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THE ROLE OF OMBUDSMEN AND SIMILAR BODIES IN THE IMPLEMENTATION OF ANTI-DISCRIMINATION LAW IN EUROPE

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The role of ombudsmen and similar bodies in the implementation of anti- discrimination law in Europe

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1 EU legislation on discrimination

The basic provision of the EU legislation concerning the prohibition of discrimination is Article 13 EC Treaty introduced by the Amsterdam Treaty which reads:
" Without prejudice to the other provision of this Treaty and within the limits of the power 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." From all the grounds listed in Article 13 I will now concentrate on the ground: "racial or ethnic origin".

In order to facilitate the implementation of this basic regulation through the legislation of the Member States, the EU established two Directives; the race Directive[1] 2000/43/EC, in June 2000 and the employment Directive[2] 2000/78/EC, in November 2000. As an additional measure the Council decided to start a five year campaign, the Community Action Programme to combat discrimination in the EU States.[3] This shows that the EU law on discrimination is implemented in the Member States in an indirect way, through the transposition of EU Directives into the domestic legal systems of the Member States. That means that the Member States have to redraft their legal system in order to fulfil all the requirements stipulated in the relevant EU Directives. This is a procedure in which national ombudsmen can play a very important role by assisting national bodies drafting new legislation. Most of the national ombudsmen were indeed very much involved in these events and some of them even played an outstanding role.[4]

2 Transposition of the EU anti-discrimination Directives into the domestic legislation of the Member States

2.1 Definition of discrimination and the covered grounds

One of the main problems in the treatment of discriminatory practices by the national legal systems was (and to some extent it still is) that discrimination was neither clearly defined, nor was there an agreement in the judiciary and in the legal literature as to what kinds of differential treatment can and what cannot be regarded as justified. Although national constitutions usually have a basic provision on equality and non-discrimination, however, only some of the older Member States had some experience about equality between man and woman.[5] In the accession countries the Constitutional Courts - established in the beginning of the nineties - took the first steps to distinguish between justified and unjustified differential treatments, however only in the case of situations

[1] Council Directive implementing the principle of equal treatment between persons irrespective of racial or ethnic origin.
[2] Council Directive establishing a general framework for equal treatment in employment and occupation.
[3] Council Decision 2000/750/EC
[4] The Ombudsman for Minorities in Hungary for example prepared a draft law on equal treatment and combating racial discrimination in September 2000, three years before the government submitted the „official" version to the parliament.
[5] The only country with a longer legal tradition on racial equality was Great Britain were the first Race Relations Act was established in the year 1976.

that we now refer to as direct discrimination. This was set forth by some of the national ombudsmen, from which some went even further, by using the term indirect discrimination too.

The race Directive sets out definitions of direct discrimination, indirect discrimination and harassment which the Member States are required to incorporate in their national legislation. In particular the definition of indirect discrimination covers apparently neutral provisions which particularly disadvantage members of a certain racial or ethnic group. In this case a different treatment can only be justified if there is an objective and legitimate aim which is appropriate and necessary. This definition is drawn from the sex discrimination legislation, but it has also been simplified. While in cases of gender discrimination statistical proof is often required to prove the disproportionate impact of a measure, the approach of Article 13 of he Directive is to allow judges a more flexible approach to establishing if there is a particular disadvantage.[6] For most of the Member States this concept was absolutely new, especially in civil and administrative law. Until the deadline of the 19-th of July 2003 very few Member States met all the requirements of the Directives, but since that time progress has been made in a rather significant number of the countries, especially in the new Member States.

Some of the countries (most of the new Member States) drafted and published comprehensive anti-discrimination legislation mostly fulfilling the requirements of the EU Directives. Some others amended existing laws or established different legal acts to combat racial (and other) discrimination. A third group of Member States have only drafts but no legislation. Accordingly, there are Member States in which there is no definition at all of direct or indirect discrimination. Since the transposition of the Directives is only a minimum standard and Member States are of course permitted (advised) to introduce or maintain more favourable legislation, this is a rather unfavourable situation.

Concerning the covered grounds, in the case of the race Directive the situation is rather simple, because this is a "single ground" Directive. Two remarks should be made, however. Most experts hold that nationality could be regarded as one of the typical grounds of racial discrimination. Nevertheless the race Directive does not cover this ground. There is another restriction in the Directive, namely the specifically exempt rules on the immigration and the legal status of third country nationals do not fall under the jurisdiction of the Directive.

2.2 The scope of legislation (sectors covered by the anti-discrimination legislation)[7]

[6] See Council Directives in Non-Discrimination under Article 13 of the European Community Treaty. Background Paper by Adam Tyson 2001.

[7] This point is of course only relevant for the race directive. The employment Directive is of course limited to the field of employment, but sex is practically to the same area.

The following elements fall into the scope of Article 3 of the race Directive :

- it covers both the public and the private sector,
- the field of employment and occupation (including recruitment, promotion, training, working conditions, payment, dismissal),
- membership of and involvement in an organisation of workers or employers,
- social protection (including social security and healthcare),
- social advantages,
- education,
- access to and supply of goods and services (including housing).

One of the main difficulties in implementing the Directive by national ombudsmen is that their mandate is typically limited to the public sector. Some of the ombudsmen try to remedy these shortcomings by using indirect methods, for example by supervising public bodies that have an administrative role in reviewing certain private activities.
The domestic legislation of most of the Member States is well developed in the field of employment and occupation. This must be explained by the longer tradition in the field of sex discrimination. The other fields are only usually covered in the countries that have introduced a comprehensive body of anti-discrimination legislation. In some countries anti-discrimination provisions are included in a variety of regulations. The typical problem of such legislation is, that there may be significant differences among the different fields, as a consequence of which the law does not provide equal protection against discrimination in old fields.

2.3 Protection of rights and the burden of proof

Article 7(2) reads:

"Member States shall ensure that associations, organisations, or other legal entities, which have... a legitimate interest in ensuring that the provisions of this Directive are complied with, may engage, either on behalf or in support of the complainant, with his or her approval in any judicial and/or administrative procedure provided for the enforcement of obligations under this Directive."[8]

Experience shows a need to address the power imbalance in seeking legal redress which an individual will face when taking on an organisation. Without

[8] Other than in the legal tradition of the United States the institution of the so called amicus curiea briefs in unknown in the European and especially in the continental legal tradition, which makes the implementation of this provision not easier.

support, a victim may feel that taking on a battle to establish that he or she has suffered discrimination is simply too difficult.[9] This idea is very close to that of ombudsmanship and ombudsmen usually play a similar role. The basic limitation is twofold: on the one hand the already mentioned prohibition to intervene in the private sector, on the other hand, the ombudsman's involvement into court procedures is usually not allowed.
Article 8 of the race Directive has a provision for the sharing the burden of proof. Once an individual has established the facts from which direct or indirect discrimination can be presumed, it is for the respondent to prove that there was no discrimination on the grounds of racial and ethnic origin or that a differential treatment has genuine and legitimate non-racist reasons and the measure was proportionate.
This procedural rule is only relevant in civil- and administrative law, it isn't applicable to criminal procedures.

2.4 Specialised bodies

A key element of the race Directive is the requirement on Member States to designate a body for the promotion of equal treatment (Article 13). The role of such bodies must include providing independent assistance to individuals making complaints, conducting independent surveys, publishing reports and making recommendations.
Specialised bodies existed in few European countries already before the introduction of the Directives.
This special "ombudsman-like" institution emerged step by step in different counties of Europe, first of all after 1993, and this was not without any reason. For this was the year of the Vienna Summit where the Heads of States resolved to step up the fight against racism, intolerance and related discrimination in Europe. As a result of that decision the European Commission against Racism and Intolerance (ECRI) was established. One of the fields of the activities of ECRI is the drafting of so called General Policy Recommendations. No. 2 of this, which was published in 1997, recommends the Member States to establish **specialised bodies** for the fight against one of the most dangerous forms of social tensions and conflicts, namely racial, ethnic conflicts.

Chapter C of this recommendation contains a long list of functions to be fulfilled by this organisation. I only would like to highlight some of them:

[9] See Adam Tyson: p 4.

b. to monitor the content and effect of legislation and executive acts with respect to their relevance to the aim of combating racism... and to make proposals, if necessary, for possible modifications to such legislation,

d. to provide aid and assistance to victims, including legal aid, in order to secure their rights before institutions and court,

h. to provide information and advice to relevant bodies and institutions, including State bodies and institutions,

i. to issue advice on standards of anti-discrimination practice in specific areas,...

k. to promote the awareness of the general public to issues of discrimination...

l. to support and encourage organisations with similar objectives...

2.4.1 National Specialised Bodies in the European States

Partly as a result of ECRI's activities and the **race Directive** of the EU, a variety of specialised bodies were established in the Member States of the Council of Europe.
Currently there are 13 national specialised bodies, ombudsman-like institutions throughout Europe:

Centre for Equal Opportunities and the Fight against Racism in Belgium,
Danish Institute for Human Rights,
Ombudsman for Minorities in Finland,
Parliamentary Commissioner for National and Ethnic Minorities in Hungary,
Equal Authority and the Equal Tribunal in Ireland,
Permanent Special Commission against Racial Discrimination in Luxembourg,
Equal Treatment Commission in the Netherlands,
Centre for Combating Ethnic Discrimination in Norway,
Commission for Equality and against Racial Discrimination in Portugal,
National Council for Combating Discrimination in Romania,
Ombudsman against Ethnic Discrimination in Sweden,
Federal Commission against Racism in Switzerland,
Commission for Racial Equality in the United Kingdom.

One common feature of these organisations is that they generally meet most of the requirements written down in ECRI's Rec. No. 2. They are organised in a variety of ways. Some of them are individual ombudsman, or ombudsman-like institutions, others are commissions having a representative character.

All are independent or semi-independent, i.e. none of them is under the jurisdiction of the government, or any other administrative authority, but their relationships with the government ranges from total autonomy (like in Hungary) to a much closer relationship (like in Finland).

There are some differences in their scopes of action too. Some of them, like traditional ombudsmen, cover only the public sector, others also deal with the private sector. Most of them are limited to supervision of racial/ethnic discrimination, but there are some (like the Dutch, or the Irish one), with a much broader mandate covering other grounds, like gender, disability, age, sexual orientation etc.

In terms of their functions, some of these institutions have a broader, others have a less extensive mandate. In addition to performing a pro-active, preventive, seismographic role, most of them have instruments to help prevent social conflicts, and to remedy or settle social tensions.

2.4.2 The main elements of the mandate of the specialised bodies

a. Information service

There are many ways and methods to inform people about issues of importance or individuals in need of information, for example through the operation of a hotline, media presence in a regular TV programme and so on.

b. Monitoring the situation and/or investigation in individual cases, or sectoral surveys

Some institutions simply collect and analyse information about relevant areas. Others have the right to investigate individuals' complaints. The broadest mandate includes the right to investigate *ex officio* and even to make a survey in a certain field of the public administration.

c. Drafting of recommendations for the law enforcement agencies

The purpose of these activities is of course the drafting of recommendations and proposals to change the procedures, the methods and sometimes even the organisation of administration to have a more effective, democratic, transparent client friendly public service.

d. Monitoring and/or amendment of the legislation

The mandate traditional ombudsman institution is focused on the implementation of the law. The role of specialised bodies and specifically their preventive feature makes it necessary to include the monitoring of the legislation too. They carry out studies and surveys on the effectiveness of the law and highlight any loopholes. Some of them have even the right not only monitor, but to prepare draft laws to amend the legal system to the necessary extend. Besides this certain institutions have the right to file complaints to the Constitutional Courts.

e. Mediation and legal assistance

Most of the specialised bodies are mandated to assist associations or individuals who have fallen victim of discrimination. They provide information, analyse the situation, direct people to relevant other authorities act as a mediator or consider possible legal recourse.

f. Awareness raising and training

Some institutions are running different projects aimed primarily at creating a dialogue and mutual understanding between different groups of the society. At the same time institutions are involved in different training courses for civil servants, police officers, mayors, staff members of local governments to improve their skills be more effective in a multicultural environment.

g. Research

Research is given a priority in the mandate of the Irish Equality Authority. The Irish legislation gives the power the institution to undertake or sponsor research to progress its functions. The Research Section plans and implements research related to the Strategic Plan of the Authority.

This involves:

- planning commissioning and managing externally contracted research projects,
- identifying policy implications of research findings and bringing these forward in relevant areas,
- promoting initiatives seeking to develop a sound statistical base for research and policy,
- supporting the development of equality research and of their infrastructure,

- developing links with relevant public bodies, research and academic organisations and institutions.

2.5 Sanctions

Article 15 of the race Directive reads:

"Member States shall lay down the rules on sanctions applicable to infringements of the national provisions adopted pursuant to this Directive and shall take all measures to ensure that they are applied. The sanctions... must be effective, proportionate and dissuasive."

Member States have the choice of weather they apply the civil, administrative or criminal law. The choice will however have implications for the ease of access of victims to the court and for the difficulty they face in providing their case once they are there, in particular as the burden of proof will not shift to the respondent in a criminal case.
A more detailed set of requirements contains ECRI's General Policy Recommendation Nr. 7 on national legislation to combat racism and racial discrimination.[10]

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[10] The paragraphs on criminal law reads:

18. The law should penalise the following acts when committed intentionally:

a) public incitement to violence, hatred or discrimination,
b) public insults and defamation or
c) threats
against a person or a grouping of persons on the grounds of their race, colour, language, religion, nationality, or national or ethnic origin;

d) 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;

e) the public denial, trivialisation, justification or condoning, with a racist aim, of crimes of genocide, crimes against humanity or war crimes;

f) the public dissemination or public distribution, or the production or storage aimed at public dissemination or public distribution, with a racist aim, of written, pictorial or other material containing manifestations covered by paragraphs 18 a), b), c), d) and e);

g) the creation or the leadership of a group which promotes racism; support for such a group ; and participation in its activities with the intention of contributing to the offences covered by paragraph 18 a), b), c), d), e) and f);

h) racial discrimination in the exercise of one's public office or occupation.

19. The law should penalise genocide.

20. The law should provide that intentionally instigating, aiding, abetting or attempting to commit any of the criminal offences covered by paragraphs 18 and 19 is punishable.

21. The law should provide that, for all criminal offences not specified in paragraphs 18 and 19, racist motivation constitutes an aggravating circumstance.

22. The law should provide that legal persons are held responsible under criminal law for the offences set out in paragraphs 18, 19, 20 and 21.

Generally speaking, one can say that racial discrimination is only sanctioned by criminal law in its most serious manifestations.
The so called "hate crimes" (incitement to racial hatred) are punished in practically all of the Member States, but the severity of the sanctions applied varies between countries.[11] In some countries this constitutes only a misdemeanour which could not be regarded as being effective sanction. Racist motivation of any other crime constitutes an aggravating circumstance in most, but not in all national legal systems. Discrimination itself is in many countries not criminalised, while in some country the act of discrimination is a criminal offence.
However the main weakness of such legislation is the lack of implementation. Complaint of racially motivated crimes are sometimes refused by the law enforcement agencies or when accepted are frequently misclassified. Investigations are often not followed up or are inadequate.

In the Member States where a comprehensive body of anti-discrimination legislation was introduced in recent years to transpose the EU Directives, it was combined by introducing administrative and civil law sanctions. In some countries the Labour Code, just like the Civil Code, was amended to sanction discriminatory practices. Now a victim of discrimination can apply for compensation and - other as described above – the implementation of these rules is much more effective.

Otherwise, because of the lacking of effective anti-discrimination campaigns, there is a relatively law standard of knowledge and as a result a rather high grade of latency in this field.

3 Conclusions

a) Despite the significant progress achieved to date, the transposition procedure of the relevant EU Directives has not been completed.finalised.[12] National ombudsmen have a vital interest in the

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23. The law should provide for effective, proportionate and dissuasive sanctions for the offences set out in paragraphs 18, 19, 20 and 21. The law should also provide for ancillary or alternative sanctions.

[11] In some countries especially in Central- East Europe there is yet a very vital discussion about the collision of two basic constitutional rights, namely freedom of expression and the protection of human dignity.
[12] In accordance with Article 226 of the EC Treaty, the European Commission has launched infringment proceedings against those Member States which, by failing to transpose of the racial and employment directive, is to consider to have failed to fulfil their Treaty obligations.

promotion of the transposition process into the domestic legal system of their countries. The answers to the questionnaire show that the problem of discrimination at least does not have a priority in the ombudsmen's practice.

b) Compared to other grounds the regulation of racial discrimination seems to have a unique character which is expressed in the race Directive. This is the only one which seems not be possible to be handled only by the traditional public mechanism and therefore needs a specialised mechanism. Ombudsmen or ombudsman like institutions are at least one of the alternatives to play this role.

c) In countries where specialised bodies have been established, - parallel to the already existing ombudsmen - there should be a close cooperation between national ombudsmen and specialised bodies in the fight against discrimination.

d) When it comes to the question of sanctions; there is a problem of harmonisation. Although the race Directive provides only a general framework for national legislation, but at the same time requires the introduction of effective, proportionate and dissuasive set of sanctions, which does not always seem to be the case.