Justice and Home Affairs Ministry of free legal aid by a specialised pool, in accordance with recommendations which had been made by the Refugee Appeals Board. As the law grants appellants the right to legal aid, the Board felt that it was unjust to adjudicate anyone who had asked for legal aid without him or her having received it. This situation how now improved so that not only has the number of appeals increased but the backlog in their adjudication has greatly decreased, sometimes it being reduced to nil, or decisions taken within a few weeks or less.

The profile of the Malta appeals caseload becomes clearer below from the evidence and analyses about the various categories researched, and should help the public understand why the vast majority of such appeals were judged to be ineligible for refugee status at law. In spite of a number of open hearings in which the Refugee Commission's decisions were fully re-scrutinised, it was rarely possible to reverse judgments; saddest of all was one such case where an appellant turned up for the open hearing with his lawyer (and his young, pregnant Maltese partner, who was actually married to another Muslim from another country) but, soon after his rejection, it transpired from the court columns in the press that he had been criminally charged with a serious offence, by which time however he had eloped. During 2007 there were four reversals of recommendation at appellate stage concerning two persons from a West African country and two from a North African one; these were granted refugee status.

The countries of origin

During 2006, the country or alleged countries of origin were the following, in descending numerical order:

Sudan: 182 (24.86%); Eritrea: 108 (14.75%); Ethiopia: 91 (12.43%); Niger: 69 (9.43%); Ivory Coast: 64 (8.74%); Nigeria: 41 (5.60%); Togo: 33 (4.51%); Somalia: 30 (4.10%); Liberia: 18 (2.46%); Ghana: 17 (2.32%); Palestine: 14 (1.91%); Iraq: 9 (1.23%); Sierra Leone: 9 (1.23%); Chad: 8 (1.09%); Burkina Faso: 8 (1.09%); Algeria: 7 (0.96%); Mali: 5 (0.68%); Syria: 4 (0.55%); Turkey: 3 (0.41%). Others: Benin, Cameroon, India, Libya, Morocco, Senegal, Tunisia, Democratic Republic of Congo (2), Guinea Bissau, Zimbabwe: 2%.

In percentage terms, this situation shows a notable increase in those from or claiming to be from the Sudan (up from 10% to nearly 25%) because of or in relation to the Darfur conflict; as well a big jump from 4-5% for Eritrea and Ethiopia, especially the former, where a relentless war-like dictatorship holds sway, increasingly bent, according to reliable BBC reports and interviews, on also Muslimising the country's large Christian population (several of whom have sought refuge in neighbouring Ethiopia, where Christians are not persecuted).

Ivory Coast has decreased from 11%, but Nigeria has gone up from 3%, while Togo was hardly a consideration at all until now. Somalis or alleged Somalis decreased markedly, down from 20%; Liberia also decreased from 3%, partly perhaps because the political situation improved following the end of internal fighting accompanied by democratisation and elections. Inexplicably, but mostly for economic reasons and the European quest, Ghanaians became a factor, whereas before they were not, although Ghana remains a reasonably safe, democratic country. Here it may be noted that not a single Ghanaian arriving illegally (and generally undocumented) in Malta, usually from Libya by boat, has been repatriated.

Palestinians declined from 8% to less than 2%, as did Iraqis, down from 3%. Turks, mainly claiming Kurdish nationality, declined markedly from 7%, although it is not known that failed Turkish asylum-seekers have been repatriated on the regular direct Air Malta route to Istanbul in recent years. Noteworthy caseloads which figured somewhat in 2005 but ceased to do so in 2006 include mainly South Asians (Pakistanis, Indians, Bangladeshis) and nationals from the Democratic Republic of Congo (down drastically from 12%), possibly as a result of peace-keeping initiatives there.

With the exception of one-offs (Kyrgyzstan, Serbia, Senegal, Tunisia), the nationality profile of illegal immigrants seeking asylum in Malta has remained characterised by sub-Saharan Africans, mainly from East, Central and West Africa, travelling more or less by the same means via the same land-and-sea routes. What is less clear is the percentage of those arriving by air, who arrange to stay on expired visas or otherwise, most of whom would be from Arab countries, the Balkans, the Caucuses, South Asia or the Far East, including China, and only very occasionally from, say, Nigeria. Most of these do not seem to apply for asylum preferring other integration alternatives through networking, work permits, inter-marriage, etc.

INDEP. 31.12.07 PG 4

The changing faces of asylum appellants in Malta (2)

Countries of departure

In 2006, as in 2005, the last country of departure of illegal immigrants who seek asylum in Malta has been Libya. In 2006 as many as 93 per cent of all appellants (678) came from Libya, a little more than in the previous year. A small percentage (12 per cent in 2005 down to 2 per cent in 2006) flew in from different airports in Europe, North Africa or the Near East. For the rest – those not arriving by boat via Libya – came from Turkey (3 per cent in 2005), the Ivory Coast or Tunisia, with isolated individual cases from Lebanon or Bulgaria.

Apart from the largely trafficked departures from Libyan ports in boat-rides procured at a price, what is even more telling is the duration of stays, usually, but not always, in Libya, prior to embarking on the voyage to Europe. 35 persons or 5 per cent had been mainly in Libya for more than 10 years before disembarking in Malta, while 19 or 3 per cent had been there for 5-10 years, and 101 or 14 per cent between two and five years. Most (252, or 34 per cent) had been in Libya for up to one year, with 142 or 19 per cent for about one month, i.e. effectively in transit on the mass illegal migration routes to Europe.

These figures compare with those for the previous year when 12 per cent had been in a third country, almost invariably, but not always, Libya, for more than five years before disembarking on Maltese shores (sometimes having been saved in search and rescue operations usually by the Maltese Armed Forces in Maltese waters). As many as 10 per cent had been in the country of departure for between two and five years, 22 per cent between one and two years, and 56 per cent up to one year. This shows fairly constantly that a slight majority, over 50 per cent, would have stayed in the country of departure, usually Libya, for up to one year, with the rest having lived and worked there for longer – often much longer. Thus, hardly any asylum-seekers come to Malta directly from their country of origin, and almost invariably, they have not applied, or even considered, applying for refugee status in any of the countries visited or lived in since leaving their home country, or alleged home country. The vast majority are not in possession of a passport or an identity document, many claiming to have lost these or had them confiscated en route.

Of all the appellants during 2006, 724 out of 732 or 99 per cent, had arrived/entered illegally; only eight persons or 1 per cent had entered Malta legally. This shows a considerable increase on 2005, when those entering Malta illegally were 84 per cent, with 16 per cent entering legally. The number of illegal entries would thus seem to be increasing further.

Age and gender characteristics

In 2006, the largest segment of appellants (335 or 45.77 per cent) were aged between 26 and 35 years. The second largest segment (266 or 36.34 per cent) was aged between 18 and 25 years. Only 26 said they were under 18 (3.55 per

cent). For the rest, 70 (9.56 per cent) were aged between 36 and 45 years, 6 (0.82 per cent) between 46 and 50 per cent, and only two (0.27 per cent) were over 50 years old. There were 21 (2.87 per cent) accompanied minors (including a few new-born babes, one or two on the boats), and 6 or 0.82 per cent were of an unknown age.

Age claims are often found to be untrue after technical/medical tests, particularly when arrivals claim to be minors so as not to be detained. Normally accompanied and unaccompanied minors are not detained, nor are families with children. However, clearly enough, the majority of arrivals are aged between 18 and 35 years, i.e. younger persons of working age, evidently seeking better jobs and futures in Europe. This statistic should be read in conjunction with the findings on gender below. In 2005 our findings regarding age groups were similar, most being in their 20s and 30s; only 7 per cent were over 40 years old.

Typically, as in previous years, in 2006 most asylum-seekers were young adult males. As many as 87 per cent (640) were males. Only 71 or 10 per cent were females. 21 or 3 per cent were accompanied minors. This statistic becomes clearer when looking at the stated reasons for claiming asylum. Most male adults are seeking better work prospects. A smaller number are evading military service, deserting the army, or are fugitives from justice. Few if any of these are ever females. Most boatloads usually comprise a token female presence with one, or perhaps two, children aboard. Of these, a number constitute families; occasionally couples claim to have been separated by traffickers in the process of being consigned to specific boats ashore, before leaving.

What this statistic also means, however, is that the country where asylum is being sought, in this case Malta, is increasingly under the stress of a increasingly disproportionate ratio between male and female residents. Moreover the great majority of males are relatively young and single. Additional light on this finding may emerge from the categories regarding religious beliefs and cultures, as well as educational standards, given below. Standards of hygiene and health have so far not been analyzed here, but in a minority of cases various diseases diagnosed by attendant doctors, most of which had been eradicated from Malta, have been mentioned in the press.

Beliefs and cultures

In 2006, religious professions of illegal immigrants seeking asylum at the appellate level in Malta were as follows:

Muslims: 53.83 per cent (394); Catholics: 24.45 per cent (179); Orthodox: 15.98 per cent (117); Pentecostal: 2.05 per cent (15); Protestant: 0.68 per cent (5);Other (including 2 Jehovah Witnesses): c. 3 per cent.

In 2005, the percentage of Muslim appellants was 67 per cent, with only 13 per cent Catholics. The rest were Protestants, Orthodox, other mainly Christian denominations and sects, with a few Hindus (3 per cent).

At first instance, the percentage would be higher, particularly because of the

Somali applicants, to whom Malta, almost invariably, grants humanitarian protection and assistance in deference to a standing UNHCR recommendation.

The implications for the host country, which has been traditionally very largely homogeneous and almost entirely Catholic, can be significant. Historically a Catholic bulwark against the advance of Islam and the Ottoman Empire, Malta's religious-cultural make-up among the ever-growing population is anyway changing at a fast and growing rate, with a relatively high proportion of Arab-Maltese marriages. So far, however, the Muslim population has grown to some 3 per cent and there is still only one big mosque (financed by Gaddafi in Mintoff's time) with a growing Islamic school adjoining it. On the other hand, for humanitarian reasons Catholic NGOs are foremost among those hosting and assisting asylum-seekers of whatever religious affiliation these may be, while efforts are being made towards facilitating integration (state schools, clinics and hospitals are free).

Educational standards

In 2006 most asylum-seeking appellants in Malta had either never attended school and were illiterate (40 per cent, or 289) or else they had attended primary school classes (36 per cent or 267). Only 17 per cent had been to a post-primary or secondary school (125), 5 per cent had been to a high school, and 2 per cent (14) to a tertiary institution such as a college or university.

These figures compare with 2005 and are not dissimilar. 35 per cent had never been to a school and were illiterate while 33 per cent had been exposed to some level of elementary schooling. In other words, in 2006 some 76 per cent were illiterate or semi-literate while in the previous year the corresponding percentage was 68 per cent. Some 10 per cent in all had been to secondary school, high school, college or university.

These statistics can be misleading because many of these appellants are (were) literally sons of the soil, coming from farming backgrounds. This means that while lacking a formal schooling several among them would have had practical experience in herding, farming, breeding, dairying or crop production of various kinds. However, from the point of view of integration, this places further pressures on a small and new island state such as Malta, where secondary education has been compulsory since 1947 and university free since 1970. It increases the need for more resources to combat illiteracy and it may well make any integration more difficult. Unfortunately farm land is extremely limited, with agriculture accounting for a small fraction of GDP, so there is little scope for any farming expertise to be put to good use on the island.

This data covers appellants whose cases have been adjudicated from November 2006 to May 2007. The most important reason given may be categorised as country instability. Such 'instability' accounts for 28 per cent of cases (42 persons). The second most important general reason given (19 per cent, 27 persons) may be said to fall within the bracket of 'politics', persons allegedly at odds with the governing party, or dissatisfied with its performance.

In both categories, corruption and a lack of Western-style democracy play a part, but complaints tend to be of a general nature or lacking in credibility, not strictly related to Convention definitions of refugee status (a well-founded fear of persecution). A third and most sincere reason for claiming asylum (15 per cent or 22 persons) is simply economic; poverty, drought, bad pay, lack of job opportunities and harsh labour conditions. As many as 10 per cent (14) left because they did not want to undergo military service in their home country, while 9 per cent (13) had committed, or been accused of having committed, a criminal act of one kind or another (murder, manslaughter, theft, fraud, tribal violence). Others said they had family problems (6 per cent, 8 persons); or religious problems (5 per cent, 7 persons), such as wishing to convert from Christianity to Islam or vice-versa; while two per cent or three persons wished to further their education in Malta, such as learning English, even saying they would then return home. There were other miscellaneous cases, but generally not cases warranting status.

This analysis of statistical compilations (which I undertook with the help of the Board's secretariat) are indicative of the nature of the influx being faced by Malta in the mass migratory phenomenon hitting Europe at the frontier, especially the Mediterranean island borders and the two smallest EU member states, Malta and Cyprus.

INDEP 2.01.2008"

PL6453

Report on the Three-Day Seminar with Detention Officers

Stress Management

Stress can be described as 'the wear and tear' of the body. It can be defined in terms of external stimuli that cause tension, in terms of the stress response which it causes, which can be both psychological and physiological and in terms of the consequences or the damage resulting from stress.

This report will give a short description of the feedback I obtained from the detention officers as well as from my analysis of their state during the short time I spent with them. I will be corroborating my assessment by theories and relevant studies that confirm my assessment.

The detention officers are exposed to both **acute** and **chronic stress**. The acute stress is due to reaction to immediate threats. This kind of stress produces the *fight or flight* response, which is when the body mobilizes itself, even on a chemical level, by pumping up adrenaline, to fight or else flee the stress provoking situation.

When the body reacts to a stressful situation, there would be a mobilization of the brain, heart, lungs, blood vessels and the muscles. However if the stress persists over time all these parts of the body become over- or under-activated thus producing physical and psychological damage over time.

The detention officers have this alerted response all the time as they are aware of the potential danger that the immigrants are posing to their own well-being. The immigrants are hostile towards the officers and threaten them continuously. They work under constant abuse by them. This abuse is both verbal and physical and the officers are instructed not to react to such provocations. This adds on to their feeling of helplessness whilst they also have to keep their frustration pent up inside themselves. Not being able to express this frustration, not even in a separate setting is counteractive to their well-being.

Moreover the detention officers are very concerned about the chance of getting infected by contagious diseases by the immigrants. This preoccupation is a constant worry which keeps them alert. However at the same time they know that they can do nothing to better their situation.

A number of studies suggest that job-related stress is a great threat to health like smoking or lack of exercising.

Studies suggest that the inability to adapt to stress is associated with the onset of depression or anxiety disorders. On a more obvious level, stress diminishes the quality of life by reducing feelings of pleasure and accomplishment and relationships are often threatened.

Heart disease is another possible effect which may result from prolonged exposure to stressful situations. Mental stress is a major trigger for angina and there have been associations between stress and heart rhythm abnormalities, hypertension, stroke, heart attacks and even deaths.

The detention officers showed great demotivation in their work. They feel that they are sandwiched between the illegal immigrants and their superiors. They feel alienated from their work and unsupported. They also feel that there are demands on them which are unreasonable and unrelenting. In fact they work in unhygienic conditions with inadequate washing facilities and toileting needs. The detention officers see the necessity of wearing gloves and masks when doing ward rounds. However they feel ambivalent towards this situation as this creates an antagonistic reaction in the immigrants and then the officers have to deal with this reaction as well.

The officers also reported working for long hours, not having a chance to stop for a break and feel that the ratio of officers to illegal immigrants is too little. This factor continues to further increase their tension and anxiety – about the fact that they and their colleagues can be in greater danger. Their perception further contributes to create intense stress as they feel they have no participation in decisions that effect their responsibilities.

They also feel that the system in which they work is more respectful towards the illegal immigrants than towards them as they are well taken care of. The detention officers also experience a sense of helplessness as they do not see any changes or are not given any explanations when they try to give feedback or suggestions to their superiors. The nature of the work, the less than favourable working conditions and the fact that they do not feel supported by the system are all factors which contribute to increase their anxiety and levels of stress.

Much of my work focused on letting them express their feelings of emotions, fear, frustration. As a recommendation I strongly suggest that they are given time and space in a supportive environment where they can vomit out their worries and their mind states. If this does not happen they will experience acute burnout and they will have other symptoms in the long run such as susceptibility to infections, immune disorders, gastrointestinal problems, heart disease, sleep disturbances, allergies, skin disorders and difficulties in memory. Obviously all these symptoms make the person weaker and thus make one more susceptible to further stress, vulnerability or weakness. A vicious cycle would be created.

I also suggest that individual detention officers be targeted individually and specific recommendations be made to each and every one of them. Personal issues and particular situations vary from one person to another. Thus, each detention officer's situation should be seen individually.

Group work can also be done with teams or with groups of detention officers who work in close contact to each other or together. This group work is important in order to:

- increase group cohesion, which can be a buffer against stress
- to educate the officers as regards diseases, the psychological states of immigrants and their backgrounds. Educating officers about the groups they are in contact with might help them to understand the background, the social, cultural, political and financial situation of the immigrants as well as their motivations and fears. This will help the officers to become more familiar with the situations they are handling – the fear would not be nameless but a little more within reach – a little more understandable.
- to continue training in how to handle stressful situations. The officers have to be helped to realize that they have to take care of themselves due to the vulnerable situation which their work exposes them to. They need to realize the importance of recreation, of creating networks which support them, of not letting the stress at work contaminate their family or intimate relationships. They also need to learn what to expect from such a highly stressful situation and be less guilty when they feel that they do not have energy, that they need to rest and have fruitful experiences outside the work place.
- They also need to learn to handle the 'side effects' of their burn out. For instance, they have to realize that sometimes they may displace their anger on their families or friends, that is, they may be angry at the system or at the immigrants and they may have be creating unpleasant situations at home or even with their colleagues at work.

Most importantly of all they need to have this difficult situation acknowledged by someone other than themselves. Having had these short sessions with me was a relief for them as they could pour their hearts out and have someone acknowledge their situation. If however nothing is done after that they will be confirming again their existing theory that they are not supported and that no one really understands their situation enough to do something about it.

Charles Cassar
Ph.D., ECP

April 2006

IMQIEGHED FUQ IL-MEJDA TAL-KAMI...
TAD-DEPUTATI FIS- SSII-27.03.07
MILL-Onor Joseph Debono Grech, M.P.

SKRIVAN

Moldova

New criminal Code 985-VV 18.04.2002 , Article 346. Actions intentionnelles visant à alimenter la discorde ou la haine nationale, raciale ou religieuse

Les actions intentionnelles, les appels publics lancés au moyen d'un mass-média écrit ou électronique, visant à alimenter la discorde ou la haine nationale, raciale ou religieuse, à porter atteinte à l'honneur et à la dignité nationale, ainsi que la restriction, directe ou indirecte, des droits des citoyens ou la création d'avantages, directs ou indirects, en faveur de certains citoyens en fonction de leur appartenance nationale, raciale ou religieuse, sont punis d'une amende de 250 unités conventionnelles au plus ou de 3 ans d'emprisonnement au maximum. (Intentional acts, public appeals, particularly by electronic media and press, directed at incitement to national, racial, or religious hatred or discord, diminishing national honour and dignity, as well as direct or indirect limitation of rights, or creation of direct or indirect privileges for persons on the basis of nationality, race or religion. Imprisonment for up to 3 years or fine of 250 conditional Units

Press law, Article 4 The Freedom of Expression and the Limitation of Publicity

(1) Periodicals and press agencies can publish, according to their own appreciation, any kind of materials and information, except:

a) materials that contains disrespect and defamation against the state and people, urge on war of aggression, national, racial or religious hatred, inciting discrimination, territorial separatism, public violence, as well as other manifestations that violate the present constitutional regime; (…)

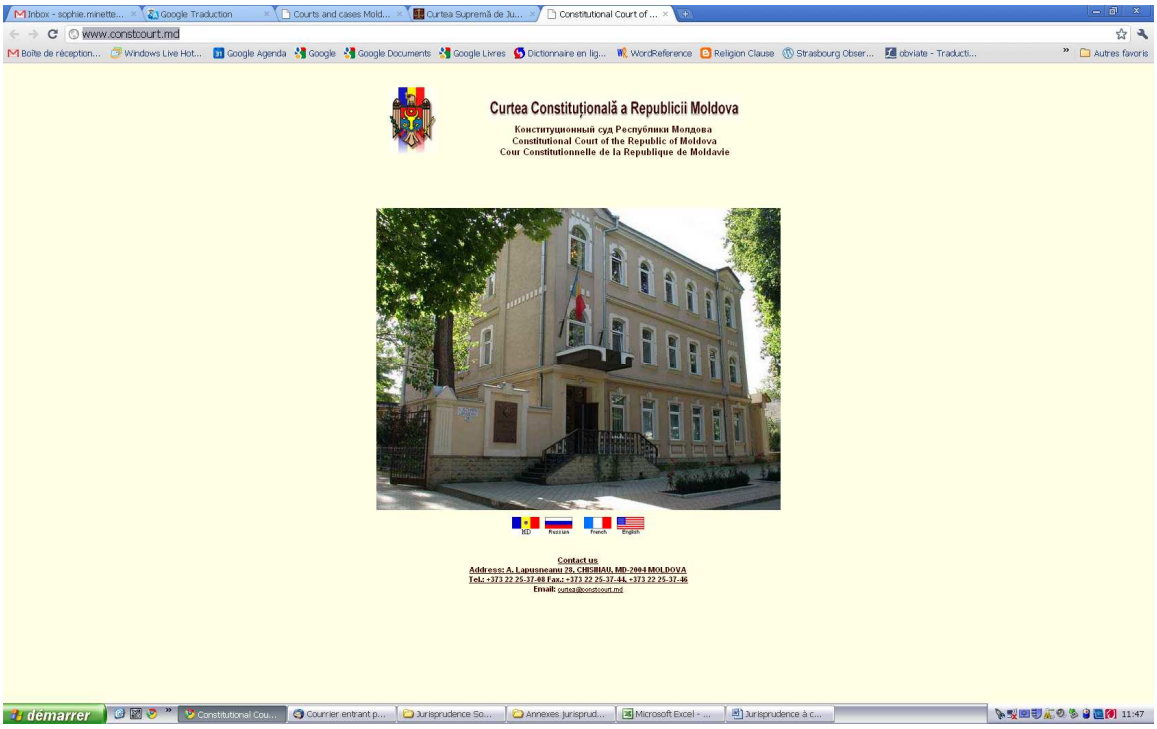
Extremist Activity Law 54-XV 21.02.2203 art.6 : Activity of a social or religious association, a mass medium or other organisation, physical person consisting in planning, organising, preparation or accomplishing of actions directed at::
Incitement to racial, national, or religious discord, as well as social discord, entailing violence or appeals to violence; diminishing national dignity; propaganda of elitism, superiority or inferiority of persons on the basis of their religion, race, nationality, sex, views, political convictions, material situation or social origin; propaganda and public demonstration of Nazis' or similar attributes and symbols, or public appeals to these actions,

Associations Code, art. 4 : The establishment and the activities of associations whose programmatic documents propagate or which practice racial, religious, social or class inequality or hatred, methods of forcible (violent) seizure of power, war, violent propaganda, violation of human rights and freedoms, or other ideas or actions which contradict the constitutional order of the Republic of Moldova and are incompatible with universally recognised norms of international law, are strictly forbidden.

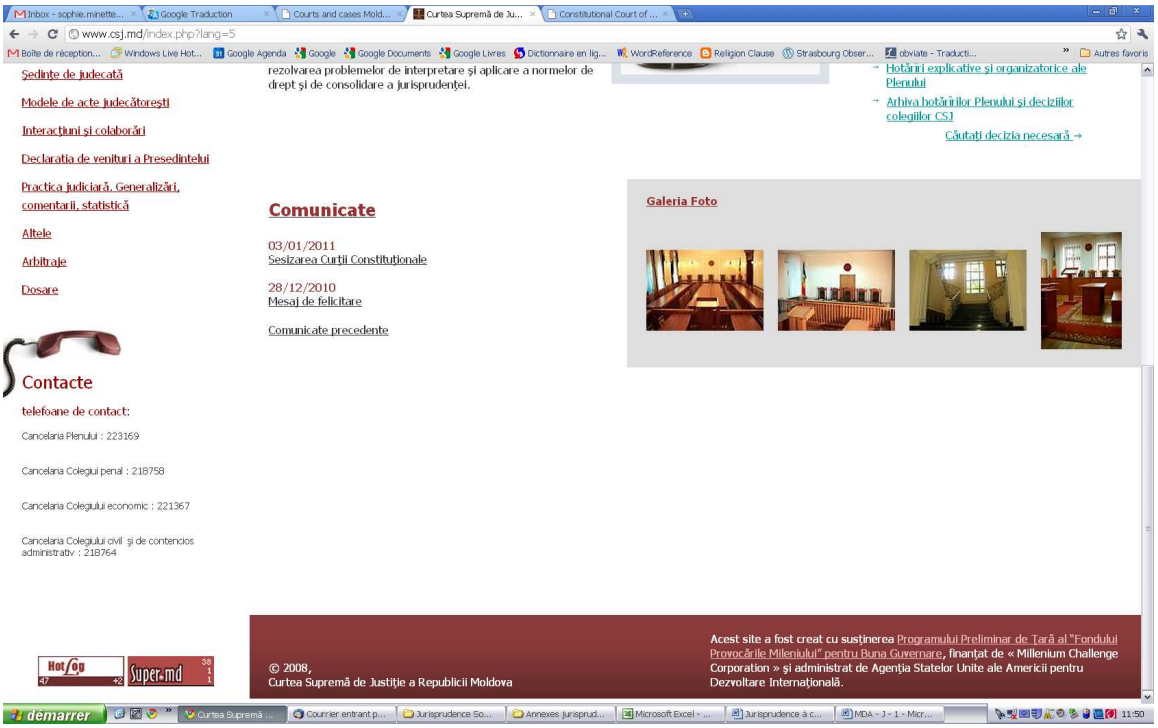
Case Law

Moldova

Constitutional Court: http://www.constcourt.md/



Supreme Court of Justice: http://www.csj.md/index.php?lang=5



Public Policies

European Commission against Racism and Intolerance
Commission européenne contre le racisme et l'intolérance

CRI(2008)23

Third report on Moldova

Adopted on 14 December 2007

Strasbourg, 29 April 2008

COUNCIL OF EUROPE CONSEIL DE L'EUROPE

For further information about the work of the European Commission against Racism and Intolerance (ECRI) and about the other activities of the Council of Europe in this field, please contact:

Secretariat of ECRI
Directorate General of Human Rights and Legal Affairs
Council of Europe
F - 67075 STRASBOURG Cedex
Tel.: +33 (0) 3 88 41 29 64
Fax: +33 (0) 3 88 41 39 87
E-mail: combat.racism@coe.int

Visit our web site: www.coe.int/ecri

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Foreword

The European Commission against Racism and Intolerance (ECRI) was established by the Council of Europe. It is an independent human rights monitoring body specialised in questions relating to racism and intolerance. It is composed of independent and impartial members, who are appointed on the basis of their moral authority and recognised expertise in dealing with racism, xenophobia, antisemitism and intolerance.

One of the pillars of ECRI's work programme is its country-by-country approach, whereby it analyses the situation as regards racism and intolerance in each of the member States of the Council of Europe and makes suggestions and proposals as to how to tackle the problems identified.

The country-by-country approach deals with all member States of the Council of Europe on an equal footing. The work is taking place in 4/5 year cycles, covering 9/10 countries per year. The reports of the first round were completed at the end of 1998 and those of the second round at the end of the year 2002. Work on the third round reports started in January 2003.

The third round reports focus on "implementation". They examine if ECRI's main recommendations from previous reports have been followed and implemented, and if so, with what degree of success and effectiveness. The third round reports deal also with "specific issues", chosen according to the different situations in the various countries, and examined in more depth in each report.

The working methods for the preparation of the reports involve documentary analyses, a contact visit in the country concerned, and then a confidential dialogue with the national authorities.

ECRI's reports are not the result of inquiries or testimonial evidences. They are analyses based on a great deal of information gathered from a wide variety of sources. Documentary studies are based on an important number of national and international written sources. The in situ visit allows for meeting directly the concerned circles (governmental and non-governmental) with a view to gathering detailed information. The process of confidential dialogue with the national authorities allows the latter to propose, if they consider it necessary, amendments to the draft report, with a view to correcting any possible factual errors which the report might contain. At the end of the dialogue, the national authorities may request, if they so wish, that their viewpoints be appended to the final report of ECRI.

The following report was drawn up by ECRI under its own and full responsibility. It covers the situation as of 14 December 2007 and any development subsequent to this date is not covered in the following analysis nor taken into account in the conclusions and proposal made by ECRI.

Executive summary

Since the publication of ECRI's second report on Moldova on 15 April 2003, progress has been made in a number of the fields highlighted in that report. New legislation was introduced in 2003, outlawing extremist activity in fields related to racism and intolerance. The new Labour Code adopted in 2003 contains anti-discrimination provisions. At the policy level, a National Human Rights Action Plan for 2004-2008 and a National Action Plan for 2007-2010 to support Roma have been adopted, providing a framework for more concrete action in future. On several occasions, high-level officials have publicly condemned manifestations of antisemitism.

However, a number of recommendations made in ECRI's second report have not been implemented, or have only been partially implemented. There is a problem of inadequate implementation of the existing law in many fields which are of importance to combating racism and racial discrimination. At the same time, no comprehensive body of civil and administrative anti-discrimination legislation has been adopted. There is also a general lack of awareness of the danger of racism and the need to combat it among those involved in the criminal law system but also among the general public. Some media, politicians and members of the general public make intolerant remarks concerning several minority groups including Roma, Jews, religious minority groups and immigrants. There have been allegations of racial discrimination against Roma and immigrants by some police officers or some private parties. Roma children still face disproportionate difficulties in access to education at all levels. Minority religious groups, and in particular Muslim communities, continue to experience difficulties in exercising their freedom of religion. There have been allegations of unjustified obstacles in registering their denomination and of harassment, including by officials. Concerns also remain as to the adequacy of measures so far taken, particularly in the educational field, to ensure that members of national minorities benefit from an adequate protection of their cultural rights and a sufficient command of the state language to be able to participate fully in society. The school curricula do not cover enough issues such as human rights, combating intolerance and promoting diversity.

In this report, ECRI recommends that the Moldovan authorities take further action in a number of areas. In the field of criminal law, ECRI recommends ensuring that criminal law provisions designed to combat racism are effectively implemented, including through providing training in this field to the relevant officials. It recommends adopting a comprehensive body of civil and administrative anti-discrimination legislation. It also recommends alerting officials, the media and the general public, including school-aged children, to the need to combat racism and intolerance. It recommends that specific measures be taken to improve the situation of Roma, in particular combating racism and racial discrimination targeting Roma and improving access to education of Roma children. It also recommends removing obstacles faced by members of religious minority groups in practising their religions. Measures should be taken to ensure that national minorities have the opportunity to learn the state language, particularly at school.

I. FOLLOW-UP TO ECRI'S SECOND REPORT ON MOLDOVA

International legal instruments

1. In its second report on Moldova, ECRI recommended that Moldova ratify the following international legal instruments: Protocol No. 12 to the European Convention on Human Rights (ECHR), the European Charter for Regional or Minority Languages, the Convention on the Participation of Foreigners in Public Life at Local Level and the European Convention on the Legal Status of Migrant Workers.

2. The Moldovan authorities have explained that they are currently considering the possibility of ratifying Protocol No. 12 to the ECHR, which provides for a general prohibition of discrimination and which was signed on 4 November 2000. The authorities are examining the compatibility of national laws with the Protocol and the financial implication that its ratification would have for the State.

3. ECRI is pleased to note that Moldova ratified the European Convention on the Legal Status of Migrant Workers on 20 June 2006. This instrument entered into force in Moldova on 1 October 2006. The Moldovan authorities have explained that they are currently considering the possibility of ratifying the European Charter for Regional or Minority Languages, which was signed on 11 July 2002[1]. As regards the Convention on the Participation of Foreigners in Public Life at Local Level, the Moldovan authorities have stated that they are currently considering the possibility of signing and ratifying this instrument.

4. Moldova has not yet signed the International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families, which has entered into force since ECRI's second report. The Moldovan authorities have reported that there are no immediate plans to sign or ratify this instrument.

5. ECRI notes that Moldova signed the Convention on Cybercrime on 23 November 2001 and its Additional Protocol concerning the criminalisation of acts of a racist and xenophobic nature committed through computer systems on 25 April 2003. The authorities are currently considering the possibility of ratifying these instruments.

Recommendations:

6. ECRI reiterates its recommendation that Moldova ratify the following international instruments as soon as possible: Protocol No. 12 to the European Convention on Human Rights, the European Charter for Regional or Minority Languages, and the Convention on the Participation of Foreigners in Public Life at Local Level.

7. ECRI recommends that Moldova ratify the Convention on Cybercrime and its Additional Protocol concerning the criminalisation of acts of a racist and xenophobic nature committed through computer systems, and the International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families.

8. In its second report on Moldova, ECRI recommended that Moldova make the declaration provided for under Article 14 of the International Convention on the Elimination of All Forms of Racial Discrimination (CERD), which allows the Committee on the Elimination of Racial Discrimination to receive communications

[1] See also below: Vulnerable groups, - National minorities.

from individuals. The Moldovan authorities have indicated that there are no immediate plans to make the declaration under Article 14 of the CERD.

Recommendations:

9. ECRI reiterates its recommendation that Moldova make the declaration provided for in Article 14 of the International Convention on the Elimination of All Forms of Racial Discrimination, which allows the Committee on the Elimination of Racial Discrimination to receive communications from individuals.

Constitutional provisions and other basic provisions

- *Law on Citizenship*

10. In its second report, ECRI recommended that the Moldovan authorities ensure that decisions concerning the acquisition and loss of citizenship were subject to judicial review and not arbitrary.

11. ECRI notes with concern reports of misinterpretation or incorrect implementation of the Law on Citizenship by the officials responsible for its implementation. Thus, individuals who apply for citizenship may encounter unnecessary bureaucracy and sometimes arbitrary decisions. Some applicants for naturalisation have allegedly been asked to fulfil conditions which are not required by this Law. For instance, the Law provides that the requirement to lose or renounce one's previous citizenship in order to obtain Moldovan citizenship does not apply when such loss or renouncement is impossible or when it cannot reasonably be requested. It seems that, despite this provision, some applicants have been asked to prove that they had lost their citizenship of another country even though they were in possession of documents proving their statelessness. The Law also clearly stipulates that decisions refusing to grant Moldovan citizenship should always be "well reasoned", but some applicants have indicated that they have not received an indication of the grounds for the rejection of their application. Finally, even though the Law states that a certificate of renunciation of previous citizenship may be presented only after obtaining a provisional decision in favour of granting Moldovan citizenship, it seems that in practice, applicants may become stateless if they renounce their citizenship and do not obtain Moldovan citizenship in the end, as the final decision remains at the discretion of the Moldovan authorities.

12. In principle, the applicants who encounter this type of difficulties are not left without a remedy: the Law on Citizenship provides that presidential decrees concerning the acquisition and loss of citizenship are subject to appeal before the Supreme Court within six months. Misinterpretations, incorrect implementation or other wrongful actions by officials in this field are also subject to appeal before the courts. Apparently, the courts have already remedied cases of misinterpretation of the law, but it is also true that in many cases, applicants are discouraged from turning to the courts for reasons related to the general situation of administration of justice and which are covered in another section of this report[2].

[2] See Section II: Specific Issues, Difficulties in implementing the legislation to combat racism and racial discrimination.

Recommendations:

13. ECRI strongly recommends that the Moldovan authorities examine allegations of misinterpretations and incorrect implementation by officials of the Law on Citizenship and take all necessary measures to ensure that the Law is duly implemented in all cases without any arbitrariness.

14. In its second report, ECRI recommended that the Moldovan authorities adopt the law allowing for multiple citizenship as soon as possible.

15. ECRI is pleased to note that amendments were made in 2002 to Article 18 of the Constitution, which governs citizenship, and that the 2000 Law on Citizenship was revised in 2003 so as to extend the possibilities for Moldovan citizens of having multiple citizenship. According to Article 24-3 of the Law on Citizenship, it is now possible for a Moldovan citizen to obtain another citizenship without losing his or her Moldovan citizenship and without any particular requirement. However, the same is not true for citizens of another State who would like to obtain Moldovan citizenship. For them, the principle remains that they must first lose or renounce their previous citizenship. There are some exceptions to this principle, for instance a person can obtain multiple citizenship by marriage, birth, adoption, under an international agreement, or when it is impossible to lose or renounce the citizenship of another State. However, ECRI considers that in order to facilitate the integration of immigrants into Moldovan society, it would be preferable that the principle of multiple citizenship be applicable in the same way to all, whether or not they are already Moldovan citizens[3].

16. ECRI notes with interest that Article 25 of the Law on Citizenship, in full accordance with Article 17 of the European Convention on Nationality, which has been ratified by Moldova[4], provides that Moldovan citizens who are also citizens of another State and who have their lawful and habitual residence in Moldova enjoy the same rights and duties as other Moldovan citizens. In this respect, ECRI would like to express its concern about a draft law on the modification and completion of certain legislative acts adopted in its first reading by Parliament on 11 October 2007. According to this draft law, only persons having exclusively Moldovan citizenship are entitled to work in senior positions in the government and in several public services. From the information it has received, ECRI understands that if this draft law enters into force as it stands, Moldovan citizens with multiple citizenship would be seriously disadvantaged compared with other Moldovan citizens in access to public functions. It thus appears that, if the law enters into force as such, this could lead to discrimination, i.e. unjustified differential treatment on the grounds of citizenship. ECRI understands that a wide-ranging debate is occurring within Moldova at the time of writing this report as far as this draft law is concerned and that many sources both at the national and international level have stressed the need to revise the text thoroughly before

[3] See also below, Reception and status of non-citizens, - Immigrants.

[4] Article 17 of the 1997 European Convention on Nationality Rights and duties related to multiple nationality: 1. Nationals of a State Party in possession of another nationality shall have, in the territory of that State Party in which they reside, the same rights and duties as other nationals of that State Party. 2. The provisions of this chapter do not affect: a) the rules of international law concerning diplomatic or consular protection by a State Party in favour of one of its nationals who simultaneously possesses another nationality; b) the application of the rules of private international law of each State Party in cases of multiple nationality." Moldova has made no declaration, reservation or other communication concerning this provision.

its final adoption in order to ensure its compatibility with national and international standards.

Recommendations:

17. ECRI recommends that the Moldovan authorities reconsider their position which in principle offers the possibility of possessing multiple citizenship only to Moldovan citizens who acquire another citizenship and not to citizens of other countries who would like to acquire Moldovan citizenship. The Moldovan authorities should ensure that in principle all persons, whether or not they are already Moldovan citizens, benefit from the principle of multiple citizenship.

18. ECRI strongly recommends that the Moldovan authorities revise the draft law of 11 October 2007 on the modification and completion of certain legislative acts in order to ensure that it neither infringes the principle of non-discrimination on the grounds of citizenship nor undermines all benefits of the recent changes made to the law on citizenship and allowing for multiple citizenship.

Criminal law provisions

19. In its second report, ECRI encouraged the Moldovan authorities to monitor more closely the implementation of criminal law provisions to combat racism and racial discrimination in order to ensure that racist cases are investigated and that, where necessary, those responsible are punished.

20. The new Criminal Code, enacted on 18 April 2002, came into force on 1 January 2003. According to Article 77-1 d), the commission of a crime out of social, national, racial or religious enmity or hatred is to be considered as an aggravating circumstance in determining the punishment for the crime. Article 135 of the Code prohibits genocide, with a prison sentence of between 16 and 25 years or life imprisonment.

21. Under Article 176, an infringement of the rights and liberties set forth by the Constitution and other laws, on the basis of gender, race, colour, language, religion, political opinions or any other opinions, ethnic or social origin, affiliation to a national minority, property, birth or any other situation shall be punished with a fine of 300 to 600 conventional units[5] or imprisonment for up to 3 years, in both cases with (or without) forfeiture of the right to hold certain positions or exercise a certain activity for a term of 2 to 5 years.

22. Under Article 346, deliberate actions or incitement to commit actions aimed at directly or indirectly limiting the rights of citizens or the granting of privileges to citizens on the grounds of their national, racial or religious identity are punishable by law. The same provision also prohibits deliberate actions and public incitement, including in the printed or electronic media, that may cause religious, national or racial hatred or discord or that may denigrate national honour or dignity. Infringements of Article 346 are punishable by a fine of up to 250 conventional units, by community service, or by imprisonment for a term of up to 3 years. The authorities have informed ECRI that the Parliament is currently examining a Bill aimed at complementing Articles 176 and 346 of the Criminal Code in order to increase the number of situations where the principle of non-discrimination could be violated.

[5] *In 2006, a "conventional unit" represented approximately 20 lei (about EUR 1.25).*

23. A law punishing the activities of extremist groups was enacted on 21 February 2003. In particular, this law prohibits actions directed at incitement to racial, national, or religious discord or diminishing national dignity; the dissemination of propaganda of elitism, superiority or inferiority of persons on the basis of, *inter alia*, their religion, race or nationality, or public appeals to such actions, and the dissemination of propaganda or public demonstration of Nazi or similar attributes and symbols[6]. No case-law under the Extremist Activity Law has been reported.

24. The Moldovan authorities have indicated that three criminal cases were initiated in 2004 on the basis of Article 176 of the Criminal Code, all of which concerned allegations of violations by the self-proclaimed authorities in Transnistria of children's rights to have access to education in their mother tongue following the closure of schools teaching the state language in the Latin script. However, in part because Moldovan law enforcement agencies cannot *de facto* prosecute in territory that is not under their effective control, none of these cases has led to any decision by a court[7].

25. Three criminal investigations have also been launched under Article 346, in 2003, 2004 and 2006 respectively; however, the Moldovan authorities have reported that, partly due to difficulties in identifying the perpetrators in each case, none of the investigations in these cases have yet been completed.

26. ECRI has received reports of the circulation of material and literature inciting to hatred and in particular to antisemitism, and reports concerning the desecration of Jewish cemeteries. These are also dealt with in another part of this report[8]. While criminal investigations have been launched into such incidents, none of them has led to criminal charges being brought on the basis of the specific provisions referred to above.

27. ECRI notes that the criminal provisions in force in Moldova which prohibit a broad range of racist activities are not duly applied. It is concerned that a general lack of awareness of the importance of racist offences as an issue may result in a failure to treat racist offences as such. It considers that specific training for all those involved in the criminal justice system – police, prosecution and judiciary – is needed to raise officials' awareness of issues of racism, discrimination and intolerance and to ensure that the relevant cases are treated appropriately. Lack of confidence in the judicial system has been widely suggested as the reason why people in Moldova often refrain from having recourse to it: they consider that it is pointless to do so, or that applying to a court might even be counterproductive. In this domain, ECRI notes with concern the reports of non-governmental organisations and intergovernmental organisations referring to serious problems in the functioning and independence of the judicial system in general[9].

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[6] The following groups can be prosecuted under Article 6 of Law No. 54-XV on Extremist Activity: social or religious associations, mass media agencies or other organisations or physical persons. Extremist activities are punishable by a written injunction to cease the activity coupled with the elimination of the violations within one month. If the violations have not ceased within that time-frame, the court may issue an order for the dissolution of the organisation or of one year's suspension of its activity.

[7] See also below, Area currently not under the effective control of the Moldovan authorities.

[8] See below, Vulnerable groups, - Religious minority groups.

[9] See also below, Section II: Specific Issues, Difficulties in implementing the legislation to combat racism and racial discrimination.

Recommendations:

28. ECRI recommends that the Moldovan authorities implement a training programme for all those involved in the criminal justice system – police, prosecution and judiciary – in order to raise these officials' awareness of issues of racism, discrimination and intolerance.

29. In addition, ECRI strongly recommends that the Moldovan authorities ensure that racially motivated offences are effectively investigated and that, where necessary, those responsible are punished.

Civil and administrative law provisions

30. In its second report, ECRI recommended that the Moldovan authorities consider the possibility of adopting a comprehensive body of civil and administrative legislation designed to combat discrimination in all spheres of life, including provision for appropriate compensation and sanctions.

31. ECRI notes with interest that the new Labour Code, adopted on 28 March 2003, contains anti-discrimination provisions. Article 5 of the Labour Code sets forth the principle of equal rights and opportunities and the principle of non-discrimination as two of the basic principles applying to labour relations. Article 8 prohibits any direct or indirect form of discrimination on the grounds among others of race, national origin, and religion. Other laws, including some adopted recently, contain a provision prohibiting racial discrimination. For instance, Article 4 of the Law on the Status of Refugees stipulates that any person seeking asylum shall be treated without any discrimination based among others on race, national or ethnic origin, language and religion[10]. There are a number of other equality or anti-discrimination provisions scattered in several laws, such as the Constitution (Articles 16 and 19), the law on education, the law on the rights of national minorities, the law on the legal status of foreigners and stateless persons, etc.

32. As far as ECRI knows, the only case where a complaint of racial discrimination went before a court was in 2007 and the court rejected the claim[11]. With this unsuccessful exception, ECRI understands that until now Article 8 of the Labour Code has not been applied by the courts in the area of racial discrimination. Apparently, the situation is the same as concerns anti-discrimination clauses contained in all other laws. However, several sources report allegations of racial discrimination on the part of some private parties, particularly discrimination against Roma and immigrants from African and Asian countries[12]. It seems that these cases are not always brought to justice by the persons concerned mainly because they consider that it is pointless to do so, or that applying to a court might even be counterproductive[13].

[10] See also below, Reception and status of non-citizens, - Refugees and asylum seekers.

[11] See also below, Reception and status of non-citizens, - Immigrants.

[12] For more information about discrimination against members of the Roma communities, see below: Roma communities, and about discrimination against immigrants, see below: Reception and status of non-citizens - Immigrants.

[13] See also below, Section II: Specific Issues, Difficulties in implementing the legislation to combat racism and racial discrimination.

33. To date, no comprehensive body of civil and administrative legislation to combat racial discrimination has been adopted in Moldova. However, ECRI notes with interest that a coalition of NGOs, supported by the OSCE Mission to Moldova, established a strategy for the promotion of non-discrimination policies in Moldova. One of the main objectives of this strategy is to promote the adoption of comprehensive anti-discrimination legislation in Moldova which would cover a large number of grounds including race, colour, language, religion and ethnic origin. The legislation proposed would prohibit direct and indirect discrimination in many fields of life including employment, education, social services, and access to goods and services. ECRI understands that the coalition of NGOs has met with the Moldovan authorities to discuss the possibility of adopting such a law. The authorities are currently examining the NGOs' draft law on preventing and combating discrimination in Moldova. ECRI has also been informed by several public agencies such as the Bureau for Interethnic Relations that they are generally in favour of adopting comprehensive anti-discrimination legislation.

Recommendations:

34. ECRI recommends that the Moldovan authorities ensure the proper implementation of the existing civil and administrative law provisions prohibiting racial discrimination. It recommends that they inform the general public of the existence of such provisions and that they take steps to encourage victims to lodge complaints concerning acts of racial discrimination.

35. ECRI also recommends that the Moldovan authorities complement the existing provisions by adopting comprehensive legislation prohibiting racial discrimination in a precise and exhaustive manner to ensure that all areas of life such as education, access to housing, public services and public places and contractual relations between individuals are covered. On this point, ECRI invites the Moldovan authorities to work in close co-operation with civil society particularly in the context of the NGOs' strategy for the promotion of non-discrimination policies in Moldova. ECRI also draws the authorities' attention to the parts of its General Policy Recommendation No. 7 on national legislation to combat racism and racial discrimination dealing with civil and administrative law[14].

Administration of justice

36. See below, Section II- Specific Issues, Difficulties in implementing the legislation to combat racism and racial discrimination.

Specialised bodies and other institutions

- The Parliamentary Advocates (Ombudsman)

37. In its second report, ECRI recommended that the Moldovan authorities enshrine the status of the Ombudsman institution (more often referred to in Moldova as the Parliamentary Advocates) in the Constitution in order to reinforce its independence. ECRI also called on the Moldovan authorities to ensure that the Parliamentary Advocates' decisions were implemented, and invited the Moldovan authorities to give the Parliamentary Advocates all the means and resources they need to carry out their various tasks. ECRI also welcomed the Parliamentary Advocates' determination to do their utmost to prevent or remedy racial

[14] See Paragraphs 4-17 of the General Policy Recommendation and Paragraphs 34-36 and 40-65 of its Explanatory Memorandum.

discrimination or racist or intolerant behaviour by the public authorities if ever they should become aware of it taking place.

38. The three Parliamentary Advocates, established by the Law of 17 October 1997, are equally responsible for guaranteeing the respect of constitutional human rights and freedoms by local and national administrative bodies, institutions, organisations and public enterprises, as well as public associations and officials at all levels. They run a Centre for Human Rights which is responsible, among other things, for publishing an annual report on the activities of the Advocates. There are three local offices of the Ombudsman, in Baltsi, Cahul and Comrat, where individuals can seek advice. The Ombudsman has also been running a free hotline giving legal assistance to those who call since 2004.

39. To some extent, the Parliamentary Advocates' competencies include monitoring of the situation concerning racism and racial discrimination issues, for instance through ensuring the respect of Article 16 of the Constitution which guarantees the principle of non-discrimination. However, the Parliamentary Advocates seldom receive complaints of racial discrimination. There are some exceptions, for instance when a Roma NGO sought assistance from the Parliamentary Advocates to solve a case of racial discrimination in access to bars and restaurants[15]. In situations like this one, where the complainants do not wish to go before the courts, the Ombudsman can serve as a mediator and remind the premises' owners of the prohibition on discrimination on the grounds of ethnic origin.

40. ECRI notes that until now no changes have been made to the status of the Moldovan Ombudsman in order to reinforce the institution's independence. However, the Parliamentary Advocates have informed ECRI that they are currently proposing amendments to their status, which would increase their independence. Among several proposals, they suggest that the existence of this institution be guaranteed in the Constitution. They also ask that it no longer be possible for the Parliament to remove a Parliamentary Advocate from his or her position before the end of his or her term by a two-thirds majority vote of no-confidence, as is currently the case. ECRI hopes that these proposals, which correspond to its own recommendation to reinforce the Parliamentary Advocates' independence, will be followed by the Parliament.

41. In their 2006 annual report, the Parliamentary Advocates mention several recurring financial and organisational problems which prevent them from fully exercising their role as defenders of constitutional rights in Moldova. A major difficulty with which the Parliamentary Advocates are confronted is the lack of reaction to or follow-up of their notifications, recommendations and proposals by the relevant authorities.

42. In its second report, ECRI recommended that an independent specialised body be established in Moldova to combat racism and racial discrimination at national level. To date no such body has been established. ECRI believes that there is a need in Moldova to consider creating a specialised body to combat racism and racial discrimination at national level, whether within the existing Ombudsman institution or through the creation of a separate institution.

[15] See below, Roma communities.

Recommendations:

43. ECRI reiterates its recommendation that the Moldovan authorities enshrine the status of the Ombudsman institution in the Constitution in order to reinforce its independence. They should also take measures to guarantee that the Ombudsman's decisions are implemented, and give this institution all the means and resources it needs to carry out its various tasks, including combating racism and racial discrimination.

44. ECRI strongly encourages the Moldovan authorities either to clarify and strengthen the responsibility and ensure the competence of the Ombudsman in the field of combating racism and racial discrimination or to set up in the near future an independent specialised body to combat racism and racial discrimination. To this end, the Moldovan authorities should draw inspiration from ECRI's General Policy Recommendation No. 2 on specialised bodies to combat racism, xenophobia, antisemitism and intolerance at national level and General Policy Recommendation No. 7 on national legislation to combat racism and racial discrimination. ECRI particularly emphasises the need to ensure that the body specialising in combating racism and racial discrimination is entirely independent.

- Bureau for Interethnic Relations

45. The Bureau for Interethnic Relations reports directly to the government and is responsible for implementing governmental policy on interethnic relations and co-operating with civil society in this area. The Bureau works closely with sixty-five socio-cultural organisations representing different ethnic groups, particularly within the context of a Co-ordination Council, which comprises representatives of these bodies and enjoys consultative status. As it already did in its previous report, ECRI welcomes the existence of the Bureau for Interethnic Relations and stresses the need for this institution to reinforce and develop its activities as far as national minorities, interethnic and languages issues are concerned. Some of the activities of the Bureau are referred to in other parts of this report[16] but ECRI notes that in general the Bureau lacks sufficient resources to accomplish fully its important mission.

Recommendations:

46. ECRI reiterates its recommendation that the Moldovan authorities provide the Bureau for Interethnic Relations with the necessary status and with the resources it needs to perform its various tasks.

Education and awareness-raising

47. See below, Climate of opinion and Section II (Specific Issues), Combating racism and intolerance in and through school education in Moldova - Combating intolerance and promoting diversity in school education.

[16] See in particular, National minorities.

Reception and status of non-citizens

- *Refugees and asylum seekers*

48. In its second report, ECRI recommended the adoption of the Law on the Status of Refugees, which was then being drafted, and hoped that this Law would help to solve any social and economic difficulties that asylum seekers and refugees could meet. It also called for awareness-raising measures among the general public and the main public authorities in contact with refugees and asylum seekers.

49. There are very few asylum seekers and refugees in Moldova. The authorities have indicated that as of October 2007, there were 68 asylum seekers and 88 refugees. 59 persons held temporary protection status and 27 persons had been granted humanitarian protection. Most asylum seekers are from Armenia, Russia, Jordan, Turkey and Sudan. ECRI is pleased to note that the Law on the Status of Refugees was adopted on 25 July 2002 and entered into force on 1 January 2003. Since then, the Law has been amended. For instance in 2005, a new form of protection, humanitarian protection, was added to the kinds of protection which can be granted to non-citizens by the State and a temporary right to work was granted to asylum seekers who do not have other forms of income. Generally speaking, the law meets international standards, although the United Nations High Commissioner for Refugees (UNHCR) has indicated that there are still some improvements to be made, for instance in order to clarify the provisions governing temporary protection status and the rights that are attached to it. ECRI understands that the law is being revised in order to bring it into line with European Union standards.

50. ECRI notes with interest that awareness-raising measures are among the core activities of the UNHCR in Moldova in partnership with the relevant national authorities. In particular, ECRI notes the existence of training seminars for Moldovan teachers based on a pedagogical kit called “knowing refugee rights for the education of tolerance”, the aim of which is to increase tolerance towards refugees[17].

51. The main difficulties as far as asylum seekers and refugees are concerned are more linked to the inadequate implementation of the law than to their status. There are still cases of misinterpretation of the law and there remains room for subjectivity and even, in extreme cases, arbitrariness by some officials. The absence of implementing orders has also been quoted as a recurrent problem which for instance makes it difficult for refugees to obtain an identification card/number, a document automatically required if they wish to work. Bureaucracy is yet another problem. For instance, asylum seekers and those under temporary protection are obliged to re-register before the authorities every month, which seems to be a cumbersome procedure without real justification.

[17] Concerning school education, see also below, Section II: Specific Issues, - Combating racism and intolerance in and through school education in Moldova: - Combating intolerance and promoting diversity in school education.

Recommendations:

52. ECRI recommends that the Moldovan authorities examine the conclusions and recommendations of the UNHCR Office in Moldova and of human rights NGOs working in the field of asylum as concerns the need to change legislation and practice pertaining to asylum seekers, refugees, and persons with temporary or humanitarian protection status in order to improve their general situation.

53. ECRI recommends that the Moldovan authorities pursue and strengthen their efforts to provide all officials and other staff who come into contact with asylum seekers and refugees with training in human rights and the need to fight against racism and racial discrimination. ECRI also recommends that the Moldovan authorities strengthen awareness-raising among the general public of the situation of refugees and asylum seekers.

- *Immigrants*

54. The number of immigrants in Moldova remains low. In 2006, 13 000 immigrants were registered in the country and 1 481 non-citizens without legal status were arrested. For the time being Moldova is far more a country of emigration than of immigration as it is estimated that around 20% of the whole Moldovan population lives abroad, living either legally or illegally in neighbouring countries, in Russia and in Western Europe. The immigrants living in Moldova are mainly from other CIS countries but a small number also come from Africa and Asia, including permanent residents who have been living for many years in Moldova, have married Moldovan citizens and have Moldovan children.

55. Representatives of immigrants have explained that there remain many obstacles to full integration into Moldovan society, even for those who arrived more than ten years ago. A first obstacle is the cumbersome and costly procedure relating to permanent residence permits. The acquisition of citizenship through naturalisation is also problematic, particularly for those who are stateless[18]. Another problem is the general attitude of some members of the majority population towards immigrants from Africa and Asia. While it seems that racist physical violence occurs rarely in Moldova, cases of racist verbal violence through insults in the street and public places are reported to occur on a daily basis, affecting not only adults but also children, for instance in schools. Representatives of immigrants insist on the difficulties experienced in finding a job, even when a person is very qualified, due not only to the generally stretched labour market but also to the fact that employers are reluctant to employ non-citizens, particularly if they come from non-CIS countries. However, with one unsuccessful exception[19], persons who have suffered from discrimination in access to employment have been reluctant to bring these cases before justice. ECRI is worried to note allegations from different sources according to which non-citizens and particularly those who come from Africa or Asia are victims of racial profiling by police officers, particularly in the form of abusive and repetitive identity checks sometimes accompanied by attempts to extort bribes. Reportedly, some police officers who are in contact with Africans and Asians insult and even mistreat them. However, it seems that the general behaviour of police officers

[18] See above, Constitutional provisions and other basic provisions, - Law on Citizenship.

[19] See above, Civil and administrative law provisions.

towards immigrants has slightly improved over recent years[20]. In general, NGOs have stressed the need for a national integration policy for immigrants in Moldova.

Recommendations:

56. ECRI recommends that the Moldovan authorities adopt a general integration policy for all immigrants. Integration measures could include measures aimed at simplifying the procedure for citizenship and residence permit applications, providing language teaching, training and other measures to facilitate integration into the employment market, and providing relevant training for officials coming into contact with immigrants in their work.

57. ECRI recommends that the Moldovan authorities strengthen their efforts to take measures within society in general to raise awareness of the contribution made by immigrants to Moldovan culture and society and of the need to combat intolerant attitudes against them.

58. ECRI urges the Moldovan authorities to monitor the situation concerning possible cases of racial discrimination on the part of employers and members of the majority population as well as on the part of police officers against immigrants from African and Asian countries and, if need be, to take all appropriate measures to remedy such cases by granting compensation to victims and punishing the persons responsible for such discrimination.

Vulnerable groups

- Roma communities

59. In its second report, ECRI invited the Moldovan authorities to identify and eliminate all discrimination against Roma, by enforcing the relevant constitutional, criminal and civil and administrative law provisions aimed at combating discrimination. It also recommended that the Moldovan authorities ensure the adequate implementation of Decree No. 131, adopted in February 2001, which aimed to "create the conditions necessary for the socio-cultural development of Roma". ECRI underlined the importance of involving Roma, especially when various measures concerning them are designed and implemented.

60. ECRI is concerned that the situation of Roma in Moldova has not improved overall since the publication of its previous report. According to the 2004 census, there are around 12 200 Roma in Moldova, although according to some estimates, there could be more than 20 000 Roma in the country. The majority of Roma have to contend with numerous difficulties, resulting in the marginalisation of Roma communities in Moldova. ECRI deplores the fact that a large number of Roma still live in extremely difficult conditions.

61. There are allegations that some Roma are prevented, because of their ethnic origin, from accessing employment and public places. The question of access to education for Roma children is dealt with below[21]. The media are said to play a role in the negative climate against Roma among the general population. Some press articles tend to perpetuate racist prejudices and stereotypes against Roma, although there are also some other press reports which try to draw the attention of the public to the problems of the Roma in a positive manner. There are also

[20] See also below, Conduct of law enforcement officials.

[21] See below, Section II: Specific Issues, Combating racism and intolerance in and through school education in Moldova: - Access to education of Roma children.

allegations that the police discriminate against Roma, particularly in on the spot identity checks[22]. ECRI notes with interest that Roma NGOs are increasingly trying to draw the authorities' attention to the general problem of discrimination and racism against Roma. For instance, acting on reports from a number of Roma, an NGO recently organised tests to prove that in some cafés and restaurants, Roma were refused entry on the sole grounds of their ethnic origin. On the basis of testimonies and recorded material, Roma NGOs have until now only resorted to non-judicial remedies on behalf of victims, for instance through the mediation of the Ombudsman[23]. The NGOs have explained that they prefer for the moment to avoid resorting to judicial remedies, partly because of the lack of clear civil and administrative provisions in this field[24] and also due to the weaknesses of the current judicial system[25].

62. However, ECRI is pleased to note that some initiatives have been taken to monitor the situation of Roma in several fields of life and to set up a network of socio-sanitary mediators to help Roma in access to healthcare. Such initiatives have been taken by Roma NGOs, which stressed that they would need more political and financial support from the State to be able to really help in solving the problems encountered by the Roma population.

63. ECRI welcomes the Decision of the Moldovan Government adopting the Action Plan to support Gypsies/Roma of the Republic of Moldova for the period 2007-2010 (Decision No. 1453 of 21 December 2006). This Decision replaces Decree No. 131, adopted in February 2001, which aimed to "create the conditions necessary for the socio-cultural development of Roma". The present Action Plan contains measures aimed at improving the situation of Roma in the fields of employment, health protection, culture and education. However, ECRI notes that the Action Plan does not foresee specific measures to combat racism and racial discrimination against Roma even though they appear to play a role in the difficulties met by Roma, in particular in the field of access to employment or to education.

64. The Action Plan provides that funds will be allocated for its implementation depending on the financial means of the State. ECRI has been informed that in 2007 no funds were allocated by the State and that it is not sure yet whether funds will be allocated to the Plan in 2008. It is difficult to see how such an Action Plan can produce concrete results if the State does not provide the bodies that are responsible for its implementation with adequate financial means. It is to be hoped that for the remaining years the situation will improve.

Recommendations:

65. ECRI strongly encourages the Moldovan authorities to continue to take all necessary measures to assist members of Roma communities in obtaining employment. It is imperative that such a policy to facilitate employment for Roma be accompanied by measures to prohibit any discriminatory conduct by employers who refuse to take on Roma on the grounds of their ethnic origin.

66. ECRI strongly recommends that the Moldovan authorities take steps to combat racial discrimination against Roma with regard to access to public places and

[22] See also below, the recommendations made under Conduct of law enforcement officials.

[23] See above, Specialised bodies and other institutions, - the Parliamentary Advocates (Ombudsman).

[24] See above, Civil and administrative law provisions.

[25] Section II: Specific Issues, Difficulties in implementing the legislation to combat racism and racial discrimination.

access to goods and services, ensuring in particular that any discriminatory act in these areas is duly remedied.

67. ECRI strongly recommends that the Moldovan authorities duly implement the Action Plan to support Gypsies/Roma of the Republic of Moldova (2007-2010). The authorities should provide all necessary human and financial resources to this end.

- *Religious minority groups*

68. As already noted in ECRI's second report, Orthodox Christians constitute more than 90% of the Moldovan population. The rest includes other Christians, Jews, Muslims and members of other religions. A new Law on Religious Denominations entered into force on 18 August 2007 and replaced the former 1992 Law on Denominations. Article 15 of the new Law provides that religious faiths are separate from the State and equal before the law and should not be discriminated against. According to the same Article, the State recognises the particular importance and the primordial role played by the Orthodox Christian faith and the Moldovan Orthodox Church in Moldovan life, history and culture. The new law regulates the procedure of registration of religious denominations and of individual parishes belonging to these religions.

69. The registration of several minority religious groups remains an acute problem in Moldova. In its previous report, ECRI noted that following a judgment of the European Court of Human Rights, the Metropolitan Church of Bessarabia was finally registered as a church at the national level in 2002. However, it still experiences difficulties in registering individual parishes at local level, even though the overall situation has gradually improved over the years. Other groups have finally been registered, after some time, such as the Church of Jesus-Christ of Latter-day Saints (Mormons) in 2006. However, there are religious groups that are still awaiting registration. On 27 February 2007, the European Court of Human Rights decided that the refusal to register the True Orthodox Church in Moldova violated Article 9 of the European Convention on Human Rights which guarantees freedom of religion[26]. For the time being no Muslim religious group has been registered even though two different associations have already applied to the State authorities on several occasions[27]. ECRI notes that according to Muslim representatives there are around 30 000 Muslims in Moldova, while they account only for 1 667 in the 2004 census.

70. Many sources have described the procedure of registration which was applicable until the entry into force of the new Law on Religious Denominations as unnecessarily bureaucratic and even as arbitrary. It is to be hoped that the new Law, which entered into force recently, will facilitate the registration procedure and provide a strong basis for resolving the remaining issues in this field. ECRI notes that the requirements for registration have been somewhat simplified in the new law. The responsibility for registering a faith will be transferred from the State Service for Religious Affairs, which will disappear, to the Ministry of Justice. Nevertheless, ECRI expresses its concern at the fact that only denominations

[26] Case of Biserica Adevărat Ortodoxă din Moldova v. Moldova, application no. 952/03.

[27] In 2002, the *Carmuirea Spirituala Musulmanilor din Republica Moldova*, applied before the European Court of Human Rights but the application was declared inadmissible on the grounds that the applicant failed to produce a document required by law when applying for registration to national authorities. The European Court considered this requirement as not disproportionate under Article 9 of the ECHR. ECHR, Decision 14 June 2006, Carmuirea Spirituala Musulmanilor din Republica Moldova against Moldova, Application No. 12282/02. Since then a new application was made before the authorities apparently with the relevant document but with no success so far.

with a list of founding members containing at least 100 Moldovan citizens are allowed to register (Article 19-d of the Law), a requirement which is difficult to fulfil for small religious groups.

Recommendations:

71. ECRI recommends that the Moldovan authorities ensure that members of religious minority groups can fully exercise their freedom of religion in accordance with Article 9 the European Convention on Human Rights as interpreted by the European Court of Human Rights. To this end, the authorities should take steps to improve the mechanism of registration so as to avoid unnecessary bureaucracy and arbitrariness.

72. The Moldovan authorities have recalled that according to the law, the lack of registration does not prevent members of a religious group from collectively practising their religion. The only consequence is that they cannot benefit from the status of a legal entity and the specific rights attached to it. However, ECRI has received allegations according to which the police and other authorities sometimes interfere in religious activities of religious groups on the grounds that they are not registered, even though registration should not be a precondition for running these activities. For instance, members of Muslim communities have been unduly prosecuted by law enforcement officials under Article 200 of the Code of Administrative Offences, which prohibits religious intolerance, for practising their faith in private premises, a right which does not depend on registration. It is true that in some cases, the courts ordered the end of the procedure, stating that it was not legally founded. The Parliamentary Advocates (Ombudsman) are currently following up this situation and they have asked the law enforcement authorities to take measures to avoid further misinterpretations of this provision. The Muslim representatives also complain that partly due to the lack of registration, their demands to have a real mosque in Chisinau where they can pray or the possibility of organising burials according to Muslim rituals have not been satisfied for the moment despite their repeated requests.

73. There are allegations according to which persons belonging to some faiths other than the majority religion are sometimes subject to harassment on the part of members of the majority population or members of the majority church, particularly in rural areas. Even more worrying are the allegations from many sources according to which Muslims, and to a lesser extent other minority religious groups, are subject to harassment on the part of the authorities and particularly the police. For instance, cases of abusive identity checks during Friday prayers in Chisinau have been reported. The pressure on the part of the law enforcement officials on Muslim groups is said to have increased with no real justification since the 11 September 2001 terrorist attacks in the United States[28].

Recommendations:

74. ECRI recommends that the Moldovan authorities find solutions as soon as possible in full consultation with the interested groups to all the obstacles encountered by members of the Muslim communities who wish to practise their religion. In this connection, ECRI draws the attention of the Moldovan authorities to its General Policy Recommendation No. 5 on combating intolerance and discrimination against Muslims, which provides detailed guidance on the measures which should be taken in this field.

[28] See also below, Conduct of law enforcement officials.

75. ECRI recommends that law enforcement officials be trained in the application of the existing and recently adopted legislation concerning religious denominations in order to avoid in the future any misinterpretation that could infringe freedom of religion.

76. ECRI strongly recommends that the Moldovan authorities pursue and reinforce their efforts to effectively combat manifestations of religious intolerance by members of the majority population or harassment by the police and other authorities against members of some religious groups. They should ensure that those responsible for such acts are duly prosecuted and punished in accordance with Moldovan law.

77. As far as the Jewish communities are concerned, representatives of these communities and other sources report cases of desecration of Jewish cemeteries and tombstones, even though they consider that it is difficult to establish whether they should be qualified as mere vandalism or as antisemitic acts. The authorities have indicated that they have enquired into such cases but could not find any antisemitic motivation behind these acts. Cases of antisemitic material published on internet, in press articles or in literature, sometimes taking the form of Holocaust denial, have also been reported to ECRI even if they seem rather rare. However, the prosecution authorities have indicated to ECRI that so far, they have received no complaint in this respect[29].

78. Another problem raised particularly by representatives of the Jewish communities but which also concerns other minority religious groups is the issue of restitution of religious properties confiscated by previous regimes. There seems to be no legislation regulating the restitution of religious properties, a fact which hinders the current discussions with the authorities on this question. The Moldovan authorities have informed ECRI that following the declaration of independence, State properties were privatised in accordance with legal provisions. As a consequence, they consider that a restitution *in integrum* would be practically impossible.

79. On a positive note, ECRI is pleased to learn that the President of the Republic has participated in several events commemorating the victims of Holocaust in Moldova and has condemned antisemitism at such occasions. Some Holocaust commemoration monuments have been erected in Chisinau and in other parts of the country. However, Jewish representatives have explained that it appears that commemoration monuments as well as some religious monuments may be threatened by construction permits which risk being granted in the vicinity of such monuments without real consideration to their presence and symbolic value.

Recommendations:

80. ECRI recommends that the Moldovan authorities pursue their efforts in finding arrangements for the restitution of religious properties confiscated prior to the declaration of Moldovan independence, for instance through the adoption of a legislation regulating this issue.

81. ECRI strongly recommends that the Moldovan authorities monitor all instances of antisemitism and strengthen their efforts to punish the perpetrators of antisemitic offences. In this connection, ECRI draws the attention of the Moldovan authorities to its General Policy Recommendation No. 9 on the fight against antisemitism,

[29] On the implementation of criminal law provisions prohibiting antisemitism, see above, Criminal law provisions.

which provides detailed guidance on the measures that should be taken to prevent and sanction antisemitic acts.

- ***National minorities***

82. According to the 2004 census, national minorities account for around 24% of the population of Moldova. Among a large number of minorities, the Ukrainian minority represents around 8.3% of the total population, Russians 5.9%, the Gagauz 4.4%, Romanians 2.2% and Bulgarians 1.9%. There are also several other smaller groups. The Law of 2001 on the Rights of Persons Belonging to National Minorities and on the Legal Status of their Organisation was complemented by the National State Policy Concept in 2003.

83. Each national minority has its own interests and needs in Moldova. For example, the Roma community is, generally, in a much more difficult situation than other minorities[30]. ECRI notes, however, that there are some areas of concern common to all national minorities. Representatives of several national minorities have stressed that they wish to obtain more support from the Moldovan authorities in a number of fields. They particularly mentioned the need for assistance in protecting their cultural and linguistic and sometimes religious heritage[31]. In this field, ECRI notes that the presence of minority languages and cultures in printed and other media remains insufficient. For instance, on public TV, some programmes are devoted to minorities' issues and broadcast in minority languages but these programmes are irregular and few in number. Since ECRI's last report, the time allocated to such programmes has increased and decreased several times and the time-slot of broadcasting has changed repeatedly. As regards the use of languages in contacts with public authorities, the legislation on national minorities provides that in regions where the latter constitute a significant part of the population, they should be able to communicate with the public authorities in their own languages. In the Gagauz-Yeri autonomous region, the law provides that there are three languages which can be used in contact with the public authorities: Gagauz, Russian and Moldovan. The law also provides for a proportionate representation of national minorities within public bodies. However, in practice there are still many obstacles to a full implementation of these principles. The Bureau for Interethnic Relations organises in partnership with NGOs cultural events throughout the countries and in particular a yearly ethno-cultural festival in Chisinau. However, the lack of adequate financial support from the State remains a significant obstacle to a full development of minorities' cultures.

84. Another issue of concern to ECRI is the lack of command of Moldovan, the state language, among members of national minorities. In its second report, adopted in 2002, ECRI underlined the tensions existing at the time of the adoption of the report concerning the role and use of languages in Moldova and particularly the balance to be found between Moldovan as the state language and Russian which still played the role of the language of interethnic communication. ECRI stressed then that the language issue was used as a substitute for democratic debate over political and economic matters. At the time of drafting the present report, the political tensions surrounding the language issues still exist even if they may be less apparent. ECRI regrets that, despite the few measures which have been taken by the authorities so far and despite other initiatives supported by intergovernmental organisations, the number of persons belonging to national minorities having a better command of Moldovan does not seem to have

[30] See above, Vulnerable groups – Roma communities.

[31] Concerning the Jewish communities, see also above, Vulnerable groups – Religious minority groups.

increased[32]. Given the large number of linguistic minorities in Moldova, ECRI believes that particular attention needs to be paid to the language issue, which is a key aspect of successful integration into Moldovan society. The State should ensure that all Moldovan citizens have the opportunity to learn Moldovan so as to be able to integrate into society and have genuine equality of opportunities; at the same time, it should avoid any assimilation which would deprive national minorities of the possibility or capability of using their own language.

Recommendations:

85. ECRI strongly encourages the Moldovan authorities to provide more opportunities to learn Moldovan for those who want to. Measures for that purpose could include affordable evening classes or vocational language courses.

86. ECRI recommends that the authorities take care to preserve and encourage minority cultures and languages. In this connection ECRI reiterates its recommendation that the Moldovan authorities ratify as speedily as possible the European Charter for Regional or Minority Languages[33].

Climate of opinion

87. ECRI has received disturbing information according to which some media, some politicians and some members of the general public make intolerant remarks concerning several minority groups including immigrants, Roma, Jews and anyone not of Moldovan origin, or of ethnically mixed origin, or not professing the Orthodox Christian faith, the dominant religion in Moldova. Extremist Russians or extremist pro-Russia Moldovans on the one hand, and extremist pro-Romania Moldovans on the other hand sometimes managed to taint general debates over political, language and historical issues with intolerant speech geared towards each other but also towards some ethnic or religious groups such as the Roma or Jewish communities. Some politicians and some media take advantage of the growing sense of nationalism in Moldova, which inevitably targets minority groups. ECRI notes that the current ultra-nationalist and radical religious discourses and activities mainly target people on the basis of their sexual orientation, but also that xenophobia and intolerance towards small religious groups and some ethnic groups is a component – even though less visible for the moment – of these extremist trends. ECRI expresses its concern at the negative consequences that a discourse stigmatising visible minorities and other minority groups for political or other gain has on the perception of these minority groups by the majority population. Such expressions can only foster a climate of general intolerance and xenophobia in the country. In this connection, ECRI draws attention to reports that the Moldovan Orthodox Church, the religion practiced by over 90% of the Moldovan population, has not always played the role it should have in promoting tolerance among its followers.

[32] See also below, Section II: Specific Issues, Combating racism and intolerance in and through school education in Moldova: - Access to education of children belonging to national minorities.

[33] See also above, International legal instruments.

88. ECRI notes that problems of racism and racial discrimination are not generally considered to be the main concerns for members of Moldovan society and that there is a corresponding lack of awareness of these issues. It is true that Moldovan society is often described as being tolerant but some issues covered in this report indicate that there is a problem of general awareness of what constitutes a racist or otherwise intolerant statement or act. Racism is often perceived in Moldova as a notion covering only the most blatant abuses of human rights such as state-sanctioned segregation, apartheid or Nazism. However, racism and racial discrimination are continually evolving. They can also take on other forms, such as the targeting of groups on the grounds not only of race[34] but also of skin colour, language, religion, nationality and national or ethnic origin, or a combination of these grounds, and can occur in more subtle, but nonetheless harmful, forms experienced in everyday life. For instance, in other parts of this report, mention is made of other forms of racism that need to be duly countered, such as the daily occurrence of racist verbal abuse encountered by immigrants from African and Asian countries[35] or police harassment against Muslims[36]. There is an urgent need for the Moldovan authorities and society in general to become aware of the various dimensions of racism and related intolerance and of racial, ethnic or religious discrimination in daily life in Moldova.

Recommendations:

89. ECRI encourages the Moldovan authorities to impress upon the media, without encroaching on their editorial independence, the need to ensure that reporting does not contribute to creating an atmosphere of hostility and rejection towards members of visible minority groups, including Roma and other ethnic groups, religious minority groups and non-citizens.

90. ECRI stresses that politicians must resist the temptation to approach issues relating to minority groups living in the country in a negative fashion. Political parties should also take a firm stand against any forms of racism, racial discrimination and xenophobia. ECRI recommends that an annual debate be initiated in Parliament on the subject of racism and intolerance faced by members of minority groups in Moldova.

91. ECRI recommends that the Moldovan authorities take measures aimed at raising the general public's awareness of the problem of racism and intolerance in Moldova. The need to combat racial discrimination should also be emphasised in this context, as well as the need to accept and promote cultural diversity. Such a campaign could be part of a more general national action plan against racism, racial discrimination, xenophobia and related intolerance.

Conduct of law enforcement officials

92. In its second report, ECRI recommended that the Moldovan authorities consider the establishment of an independent body which would investigate all allegations of human rights violations by the police.

[34] Since all human beings belong to the same species, ECRI rejects theories based on the existence of different "races". However, in this report, ECRI uses this term in order to ensure that those persons who are generally and erroneously perceived as belonging to "another race" are not excluded from the protection provided for by the legislation.

[35] See above, Vulnerable groups – Immigrants.

[36] See above, Vulnerable groups – Religious minority groups.

93. ECRI is concerned that illegal behaviour, such as arbitrary arrests, excessive use of force, ill-treatment and even torture, on the part of some law enforcement officials continues to be widely reported. In addition, corruption within law enforcement agencies is said to be prevalent. In particular, ECRI notes with deep concern allegations according to which the use of discriminatory practices by the police towards some minority groups such as the Roma, the Muslims and immigrants from African and Asian countries remains frequent, even if a slight improvement is to be noted as far as the situation of immigrants is concerned[37]. The practice most reported is the disproportionate number of identity checks that members of these groups have to undergo in the streets but ECRI has also received information about complaints of racist insults and other forms of racially motivated misconduct on the part of police officers.

94. ECRI notes that the Moldovan authorities have taken a number of steps to combat illegal behaviour on the part of law enforcement officials. For instance, a Code of Ethics for the Police was adopted in 2006. ECRI notes that despite allegations of cases of racially motivated misconduct on the part of the police, no formal complaint on this ground was brought before the Police Security Department, the Prosecutor or the Ombudsman. However, according to NGOs, when a person has the courage to bring a complaint against a police officer for human rights violations in general, investigations still too seldom lead to punishment, which does nothing to remove the impression that law enforcement officials enjoy a degree of impunity.

Recommendations:

95. ECRI strongly recommends that the Moldovan authorities take further steps to put an end to all forms of racially motivated misconduct on the part of the police. It is important for the Moldovan authorities to make clear to society that such conduct by law enforcement officials will not be tolerated and will be punished. ECRI again recommends that the Moldovan authorities establish a body, independent of the police and prosecution authorities, entrusted with the investigation of alleged cases of racial discrimination and racially motivated misconduct by the police. ECRI also recommends that the authorities ensure as necessary that the perpetrators of these acts are adequately punished.

96. In particular, ECRI urges the Moldovan authorities to take steps to prohibit racial profiling by the police. ECRI draws the authorities' attention to its General Policy Recommendation No. 11 on combating racism and racial discrimination in policing, which provides guidelines in this field.

97. ECRI strongly encourages the Moldovan authorities to allocate all the necessary resources to law enforcement officers to enable them to operate under appropriate conditions, with full respect for the human rights and dignity of the persons they arrest or who come into contact with them. This presupposes improving training in human rights and raising awareness of racism and racial discrimination issues. Further emphasis should also be placed on training in cultural diversity.

Monitoring the situation

98. ECRI is worried about the lack of adequately detailed information about the situation of the various minority groups in Moldova. Some steps have been taken to improve matters in this area. However, the lack of financial means seriously

[37] See above: Reception and status of non-citizens, - Immigrants; Vulnerable groups: - Roma communities; - Religious minority groups

hampers progress in the field of scientific research, statistics, polls and other forms of monitoring. In ECRI's view, collection of data broken down by ethnic origin would make it easier to identify areas of life in which there is direct or indirect racial discrimination and to find the best means of combating those forms of discrimination.

Recommendations:

99. ECRI strongly encourages the Moldovan authorities to look into means of setting up a full and coherent system of data collection so as to evaluate the situation regarding the different minority groups in Moldova and determine the extent of manifestations of racism and racial discrimination. ECRI recommends that the Moldovan authorities collect relevant information broken down according to categories such as ethnic origin, language, religion and nationality in different areas of policy and to ensure that this is done in all cases with due respect for the principles of confidentiality, informed consent and the voluntary self-identification of persons as belonging to a particular group. This system should also take into consideration the gender dimension, particularly from the point of view of possible double or multiple discrimination.

Area currently not under the effective control of the Moldovan authorities

100. With regard to the eastern (Transnistrian) region of Moldova (known as "Transnistria"), following the declaration of Moldovan independence of 23 June 1990, the self-proclaimed "Republic of Transnistria" came into being on 2 September 1990. Since the region of Transnistria is not under the effective control of the Moldovan authorities, to whom this report is addressed, ECRI will not examine the situation in Transnistria. However, in line with its mission, ECRI would like to reiterate its concern over reports of human rights violations in Transnistria, particularly discrimination relating to education[38] and freedom of religion.

II. SPECIFIC ISSUES

Difficulties in implementing the legislation to combat racism and racial discrimination

101. In several sections of this report, ECRI describes the existing legislation which constitutes in principle a favourable framework for combating racism and racial discrimination in Moldova. However, the main problem identified by ECRI in Moldova relates to the inadequate implementation of the law in many fields which are of importance to combating racism and racial discrimination. The explanation sometimes given to ECRI is that the law is not applied because there is hardly any intolerance in the country. However, this explanation does not correspond to the description made in other parts of this report of alleged problems of racism and racial discrimination encountered by several minority groups. It is therefore urgent to solve certain general problems affecting the rule of law and the protection of human rights in Moldova in order to tackle at the same time those that are more directly linked to racism and racial discrimination.

102. Representatives of minority groups have explained that they often cannot exercise their rights due to the low level of quality of public services in general and particularly of the administration of justice. The functioning of public services is far from satisfactory, partly due to the low salaries of civil servants, the fast

[38] See also above, Criminal law provisions.

rotation of staff and the lack of state financial means. Arbitrariness in decisions, corruption and bribes are also said to be common in many services. Despite increasing efforts from the government to combat such practices, they are still widely recognised as prevalent in Moldovan society. This situation disadvantages those who do not have the necessary connections or means to have access to public services, amongst whom a comparatively larger proportion are members of minority groups. Concerning allegations of intolerant acts or racial discrimination on the part of the general public, when asked why victims do not turn to the police or the prosecutor to complain, the answer given by human rights NGOs is that they are discouraged from doing so and in some extreme cases are even afraid of encountering problems of the same kind with these institutions. In general, the Moldovan authorities appear aware of these problems and of the need to make profound reforms of the system. Many measures have been already taken in recent years to this end. In particular, ECRI notes that there are a number of training courses for officials organised by NGOs or international organisations and which aim at improving the situation in the field of human rights. Measures to combat corruption have also been taken in recent years by the authorities, including the adoption of an Action Plan for the implementation of the National Strategy for Fight against Corruption (2007-2009).

103. In addition to problems with the independence of the judicial system, non-governmental organisations and intergovernmental organisations have reported serious problems in the functioning and fairness of the judicial system in general. For instance, the right to interpretation and to the translation of documents in cases of judicial proceedings is crucial for national minorities and immigrants who wish to obtain a remedy for a violation of their human rights. However, even though the law provides for the right to interpretation and translation of documents for those who need it, it is not applied in practice or the quality of translation and interpretation is often so low that it jeopardises the fairness of the whole procedure. ECRI notes with interest that the Moldovan authorities have taken some measures to reinforce the quality and the independence of the judicial system, for instance by creating in 2006 a National Institute of Justice in charge of initial training of judges and prosecutors, and by adopting in 2007 a law on free legal aid for those who do not have the financial means to pay for legal representation. Such measures are welcome but they need to be complemented by other initiatives. It is also urgent to solve the thorny issue of non-enforcement of court decisions.

104. The Moldovan authorities have informed ECRI that they are closely monitoring the implementation of the laws that have been adopted. The Parliamentary Committee for Human Rights and National Minorities has set up a working group whose task is to monitor the implementation of legislation in the field of human rights.

Recommendations:

105. ECRI urges the Moldovan authorities to ensure that the provisions against racism and intolerance are fully implemented and accompanied by a sufficient and steady supply of human and financial resources. It is important to ensure that all sections of the administration – at national, regional and local level – responsible for the different areas covered are fully committed to implementing the relevant laws. To this end, it is essential to inform all officials and to provide them with training in these laws.

106. Aware that changing attitudes is a much slower process than changing the law, ECRI encourages the Moldovan authorities to reiterate publicly, as often as

necessary, the importance of implementing human rights laws and more particularly anti-racist and anti-discrimination provisions. ECRI further emphasises the need to evaluate the actual results obtained in the field of better implementation on a regular basis, and to involve closely members of the minority groups in the evaluation, fine-tuning and implementation of these laws.

Combating racism and intolerance in and through school education in Moldova

107. In the present section, ECRI would like to draw the Moldovan authorities' attention to several issues concerning school education in Moldova and which are of concern to ECRI[39]. As a preliminary remark, ECRI notes that the sector of Moldovan public education is facing very serious difficulties mainly linked to the socio-economic crisis that the country has been confronted with since it acceded to independence in 1990. This means that some of the problems covered in the present section affect to a greater or lesser degree all pupils and students in Moldova and not only those belonging to minority groups. The main general problems are shortage of teachers and teaching material, the poor conditions in which schools operate and corruption. Overall, the public education system in Moldova is facing a crisis situation the seriousness of which is acknowledged by the national authorities.

108. The Moldovan authorities have already set up several plans of action which aim to solve all the shortcomings mentioned above and others. For instance, they have adopted a National Action Plan called "Education for All" (2004-2008), and an entire section of the National Human Rights Action Plan (2004-2008) mentioned below is devoted to the right to education. Against this background and taking into account the efforts that the Moldovan authorities plan to make in the near future as far as public education is concerned, ECRI believes that it is necessary to draw their attention to some issues which are of relevance to combating intolerance and discrimination in the field of education and which should not be left outside the indispensable overall plan of action to improve the situation throughout the country[40]. These issues are the problem of access to education of Roma children on the one hand, and of children of other national minorities on the other hand. ECRI also stresses the need to reinforce the role of education in combating intolerance and promoting diversity in Moldova.

- Access to education of Roma children

109. ECRI is deeply concerned to learn that the situation of Roma children living in Moldova in the field of education has not improved over the recent years[41]. The extremely poor living conditions of some Roma families make it difficult for them to send their children to school and to pay for the necessary school material, clothes, food and means of transportation. Roma NGOs have also raised the problem of racist stereotypes and prejudice sometimes existing among teachers or non-Roma parents, and which discourage Roma children from attending mainstream schools. Roma representatives have reported that there is a problem of *de facto* school segregation: there are schools located in Roma villages that are mainly – or even exclusively – attended by Roma children. According to

[39] Concerning access to education in the Transnistrian region, see above, Situation of Transnistria: - Area currently not under the effective control of the Moldovan authorities.

[40] For this whole section, see ECRI General Policy Recommendation No. 10 on combating racism and racial discrimination in and through school education.

[41] ECRI deals with the general situation of Roma communities in another part of this report. See above, Roma communities. Concerning the teaching of Romani language and culture, see below, Access to education of children belonging to national minorities.

Roma representatives, in such schools, the resources are even fewer, the material conditions even harsher and the lack of qualified teachers even more problematic than elsewhere in the country. For all these reasons, the school attendance of Roma children is generally low and there are very few pupils who finish secondary school and even less who start higher education. Obviously, this has a negative impact on their future, particularly as far as access to employment is concerned.

110. ECRI notes with interest that Roma NGOs, with the financial support of international organisations and in partnership with the Ministry of Education and Youth, the Bureau for Interethnic Relations and others, are trying to launch pilot projects aimed at improving the school attendance and performance of Roma children. Such projects include an awareness-raising campaign on Roma education both to reduce prejudices among non-Roma and inform Roma parents about the education system, so as to eliminate the gap between non-Roma and Roma in access to education. Nation-wide research will also be conducted on the situation of Roma in education. The authorities have also indicated that since May 2006, they have established a system of preferential scholarships granted to children belonging to disadvantaged groups which can benefit Roma children, and that some of them are studying thanks to this financial support. However, the exact number of Roma children really benefiting from such a measure is not known to ECRI and it has been described by civil society organisations as extremely low and far from meeting the real needs in this field. The low number and the symbolic nature[42] of the measures taken so far by the authorities are clearly insufficient to solve the strong disadvantages faced by Roma in the education sector.

Recommendations:

111. ECRI urges the Moldovan authorities to maintain and strengthen their efforts to ensure that Roma children have equal opportunities in access to education and particularly to continue on to higher levels of education. Measures in this field should be taken urgently, on a short, medium and long-term basis, in full consultation with representatives of the Roma communities, and should be accompanied by adequate human and financial resources. In this respect, ECRI draws attention to its General Policy Recommendation No. 10 on combating racism and racial discrimination in and through school education which provides guidelines in this field.

- Access to education of children belonging to national minorities

112. In its second report, ECRI recommended that the Moldovan authorities do their utmost to ensure that teaching of the Moldovan language is substantially improved in order that children whose mother tongue is not the state language attain sufficient command of Moldovan by the end of their schooling. At the same time, ECRI recommended that the authorities find a solution in their educational approach that reconciles the desire to promote teaching of the state language with the need to protect minority languages.

113. The present situation remains unsatisfactory as far as teaching the state language for children belonging to national minorities is concerned. There is a lack of suitable textbooks for learning Moldovan as a second language, there are too few teachers, and the teachers are poorly trained. As a result pupils at

[42] See for instance above, the section on *Roma communities* where it is indicated that no founds where allocated in the State budget to implement the Action Plan for the support of Gypsy/Roma of the Republic of Moldova (2007-2010).

schools where instruction is partly given through the medium of another language do not attain sufficient command of Moldovan by the end of their schooling, which undermines equality of access to public-sector and private-sector employment. ECRI is concerned at information indicating that the authorities seem to give less importance than before to the need for all Moldovan citizens to learn the state language. The situation is therefore far from improving in this field, which is regrettable as the state language is an important tool for the integration of the whole society.

114. The situation of children belonging to national minorities as regards learning their mother tongue and culture is also deemed unsatisfactory by representatives of these minorities. The majority of public schools teach in Moldovan. There are also minority schools teaching for the most part in Russian or, for a few schools, in another minority language spoken in the country. The authorities have taken measures to introduce in minority schools as from 2002 a subject called "the people's history, culture and traditions"[43]. This gives an opportunity to Bulgarians, Gagauz, Russians and Ukrainians to learn about their respective cultures, histories and languages. For other national minorities, the authorities have put in place a system of Sunday schools, which means that the pupils concerned can receive equivalent courses but only in the context of extracurricular activities. ECRI notes that for the time being no such courses exist for Roma pupils but also that the authorities are currently considering creating them. In general, representatives of national minorities have indicated that there is a lack of scientific research and methodological material in this field, particularly for languages other than Russian. The Institute for Interethnic Studies created within the National Academy of Sciences is not in a position to run such activities as it does not receive adequate financial support from the State to this aim.

Recommendations:

115. ECRI strongly recommends that the Moldovan authorities maintain their efforts to improve education in Moldovan for children of national minorities in order to guarantee that when they leave school they will have equal opportunities in access to higher education and employment. In this respect, ECRI draws attention to its General Policy Recommendation No. 10 on combating racism and racial discrimination in and through school education which provides guidelines in this field. At the same time ECRI strongly recommends that the Moldovan authorities ensure that there is adequate scope in minority schools for teaching minority languages and cultures.

116. More generally, ECRI recommends adopting an approach in which all measures concerning the schooling of children of national minorities, particularly measures to promote the teaching of Moldovan, are taken in consultation with the minorities concerned and with due regard for their interests.

- ***Combating intolerance and promoting diversity in school education***

117. In its second report, ECRI recommended that the Moldovan authorities improve education in the human rights field, particularly with regard to the problems of racism and intolerance, for children at all levels of education.

118. In that report ECRI already mentioned two courses, Civic Education and the Law and Us, which constitute the main subjects for teaching human rights and democratic values, including the principle of non-discrimination and the need to

[43] Concerning teaching history and culture of national minorities in mainstream schools, see below, Combating intolerance and promoting diversity in school.

combat racism and intolerance. ECRI regrets to learn that these two courses, taught from the fifth to the nine grades (i.e. in junior high schools) and which used to be compulsory, became optional from the school year 2006/2007. The Ministry of Education and Youth took this decision in order to lighten the curriculum, which was apparently too weighty, despite criticisms expressed by representatives of the civil society and by some school teachers for instance through a petition signed by 4 000 persons. The Parliamentary Advocates have also publicly asked the authorities to review their position, but with no success so far. Indeed, the general feeling among human rights specialists is that awareness and information among the population in general and children in particular are low as far as individual rights including human rights are concerned. This decision also seems to run counter to the commendable objectives of the National Human Rights Action Plan (2004-2008) to increase the opportunities for school children to learn about human rights. For instance, the Plan provides for the development of a human rights curriculum in schools and universities and for initial and in-service training of teachers at all levels in the field of human rights.

119. The authorities have stressed that many pupils opt for the two courses mentioned above, a fact that should compensate for their optional character in the authorities' view. They have also called attention to the existence of several extracurricular activities such as activities organised in the framework of international days for human rights, which give an opportunity to pupils at all levels to become familiar with issues of human rights and combating racism and racial discrimination. However, in practice, the overall situation seems to have deteriorated rather than improved in the field of teaching human rights over the recent years.

Recommendations:

120. ECRI strongly recommends that the Moldovan authorities duly implement the National Human Rights Action Plan, which includes measures aimed at ensuring that human rights education is an integral part of the school curriculum. Human rights education and particularly the principle of non-discrimination and the need to combat racism and intolerance should be taught at all levels and across all disciplines. To this end, teachers should be adequately trained in these issues. ECRI draws attention to its General Policy Recommendation No. 10 on combating racism and racial discrimination in and through school education which provides guidelines in this field.

121. In this context, ECRI recommends that the Moldovan authorities review, in consultation with human rights specialists and NGOs, their decision to transform the Civic Education and the Law and Us courses into optional subjects.

122. In its second report, ECRI expressed the hope that the reform of school history books under discussion at the time would provide an opportunity to counter all negative stereotypes concerning minority groups and enhance the appreciation of cultural diversity by all pupils in Moldova.

123. Since the publication of ECRI's second report, the Moldovan authorities have begun to prepare new history textbooks. The aim was to introduce an integrated approach to history to replace the History of Romanians and Universal History courses. However, the reform of history teaching has become a politically sensitive issue, due notably to its close links with issues of national identity. The new textbooks have raised criticisms from many historians and politicians, and protests and demonstrations took place when these textbooks were introduced in all Moldovan schools in September 2006. The new textbooks were accused of

being politically biased and of denying the true historic identity of the Moldovans and particularly the role of the Romanian identity in this respect, and even to contain anti-Romanian sentiments.

124. On 14-16 July 2006, the Council of Europe organised a seminar in co-operation with the Moldovan Ministry of Education on the use of multi-perspectives in teaching history. The seminar was a follow-up to two (unpublished) critical analyses of the new history textbooks that had been drawn up at the request of the Ministry of Education. In response to the strong protests, the authorities have set up a special committee within the Academy of Science of Moldova tasked with checking whether the objections raised are well founded and whether there is a need to revise the textbooks. At the time of adopting this report, this committee was still preparing its conclusions and recommendations.

125. Another problem linked to the content of history courses is the general lack of reference to the history and culture of national minorities, even though the authorities have sought to improve the situation through the new history textbooks or in other subjects such as literature. Representatives of national minorities have stressed that it is important that all pupils in Moldovan mainstream schools – and not only children belonging to these minorities and who study in minority schools[44] – are made aware of the history and culture of the different national minorities living in the country such as for instance the Ukrainians, the Bulgarians, the Gagauz, the Roma and the Jews. This is also true as far as religious minority groups and ethnic minorities which have arrived in the country more recently are concerned. In this respect, ECRI notes with interest that some pilot projects have been launched by members of the Jewish communities in partnership with the Moldovan authorities in order to teach about the Holocaust but also more generally about interethnic mutual respect. ECRI believes that such initiatives could be extended to the whole school system.

Recommendations:

126. In line with its General Policy Recommendation No. 10 on combating racism and racial discrimination in and through school education, ECRI recommends that the Moldovan authorities take all appropriate measures to remove from textbooks – and in particular history textbooks – any racist material or material that encourages stereotypes, intolerance or prejudice against any minority group.

127. ECRI also recommends that the Moldovan authorities regularly monitor, and if necessary revise, school textbooks to ensure that they reflect more adequately the diversity and plurality of society, and include, to this end, minority groups' contribution to society.

[44] Concerning this point, see above, - Access to education of children belonging to national minorities.

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