

The European Race Directive: A Bridge so Far?

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On the 29th June 2000, the European Council of Ministers adopted Council Directive 2000/43/EC (Race Directive)¹ implementing the principle of equal treatment between persons irrespective of racial or ethnic origin.² The purpose of this directive is to lay down a common framework, for combating racial or ethnic discrimination in the Member States of the European Union.³ The object of this common framework is to enable Member States to deliver an anti-race discrimination regime by putting into effect the principle of 'equal treatment'⁴ in their domestic laws, regulations and administrative provisions.⁵ Individuals⁶ who consider themselves wronged may rely on national provi-

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1. Directives are binding on Member States to whom they are addressed, Article 254(3) EC.
2. Official Journal L 180, 19/07/2000 p. 0022-0026.
3. Council Directive 2000/43/EC, Article 1.
4. *Ibid.*
5. *Ibid.* Article 14.
6. The directive does not cover difference of treatment of third country nationals where their legal status has not been resolved at the level of national law. See Article 3(2) of Council Directive 2000/43/EC.

sions brought in to give effect to the Race Directive. In this way, the European Community's promise⁷ to provide measures to combat racism in the EU can start to take shape.

The use of a directive as an instrument to provide minimum protection for victims of racial discrimination is useful. The adoption of such a tool takes account of the divergent legal and cultural systems of different member states when pursuing the principle of equal treatment. By its nature a directive imposes obligations only on member states,⁸ to achieve the end whilst leaving them choice as to form and method.⁹ This choice of form and method enables account to be taken of the social and political differences provided member states review and/or create instruments that will enable them to ensure compliance with a directive.¹⁰ Member states have until 19 July 2003 to complete the processes necessary to ensure that the directive will be complied with.¹¹

The scope of the Race Directive covers employment, vocational training, working conditions, membership of workers or professional organisations, social protection, healthcare, social advantages, education and access to and supply of goods and services available to the public, including public housing.¹² The directive requires that member states remove racial and ethnic barriers in these areas in order to achieve the objectives of the EC Treaty such as a high level of employment, social protection, a better quality of life, and economic and social cohesion and inclusion.

The question for this paper is whether such a general legal instrument could be deployed as a model of 'good' practice for the development of appropriate worldwide mechanisms aimed at the eradication of racism and

7. Article 13 Treaty of Amsterdam amending the EC Treaty.

8. See Article 249(2) EC Treaty and Case 148/78. *Publico Ministero v. Tullio Ratti* [1979] ECR 1629.

9. Article 249(2) EC Treaty.

10. Once they are implemented, individuals can rely on the rights that they confer as against those who flout those rights. Individuals may rely on an unimplemented directive under the doctrines of 'direct effect', Case 41/74 *Van Duyn v Home Office* [1974] ECR 1337, [1975] 1 CMLR 1, and 'indirect effect' Case 14/83 *Von Colson and Kaman v Land Nordrhein-Westfalen* [1984] ECR 1891, [1986] 2 CMLR 430. They may also bring an action in damages against a Member State that fails to implement a directive Cases C-6/90 and C-9/90 *Francovich and Bonifaci v Italy* [1991] ECR I-5357, [1993] 2 CMLR 66.

11. Article 16 Council Directive 2000/43/EC.

12. *Ibid.* Article 3(1)(a)-(h).

racial discrimination. Are the common framework model, and the principle that it has been designed to fulfil, namely the equal treatment principle as a desired goal in the eradication of racism and racial discrimination, useful in this regard? In order to answer that question this paper intends to look at the viability of the directive by applying its operation to some of the 'racial' problems that continue to trouble the relatively divergent member states of the EU. The result of this practical application may provide some insight into the viability of 21st century common framework instruments, like the Race Directive, for providing a bridge across some of the problems associated with racism and racial discrimination. This paper will attempt to examine the potential operation of the directive in the context of a number of areas—racism, racial discrimination and mechanisms of support.

The Eradication of Racism

European Community institutions such as the European Monitoring Centre¹³ state that racism is a multifaceted phenomenon.¹⁴ According to the Commission for Racial Equality (CRE) in Britain, 'racism is the belief that some 'races' are superior to others—based on the false idea that different physical characteristics (such as skin colour) or ethnic background makes some people better than others.'¹⁵ It takes many forms and may be expressed in a number of ways across the various member states, but 'racism and xenophobia is universal. No country in the Union is immune'.¹⁶ European Community-wide studies carried out by scholars such as Ford¹⁷ show that hatred of 'foreigners' has led to murderous killings of members of the Turkish, Roma and Iranian communities in Germany,¹⁸ assassinations, and the physi-

13. Set up in accordance with Council Regulation No 1035/97 of June 2 1997 to monitor and report on racism and xenophobia in the Member States of the European Community.

14. European Monitoring Centre, *Looking Reality in the Face. Annual Report 1998* (Vienna, EUMC, 1998) p. 4.

15. See CRE, 'What is Discrimination?', www.cre.uk/legaladv/rra_discrim.html

16. *Ibid*, p. 3.

17. G. Ford, *Report drawn up on behalf of the Committee of Inquiry into Racism and Xenophobia* (Luxembourg, Office of Official Publication of EC 1991).

18. *Ibid*, Ford, p. 57.

cal and mental handicapping of North Africans and Romanians in France.¹⁹ Similarities can be drawn in Britain.²⁰ At the other end, there is general intimidation and harassment of 'foreigners' and suggestion by some Eurobarometer opinion polls that approximately 40% of people are racist.²¹ That is not to say that racism is generally tolerated in member states. Numerous campaigns from governmental and non-governmental entities show that many ordinary people believe that racism is unacceptable and would not subscribe to it. Nevertheless, the existence of an unacceptable level of tolerance of racism and the failure of member states to adequately deal with it has prompted the European Community to legislate on a community wide level for its eradication.

The Race Directive attempts to deal with racism by making harassment a ground for legal action. Article 2(3)²² states that

Harassment shall, be deemed to be discrimination ... when any unwanted conduct related to racial or ethnic origin takes place with the purpose or effect of violating the dignity of a person and of creating an intimidating, hostile, degrading, humiliating or offensive environment.

It may be argued that this provision serves a dual function. One is the legislative function whilst the other relates to an educative function. In relation to the legislative function, this provision seeks to put in place a concept of racial or ethnic harassment as a legal concept. The implementation of laws, rules and sanctions regarding the concept of harassment must be, 'effective, proportionate and dissuasive'.²³ What this provision purports to do is to articulate the experience of victims of racial or ethnic harassment as one that must be addressed by the legal and administrative systems of member states. For the European Community, this is a relatively revolutionary move. There is the recognition that victims of racial or ethnic discrimination are often also victims of racial or ethnic harassment, and, to effectively deal with racial or ethnic discrimination, one must recognise the often hidden, debilitating effects of racial or ethnic harassment. Sniggering, name-calling, and racially motivated physical assaults are just as likely to lead to social exclusion as racially discrimina-

19. *Ibid*, Ford, p. 61-64.

20. See EUMC *op. cit.* p. 11.

21. *Ibid*, p. 22.

22. EC Directive 2000/43/EC.

23. Article 15 Council Directive 2000/43/EC.

tory job recruitment. In the English case of *Jones v Tower Boots*²⁴ for instance, the applicant was seriously harassed at work. Incidents included burning his arm with a hot screwdriver, throwing metal bolts at his head and racial verbal abuse. It may well be the case that in countries such as Germany and France, where racially motivated harassment is not properly recognised, a general legal requirement to link racial harassment to the right to be treated equally at work and in other sectors might bear fruit.²⁵

The duty imposed on member states to produce the legal and administrative mechanisms to articulate racial or ethnic harassment as a legal concept also serves an educative function, raising awareness of the damage that can be caused by racial or ethnic harassment and imposing on human conduct certain limits. The more people know that the law prohibits certain kinds of behaviour, it is assumed, the less likely they are to infringe the law by behaving in ways that contravene such principles. Whether or not that is true, it is presumed that the law has a role in guiding human conduct and in this respect, the law is to guide conduct away from racial and ethnic harassment.

Legal prohibition of harassment as a right with the concomitant obligations may well serve as a useful universal principle; however, the provision for harassment falls far short of the type of prohibition against racism one would have expected the EC to provide. Given the wealth of material on the persistence of racially motivated violent and intimidating conduct in the various member states,²⁶ how far will a provision for legal harassment as unlawful racial or ethnic discrimination go to deter potential aggressors? Further, the provision does not require that racially motivated assaults should be subject to the national criminal law.²⁷ The limited recognition of racism in the guise of harassment is insufficient since it only has the potential to deal with low-level forms of racially motivated unwanted conduct e.g. verbal abuse, racist jokes

24. [1997] IRLR 168, CA.

25. For other examples see Council of Europe, *Second Report on Denmark*, Adopted 16 June 2000, COE Portal, Intranet and Council of Europe, *Second Report on Austria*, Adopted 16 June 2000, COE Portal, Intranet. Both countries have been criticised for the scope of their criminal provisions concerning racially motivated crimes.

26. See Report of the European Parliament, *On Countering Racism and Xenophobia in the European Union—Committee on Citizens' Freedoms and Rights, Justice and Home Affairs. Combating Racism and Xenophobia in the European Union*, A5-0049/2000, p. 6. B.

27. Subjecting racist conduct to criminal law raises a number of issues. There is a proposal for a Council Framework decision on combating racism and xenophobia (COM(2001) 664-C5-0689/2001—2001/0207(CNS)).

low level assaults etc. This is a major limitation. In Germany, for instance, much of the Turkish population bears the brunt of racial harassment, violence and discrimination and is relatively defenceless.²⁸ There has been a rise in racially motivated attacks against them and others such as asylum seekers, Jews, Africans and Vietnamese.²⁹ According to Horrocks and Kolinsky,³⁰ German unification brought with it dire consequences for those seen as the *Auslanderproblem*, i.e., problems caused by the presence of foreigners,³¹ more racist and xenophobic assaults and murders. Whilst banning some neo-Nazi groups and passing harsher sentences on right-wing extremist offenders calmed the situation many Germans still see the solution as one of exclusion. Turkish people (as well as other minority communities) are negatively portrayed in German culture, in anti-Turkish computer games and in everyday discourse and behaviour of ordinary young Germans.³² No doubt, some of this is fuelled by racist ideology that portrays Turkish people as homogeneous, monochrome, culturally backward and an underclass brainwashed by Islamic fundamentalism.³³ This is far from the truth. In France people from the Maghreb (western parts of North Africa consisting of Algeria, Morocco and Tunisia) and the Asian communities experience similar problems with racism that goes beyond racial harassment. There is evidence to suggest that some of this antagonism is fuelled by the myth that the African Muslim will not be able to 'integrate'.³⁴ Integration in this context means that they will not assimilate to 'French norms'.³⁵ It could be argued that member states should have had positive obligations to ensure that their criminal justice systems adequately deal with racially motivated attacks.³⁶ This might include identifying certain

28. Ford, *op. cit.* p. 57.

29. D. Horrocks and E. Kolinsky, eds, *Turkish Culture in German Society Today* (Oxford, Berghahn Books, 1996), p. 104.

30. D. Horrocks, *op. cit.*

31. D. Horrocks, *op. cit.* p. 104.

32. *Ibid.* p. xii.

33. *Ibid.* p. xx.

34. C. Wihtol de Wenden, "North African Immigration and the French Political Imaginary", in M. Silverman (ed), *Race, Discourse and Power in France* (Aldershot, Avebury, 1991), pp. 98-109.

35. *Ibid.*

36. There are arguments that the identification of crimes on the basis of 'race' or 'ethnicity' is likely to raise more problems than it is likely to solve. See F. Brennan, 'Racially Motivated Crime: the Response of the Criminal Justice System' (1999) *Crim L. R.* 17-28.

types of conduct as race/hate crimes across all the member states and requiring that criminal sanctions (as well as the right to civil action) be imposed. The legal recognition of harassment as prohibited conduct could usefully feed into a universal mechanism but it is not enough. A universal instrument needs to take proper legal account of the range of racially motivated conduct and commensurate criminal penalty.³⁷

Another limitation that occurs with the harassment provision is its reliance on the concept of racial or ethnic discrimination, rather than standing alone as a separate provision. According to Article 2(3) *Harassment shall be deemed to be discrimination within the meaning of paragraph 1.*³⁸ Essentially this means that racial or ethnic harassment will be recognised as covered by the directive only where it is connected with racial or ethnic discrimination, rather than where it is a manifestation of racism per se since paragraph 1 requires that the directive ‘... is to lay down a framework for combating discrimination on the grounds of racial or ethnic origin...’³⁹ The concept of discrimination requires that the perpetrator’s conduct is either motivated by unlawful discrimination (direct discrimination) or that the perpetrator’s conduct is ‘reckless’ and that it is this thoughtlessness that leads to discrimination (indirect discrimination). If neither of these states of mind exists on the part of the perpetrator then, arguably, harassment cannot be proved even though the person has suffered from harassing conduct. The harassment provision also raises questions about the standard of proof that is required to show that harassment type conduct is racially or ethnically motivated. Without common guidance as to standard, the requisite evidence is likely to vary and dilute the effectiveness of this provision. As a universal principle attention has to be paid to such matters.

Nevertheless, the requirement on the part of member states to implement provisions that focus on discriminatory racial or ethnic harassment is likely to go some way toward resolving the problem of racially motivated conduct. Low-level type racially motivated harassment will no longer be tolerable or tolerated. In a number of member states notably France and Germany racism is seen as a taboo subject and there is a failure to connect racial or ethnic har-

37. Now see the Proposal for a *Council Framework Decision on Combating Racism and Xenophobia*, COM (2000) 664 final, Brussels, 28.11.2001, the purpose of which is to ensure that racism and xenophobia are punishable in all Member States and to improve judicial cooperation.

38. Council Directive 2000/43/EC.

39. *Ibid.* Art 1.

assment with anything other than that promulgated by the Far Right. This leads to the assumption that arguments about the lack of integration of Muslims in France or for the preservation of German culture for ethnic Germans are separate, legitimate pursuits that have nothing to do with racial harassment. A number of Germans associate racism with Nazism and fascism. Accordingly, there is a tendency not to associate certain types of conduct targeted against Turkish peoples, asylum seekers etc as racist, but rather to see it as an inevitable consequence of 'uncontrolled' immigration. Harassment at least focuses the minds of member states' towards the manifestation of racism and, perhaps more importantly, what can be done to counter it.

In France there is a long tradition of cultural cohesion premised on the principles of '*jus sanguinis*' (mixing) and '*jus soli*' (entitlement to citizenship).⁴⁰ The concept of integration is premised on the notion that people who originate from outside of France will assimilate.⁴¹ If they do not they should repatriate. The French history of its relationship with the Maghreb is peppered with government policies aimed at turning on the tap of migration from the Maghreb when it suited its need for labour shortage and closing it with repatriation when the need for labour shortage declined.⁴² The ideology surrounding the way such peoples were recruited was based on racist-oriented policy. Hargreaves argues that whilst the Vietnamese 'boat people' were received as victims of political intolerance with valuable entrepreneurial skills, Africans have been portrayed as economic, non-deserving asylum seekers and received with hostility.⁴³ The way in which political systems have helped to cultivate and maintain in place ideas and practices that make it easier for harassment to occur may be put under the legislative microscope by a universal prohibition against harassment. What the harassment provision does is to obligate member state to attention on those places where this process is likely to occur and force them to provide some means by which victims can bring action and seek compensation from the perpetrators.

40. A.C. Hargreaves, *Immigration, 'Race' and Ethnicity in Contemporary France* (London, Routledge, 1995).

41. *Ibid.* p. 2.

42. *Ibid.* p. 15-20.

43. *Ibid.* p. 21.

Racial or Ethnic Discrimination

The directive provides that, ‘...there shall be no direct or indirect discrimination based on racial or ethnic origin.’⁴⁴ Rather European citizens are to be treated equally according to the principle of ‘equal treatment.’ The prohibition of discrimination includes conduct and practices motivated by racial or ethnic preference (direct discrimination)⁴⁵ as well as the conduct that may hide or not set out to discriminate, but nevertheless end up doing so (indirect discrimination).⁴⁶ The only principle upon which job selection, housing allocation, service provision etc is to be allocated is the principle of equal treatment.

The principle of equal treatment is a familiar legal concept in the context of Community law aimed at the elimination of gender-based discrimination. Here the essence of equal treatment from the European Community perspective tends to be that of equality of opportunity: the right to be treated equally regardless of gender.⁴⁷ If equality of opportunity is what is envisaged by the principle of equal treatment contained in the Race Directive then it is likely to be based on this type of merit principle. Bercusson⁴⁸ argues that the familiar concept employed in European Community law—the merit principle—is based on a notion of formal equality that emphasises the need for everyone to be allowed to compete on an equal footing. Race and ethnicity are deemed by the directive to be irrelevant criteria.⁴⁹ The directive perceives EC citizens as people who have the right to pursue the objectives of the Community such as employment, a raised standard of living and social protection⁵⁰ without being subject to racial or ethnic discrimination which is seen as undermining such objectives.⁵¹

The principle of equal treatment irrespective of race or ethnicity can be seen as providing a mechanism for challenging employment policy and prac-

44. Article 2(1) Council Directive 2000/43/EC.

45. Article 2(2)(a) Council Directive 2000/43/EC.

46. Article 2(2)(b) Council Directive 2000/43/EC.

47. Case C-450/930 *Kalanke v Freie Hansestadt Bremen* [1995] ECR I-3051.

48. B. Bercusson, *European Labour Law* (Butterworths, London, 1996), p. 174-180.

49. Except insofar as they are relevant to ‘genuine occupational qualifications’ or to ‘positive action programmes’, see Articles 4 and 5 respectively of the Council Directive 2000/43/EC.

50. See para 9 of Council Directive 2000/43/EC.

51. See para 9 of Council Directive 2000/43/EC.

tice across a number of member states that tend to marginalise people to the least powerful, most exploited and least secure areas of the labour market. For instance, Palmer, Moon and Cox⁵² write that in Britain many black and Asian people are disadvantaged in the labour market because of the way they were recruited to the British labour market. Africans and Afro-Caribbean's came as seamen and cheap forms of labour from the colonies and ex-colonies. In the post-war period, many were recruited into the less 'skilled' poorly paid jobs such as public transport and nursing to help with the reconstruction of Britain. It is still the case that despite the settlement of such people in Britain many occupy the lower rungs of the job market and are more likely to experience the ravages of unemployment. Recent information regarding the Bangladeshi and Pakistani communities in Oldham, north of England suggests that there is 40% unemployment, they are placed in the worst types of housing and have become a target for neo-nazi groups. Further, argues Jones,⁵³ despite the highest of qualifications, Afro-Caribbean men are more likely than whites to be in lower valued jobs.

Scholars writing in the context of France with the Maghreb and the Turkish community in Germany have reported similar experiences of racially discriminatory labour markets. Hargreaves⁵⁴ points out that in France there are, '... patterns of social differentiation marked by discriminating behaviour against people of foreign origin.'⁵⁵ Hargreaves argues that in France, as in Britain, the somatic differences (i.e. bodily) of people of third world origin frequently arouse exclusionary attitudes. Similarly, people from 'minority' communities in Germany tend to occupy the lower echelons of the employment market. Kolinsky⁵⁶ contends that in terms of social exclusion criteria such as low income, homelessness, unemployment and poverty, resident non-Germans suffered far worse than West or East Germans on all accounts. This is partly due to the recruitment policy in Germany, particularly towards the Turkish community, which has tended to treat Turkish people as a temporary and cheap source labour.

52. Palmer, Moon and Cox, *Discrimination at Work* (London, LAG, 1997), pp. 6-9.

53. T. Jones, *Britain's Ethnic Minorities: An analysis of the Labour Force Survey*, (London, Policy Studies Institute, 1996).

54. Hargreaves, *op. cit.*

55. Hargreaves, *op. cit.* p. 32.

56. E. Kolinsky, *op. cit.* p. 100.

One of the problems, then, that the prohibition of racial discrimination in labour has to effect is patterns of employment in the EU that maintain systems of cheap labour based on race or ethnicity. By implication, employers should also open up all employment markets to competition based on the merit principle alone. In that way, jobs would be filled only on the basis of competence.

The duty not to discriminate on the basis of race or ethnicity is arguably morally sound, but how is this to work in practice? Apparent problems are that merit criteria may not be the only criteria important to employers. In certain markets, particularly the less skilled ones, employers concerns may be with the *cost* of labour rather than *somatic* differences. Recruitment then may reflect economies of scale rather than intentional racial discrimination. Where an employer shows this then it can be argued that there is no racial or ethnic discrimination, despite what the recruitment market 'looks like'. Labour markets that tend to have sectors where cheap labour is primarily ethnic minority labour may be a reflection of the ability of employers to maximise capital by recruiting from the cheapest source. It is not necessarily the case that employers deliberately recruit and maintain systems of cheap and insecure employment on the basis of race, rather on the basis of cost. The principle of equal treatment cannot tap into this problem on its own. Additional measures need to be taken on board that will tackle such problems. The Directive does not appear to provide for the resolution of such difficulties. A universal provision would need to take this on board.

It could be argued that the language of 'cost' is a disguised and arbitrary means of maintaining and racialising markets. The sooner legal language is developed to deal with this the better. There is provision in the directive for indirect or disparate discrimination. Accordingly, '*...where an apparently neutral provision, criterion or practice would put persons of a racial or ethnic origin at a particular disadvantage compared with other persons...*'⁵⁷ such conduct is prohibited. This provision would seem to take care of the concern expressed by many scholars and organisations that third country nationals may be exploited by employment practices in the West. Employers may deploy criteria, which prohibit such peoples from taking up the more lucrative posts, forcing them to rely on cheaper, less secure alternatives. By imposing requirements such as language, knowledge of local customs and culture etc, which are neither 'essential' nor 'desirable' criteria for posts, such criteria tends to favour certain 'groups' and present obstacles to others.

57. Article 2(2)(b) Council Directive 2000/43/EC.

However, there is provision for employers to fall back on such exclusionary criteria if it can be shown that the, '... provision, criterion or practice is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary.'⁵⁸ Whilst there needs to be some balance between the needs of industry and that of labour this provision is likely to prove contentious. Anderman⁵⁹ has argued in the context of gender equality that such a provision whilst neutral on its face serves to diminish the protective thrust of the legislation since it maintains the institutionalised patterns of discrimination between men and women.⁶⁰ In the context of the institutionalised patterns of discrimination that have been identified in the EU towards peoples from the third world, it is unfortunate that the Community has sought to maintain in place the 'objective justification' criteria in Article 2 rather than a more stringent and balanced test. This is an area that, in terms of a universal principle, requires a measure that is more penetrating.

Whilst the directive fails to deal adequately with patterns of employment that are not necessarily based on direct or indirect racial or ethnic discrimination, but nevertheless tends to structure markets along those lines, the potential exists to challenge the more overt forms of racial and ethnic discrimination that clearly do exist in a number of member states. Employers will be under a duty to ensure that they do not discriminate in the way they recruit, and, where there is evidence of discrimination, claimants have the right to ask the courts to provide them with a remedy. Potentially, this is a powerful weapon in the hands of those who may experience the sharper end of racial and ethnic discriminatory employment practices.

The Meaning of Race/Ethnicity

The Race Directive is peppered with the words 'race' and 'ethnicity', indeed these words are part of its driving force yet there is no definition provided of what these terms mean. We are told that they do not refer to origins or separate races, 'The European Union rejects theories which attempt to determine the exist-

58. Article 2(2)(b).

59. S. Anderman, 'Constitutional Law and Labour Law. Dimensions of Article 119: The Case of Justification for Indirect Discrimination', in J. Dine and B. Watt, *Discrimination Law. Concepts, Limitations and Justifications* (London, Longman, 1996).

60. *Ibid.*, p. 109.

tence of separate human races. The use of the term "racial origin" in this Directive does not imply an acceptance of such theories.⁶¹ So what do these terms mean and how are they to be understood when interpreting the directive? Moreover, how are these terms to provide an all-embracing framework for dealing with racism and racial/ethnic discrimination?

The European Community is concerned to get away from biologically determined notions of racial origin. This is in part due to the influence of eugenics and theories of inferior races that have tended to serve the interests of Western Imperial powers. The notion that third world people are inferior to those in the West would not fit with the moral and human rights culture that has evolved in the West. However, there is another consideration. Given the 'historical mix' of various populations over the centuries it makes no sense to talk of or think in terms of 'race' as a biological determinant. This tends to connote some sort of Darwinian 'purity' which surely does not exist. Banton⁶² argues that individuals may utilise physical and cultural characteristics in order to create groups and categories by the process of inclusion and exclusion.⁶³ Where this occurs in relation to 'race', it goes against the essence of inclusiveness that the directive desires. The use of the term 'ethnicity' comes some way to meet this concern. Lustgarten⁶⁴ says that it is an anthropological term devised as an alternative to 'race' to avoid any connotation of innate biological differences. From a legal point of view ethnicity means the ancestry of individual forebears—a socially and distinct minority group. Such social distinctions are more a function of culture than pigmentation.

In its effort to move away from these difficulties the directive sees fit to prohibit any reference to 'race' or ethnicity except in so far as it serves to further the needs of 'genuine occupational qualifications'⁶⁵ or 'positive action' programmes.⁶⁶ The directive promotes as the only moral principle that of equal treatment in decisions, which essentially concern the distribution, or redistribution of resources. The positive aspects of such provision is that those charged with allocating resources are under a duty to think about the criteria they use in order to pursue such activity, accept that it is legally wrong to allocate

61. See para 6 Council Directive 2000/43/EC.

62. M. Banton, *Racial and Ethnic Competition* (Cambridge University Press, 1983)

63. Banton, ch.6.

64. *Op. cit.* p. 76-82.

65. Article 4 Council Directive 2000/43/EC.

66. Article 5 Council Directive 2000/43/EC.

resources on any other basis than equality and act to avoid infringing the law.

In Germany, Britain and France this would mean that in the public housing sector, for instance, authorities would have to look at the criteria for housing allocation more closely. There has been a tendency to 'ghettoise' areas by allocating poor run down housing to third country nationals. Many live in sub-standard housing and are segregated from the 'dominant' population.⁶⁷ Such policies add to the isolation and the perception of discrimination and unfair treatment. As one Turkish gang member said of the distance between Germans and Turkish people, '...no government...speaks for us and we cannot identify with the state... I will never be able to support a government which is hostile to me. Instead, I just find my own people and try to make my own rules and follow laws that suit us.'⁶⁸ A Community provision which imposes on member states a duty to allocate housing (and other) resources on the basis of equality would go some way towards alleviating the problem of discrimination—although there is no guarantee that third country nationals would receive better housing, rather that they would be treated equally in terms of allocation.⁶⁹

Where this directive does fall down is on providing a positive duty to provide suitable housing except in so far as such a policy might be allowed for under the positive action provision in Article 5.⁷⁰ This provision states that, '*With a view to ensuring full equality in practice, the principle of equal treatment shall not prevent any Member State from maintaining or adopting specific measures to prevent or compensate for disadvantages linked to racial or ethnic origin.*' However this article does not impose a positive duty that is legally enforceable, rather it is a weak attempt to support those member states that wish to keep in place (or develop) positive action programmes. But at least there is the recognition that positive action measures may be necessary to provide quick and perhaps temporary solutions to historically structured patterns of discrimination experienced by third country nationals.

A far more pressing problem is the identification of the beneficiaries of these anti-discrimination measures. Who are the individuals that should be targeted? At first blush, it may seem obvious. The beneficiaries must be those who suffer discrimination in terms of jobs, housing and so on because they have

67. Kolinsky *op. cit.* p. 103. A.G. Hargreaves, *op. cit.* p. 32.

68. Kolinsky, *op. cit.* p. xx.

69. The implication here is that where all people receive bad housing on an equal basis there is no recourse to a legal remedy, since there is no legally recognised discrimination.

70. Council Directive 2000/43/EC.

been identified as belonging to separate racial or ethnic groups. But there are a number of individuals that may claim to be part of a discriminated against ethnic or 'racial' group whom one would not have thought of as falling within the remit of the provisions. The slogan 'German for the Germans'⁷¹ has been current in Germany's post reunification. 'Ethnic' Germans may make a claim that they are not being treated equally on the basis of race or ethnicity compared with Slav, Jewish or black Germans when it comes to housing allocation for instance.

The difficulty with this analysis when applied to the various member states is compounded by the fact that not only is the notion of race and ethnicity unclear, there are a number of member states that do not share this 'Americanised' view of race relations that seems to have shaped EU policy. Whilst some member states such as the UK are used to the language of race and ethnicity—indeed a whole race relations industry has been built on such notions- the same cannot be said of countries such as Germany and France.

Amongst the issues that face France in terms of 'race relations' is the difficulty of recognising racial or ethnic groups at all. The general view is that in France you are either French or not. If you are not French in France, this is due to *your* failure to integrate. The trend is very much towards blaming tension between groups differently perceived on the basis of *their* failure to become French. Hargreaves⁷² argues that until the recently the trend was to equate integration with assimilation, i.e. '...the wholesale elimination of differences through the generalisation of pre-existing national norms.'⁷³ It was incidents such as the challenge to the system in 1989 by three North Africans school girls: excluded from their school in northern France because they insisted upon wearing their 'Muslim' headscarves in class,⁷⁴ that forced the hand of some French policy makers to reconsider the notion of integration. However, as Hargreaves⁷⁵ points out, this falls far short of positively recognising racial or ethnic difference. The dominant policy approach has been one of 'co-option', i.e. to tolerate differences by seeking to ensure minorities limit

71. N. Piper, *Racism, Nationalism and Citizenship. Ethnic Minorities in Britain and Germany* (Aldershot, Ashgate, 1998) p. 167.

72. Hargreaves, *op. cit.* p. 32.

73. *Ibid.* p. 33.

74. S. Poulter, *Ethnicity, Law and Human Rights* (London, Oxford, 1999), pp. 386-7. An added factor was that French schools have a long tradition of secularism.

75. Hargreaves, *op. cit.* p. 205.

their distinctive patterns of behaviour in ways compatible with dominant cultural norms. In the context of France then the Race Directive should at least force the issue of recognising that different treatment on the basis of ethnicity is discriminatory. The limitation here of course is that the claims by Muslims and others for their culture or ethnicity to be recognised and protected is not one that will be resolved by the directive as it currently stands since the essence of this instrument is to ignore ethnic difference in favour of the equal treatment principle.⁷⁶

Very different considerations exist in Germany where, unless one can show genealogical roots stemming several centuries, it would seem, one cannot call oneself German. Turkish and other people may be settled in Germany in term of rights to work and reside, but they will never be German. Generally speaking, says Kolinsky neither long term residents nor their offspring born in Germany acquire a right of citizenship.⁷⁷ However, there is a distinct, if not deliberate, failure to link the idea of what it means to be German with racist ideology. It is said that there are the 'true' Germans and the rest, the '*auslandische Arbeitnehmer*'—foreign members of the workforce or '*auslandische Mitbürger*'—foreigners next door.⁷⁸ What this is not linked to are policies of deliberate exclusion based, in the main, on 'racial' preference.⁷⁹ The Race Directive may serve to clarify in the minds of the German legislature and judiciary, if not that of the public, that certain views of foreigners and the negative conduct that is likely to flow from such may be racially discriminatory. Like the French example, one of the difficulties is recognising that cultural/ethnic difference can and should be treated equally and that the merit principle, on its own, cannot provide the panacea. The definition of a racial or ethnic group may need better clarity if it is to serve as the means by which a legal system is to consider claims for equality. Moreover, a legal system must have a better

76. Another problems for Muslims in particular is whether they will be recognised as a ethnic or religious group. Council Directive 2000/78/EC prohibits religious discrimination but is limited in its scope to employment and occupation. The Race Directive, which is wider in scope may not apply to Muslims who face racial discrimination if they are not recognised as a 'racial' or ethnic group.

77. The right to German citizenship changed from the 1 January 2000 there will be entitlement provided certain requirements have been met. See http://www.german.../reform_of_the_nationality_law.htm.

78. Kolinsky, *op. cit.* p. xii.

79. See N. Piper, *op. cit.*

means of considering the idea that ethnic or cultural differences should be welcomed rather than shunned.

SUPPORT MECHANISMS

No matter how much law exists in theory, one measure of its effectiveness is whether or not those who are likely to benefit from it can use it. There should be some way of predicting difficulties of access. Such issues are reflected in the Race Directive under the heading 'Remedies and Enforcement'.⁸⁰ These mechanisms⁸¹ include provision for the defence of rights⁸² and victimisation.⁸³

Defence of Rights

Article 7(2) provides that *'Member States shall ensure that associations, organisations or other legal entities, which have, in accordance with the criteria laid down by their national law, 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'*

This provision focuses on the right of third party support for complainants. A person who alleges that there has been racial or ethnic discrimination or harassment can obtain support from associations or organisations. The association or organisation can also act on behalf of the complainant. Such a mechanism of support has proved fruitful in the context of British race-relations litigation. In the watershed case of *Mandla v Dowell Lee*⁸⁴ it was the relatively well-resourced Commission for Racial Equality⁸⁵ that took the case through the British legal system culminating in a decision by the House of Lords that Sikhs are an ethnic group, thus protected by the Race Relations Act 1976. The requirements of Article 7(2) appear to provide potential litigants with a means

80. Chapter II Council Directive 2000/43/EC.

81. By Article 6 Council Directive 2000/43/EC where member states have measures in place more favourable they are prohibited from reducing the level of protection.

82. Article 7 Council Directive 2000/43/EC.

83. Article 9 Council Directive 2000/43/EC.

84. [1982] 3 All ER 1108; [1983] 2 AC 548.

85. A statutory body set up to oversee specific race relations measures endowed with powers of enforcement and the right to make recommendations for change.

by which they could realistically access the legal and/or administrative systems that must be set up to ensure that the obligations under the directive are complied with.⁸⁶ Some member states, namely Britain, are very familiar with such organisational support mechanisms.

However, Article 7(2) falls a little short of what one would expect of a provision designed to ensure that complainants obtain appropriate support in this sense. The organisations that appear to have a right to bring action on behalf of litigants or support them in bringing complaints must be recognised as *legal entities*. The provision specifically states that, '*Member States shall ensure that associations, organisations or other legal entities...*'⁸⁷ may act on behalf of complainants. The problem with the words '*...legal entity...*' implies that third parties must have legal personality. Whilst it is perfectly reasonable to expect associations and organisations to bear legal personality when involved in legal litigation it is unclear why there should be a legal personality requirement when engaging, '*...either on behalf or in support of the complainant...*' more generally. Another difficulty is the meaning to be attached to the requirement that the association or organisation must have a '*legitimate interest*'. There is no indication of what that means bar that of ensuring that the provisions of the directive are complied with.⁸⁸ One can see why the Council of Ministers and Commission would seek to dissuade those who might use this provision to bring vexatious and frivolous complaints,⁸⁹ but the use of such vague notions in an area where precision is likely to be decisive may undermine the effectiveness of the provision. Given that the directive is aimed at providing a common framework, which imposes a duty on member states to bring in effective anti-discrimination legislation, it is unfortunate that there is such ambiguity. One hopes that member states will take to the *spirit* rather than the *letter* of this provision but in reality, arguments are generally two-sided. Much may be made of the ambiguity of this requirement, which may serve to undermine its importance for complainants.

Perhaps the most problematic issue with Article 7(2) is that it does not impose on member states the positive duty to ensure that there are organisa-

86. By Article 7(1) Council Directive 2000/43/EC, member states must ensure that there are judicial and administrative systems in place for all persons who consider themselves wronged by failure to apply the principle of equal treatment.

87. Article 7(2) Council Directive 2000/43/EC.

88. *Ibid.* Article 7(2)

89. Although some might argue that this is a bit of a red herring.

tions that not only support litigants but can also act independently. The provision only bites where organisations have the consent of the person aggrieved. A more comprehensive provision would need to give such organisations the right to bring cases under their own prerogative. The failure to require member states to create the organisational infrastructure to support litigants as well as bring cases in their own right is likely to lead to disparity between the various member states. A more meaningful provision would be one that imposed a positive duty to ensure that such organisational infrastructure with the requisite powers was brought into existence.

Victimisation

As part of the recognition of the stigmatisation and 'blame culture' that appears to prevail in various member states towards people who suffer from racial or ethnic discrimination and harassment, the Race Directive has given legal effect to the notion of victimisation. Article 9 provides that

Member States shall introduce into their national legal systems such measures as are necessary to protect individuals from any adverse treatment or adverse consequence as a reaction to a complainant or to proceedings aimed at enforcing compliance with the principle of equal treatment.⁹⁰

Unlike Article 7, Article 9 appears to impose a positive duty on member states to provide a legal remedy for those who may be victimised for bringing complaints. The reach of this provision seems to be wide since it relates to protection of, '*... individuals from any adverse treatment or adverse consequence...*' the key word *any* has the potential to catch a wide variety of conduct from whatever source. The provision also expressly supports complainants where there is an intention to victimise (adverse treatment) and where there is no intention, or it cannot be proved, (adverse consequence). There is no requirement that the source of the complaint be the person against whom an initial complaint has been brought. Thus in the context of a complaint about a housing, service provision or employment practice where it may be difficult to prove that the person or institution against whom the complaint has been made is also victimising the complainant, a case could be brought providing there is evidence of adverse treatment.

Herein lies a problem—the problem of causation. How is the complainant to link the adverse treatment to the fact that a complaint has been made con-

90. Council Directive 2000/43/EC.

tending that there has been unequal treatment? Presumably, regardless of the source of the adverse treatment, there must be a causal relationship between the original complaint and the fact that the complainant has suffered as a consequence of raising the issue, otherwise the provision would be so wide as to be unworkable. This issue of causation arose in the British case of *Aziz v Trinity Street Taxis*.⁹¹ Aziz, an Asian taxicab proprietor and member of an association of taxicab operators, complained that he was being unfairly treated in the amount he was asked to pay to have a third taxi admitted to the associations' radio system. He secretly recorded conversations with other taxi drivers and was unsuccessful in bringing a case in the industrial tribunal. As a result of that case, the secret recordings were revealed. Subsequently Aziz was expelled from the association. He brought a complaint that his expulsion led to victimisation since it was because of the secret recordings that he was expelled. The court held that the expulsion did not amount to victimisation since this '... contemplates a motive which is consciously connected with the race relations legislation—here that fact did not influence them in expelling him'⁹² since the same action would have been taken against any person who had disclosed confidential information.

Such reasoning, argues Townshend-Smith, makes the provisions on victimisation vulnerable to severe criticism.⁹³ Victimisers have an effective defence if they can prove⁹⁴ that they would have treated any person in the same way regardless of race or ethnicity. In other words, victimisers could rely on the principle of treating all people equally in order to undermine the principle of equal treatment in relation to race or ethnicity.

Despite its limitations the fact that victimisation has been recognised as a potential problem for complainants, and that member states are under a duty to ensure that complainants obtain adequate protection, should go some way towards the desire that a provision such as the Race Directive should be effective.

91. [1988] IRLR 204, CA.

92. *Aziz v Trinity Street Taxis* [1988] IRLR 204, CA, per Slade LJ, pp. 210-211.

93. R.J. Townshend-Smith, *Discrimination Law: Text, Cases and Materials* (London, Cavendish, 1998).

94. The burden of proof has been partially shifted to the respondent. According to Article 8 Council Directive 2000/43/EC, the complainant only has to provide facts from which it may be presumed that there has been discrimination.

Conclusion

The Race Directive attempts to provide Community law rights for people who suffer racism, racial or ethnic discrimination, harassment or victimisation to bring a complaint. Individuals have been given the right to challenge provisions at member state level that are contrary to the equal treatment of racial or ethnic groups. The corollary of legal rights is the creation of legal obligations. Member states are obligated under this common framework directive to provide the legal and administrative structure that will give effect to the equal treatment principle as regards anti-race discrimination. They must provide sanctions for infringement of the national provisions adopted to take account of the Race Directive that are, ‘...*effective, proportionate and dissuasive*.’⁹⁵ Following on from this there is provision in the directive for the Community institutions: European Parliament and the Council, to consider the application of the directive. This provision is vital if the Community is to build up a reservoir of information regarding the working of the directive and the need for revision.⁹⁶

There is much to commend the directive as a model providing legal rights and obligations across divergent cultural and political systems. The Race Directive is a flexible tool that can be fashioned to legal systems with different historical traditions—common and civil law, yet it speaks for those people within these legal systems who are victims of racism and racial or ethnic discrimination. The Race Directive is a ‘one size fits all’ but not a ‘once and for all’ legal instrument. It has only begun to take its first steps. There are provisions within this instrument that allow it to be fashioned in ways that are more appropriate as its influence grows. Such an instrument may well provide a useful starting point for universal legal measures.

95. Article 15 Council Directive 2000/43/EC.

96. Article 17(1) and (2) Council Directive 2000/43/EC makes provision for revision and update of the directive on a regular basis.

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