

## *The Race Directive: Recycling Racial Inequality*

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### I. INTRODUCTION

THE NEW EUROPEAN Race Directive is one of the latest measures adopted by the Council of Ministers under its enlarged powers aimed at combating racism in the EU. This Race Directive reflects the strategic thinking of EU policy aimed at combating institutionally racist<sup>1</sup> constraints on the free movement of persons within the Community. Nevertheless, this paper argues that the effectiveness of the Directive is likely to be limited. This potential impediment is premised on two factors: the textual ambivalence that surrounds the concepts of 'race' and 'ethnicity' and the scope of the instrument. In turn, these restrictions are indicative of a power struggle between the EU and nation states, a struggle that threatens to sideline the broader picture of institutional racism and how to defeat it.

European Council Directive 2000/43/EC<sup>2</sup> (Race Directive) was adopted by the Council of Ministers on 29 June 2000 and will come into effect on the 19 July 2003 in Member States. The Race Directive<sup>3</sup> is a landmark in

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<sup>1</sup> Defined as 'acts by the total white community against the black community', see Carmichael, S and Hamilton, CV *Black Power. The Politics of Liberation* (Vintage Books 1967), 4 and more recently as the 'collective failure of an organisation to provide an appropriate and professional service to people because of their colour, culture, or ethnic origin. It can be seen or detected in processes, attitudes and behaviour which amount to discrimination through unwitting prejudice, ignorance, thoughtlessness and racist stereotyping which disadvantage minority ethnic people.' See Sir William Macpherson of Cluny, *The Stephen Lawrence Inquiry. Report of an Inquiry* (London, Stationery Office 1999) CM 4264-1, para 6.34.

<sup>2</sup> Council Dir 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin, Official Journal 2000 L180/22.

<sup>3</sup> The Race Directive is broadly modelled on the UK Race Relations Act 1976.

the evolution of EU policy on race discrimination, since it is the first time that a legal duty has been placed on Member States to provide a 'common *minimum* level of legal protection from discrimination in public and private sectors.'<sup>4</sup> Its objective is to provide a foundational, common framework for Member States to put into place anti-race discrimination measures by requiring the abolition of any laws, regulations or administrative provisions contrary to the principle of equal treatment.<sup>5</sup> The Race Directive can be seen as an equal opportunities measure that addresses two related problems—market and social integration. Market integration can be understood as requiring the dismantling of racially and ethnically determined barriers to the marketplace. The business case for removing these barriers concern questions about, 'effective service delivery, concerns with the public image of an organisation ... and issues surrounding recruitment and retention'.<sup>6</sup> Social integration raises questions of equity that resonate beyond the market.<sup>7</sup> The obligations imposed by the Race Directive concern both market and social integration. Successful implementation should mean that no person is prevented from pursuing economic and social opportunities on racially discriminatory grounds.

## II. EU AND ANTI-RACISM: THE HISTORICAL CONTEXT

The EU has had a relatively poor record on anti-racist discrimination, leaving such issues to be dealt with by Member States.<sup>8</sup> Several reports demonstrate the futility of this approach<sup>9</sup> because there is no comprehensive prohibition covering areas where racial discrimination tends to occur—in civil, political, economic, social and cultural spheres.<sup>10</sup> Thus, Austria has specific legislation prohibiting incitement to hatred on racial or religious grounds and general constitutional provisions, whilst the British Race Relations Act 1976 is

<sup>4</sup> See O'Brien, M 'The European Race Directive—Our plans for implementation', *European Lookout* 3 (2000), 2.

<sup>5</sup> Art 14 Council Dir 2000/43/EC above n 2.

<sup>6</sup> Dandeker, C and Mason, D 'Diversity in the British Armed Forces: the Debate Over Ethnic Minority Representation', Paper presented to a conference on 'Redefining Society—Military Relations: From Vancouver to Valdstock, at the University of Birmingham, 16–18 April 1999.

<sup>7</sup> *Ibid.*

<sup>8</sup> International influence on racial discrimination has tended to come from the jurisprudence of the European Court of Human Rights in interpreting the ECHR, however, racial discrimination is not an autonomous right and the remedy relies on the willingness of member states' governments to comply with court rulings.

<sup>9</sup> Forbes, I and Mead, G *Measure for Measure: a comparative analysis of measures to combat racial discrimination in the Member Countries of the European Community*, Equal Opportunities Study Group, University of Southampton, 1992, Research Series No 1 (London, Department of Employment).

<sup>10</sup> UN Centre for Human Rights (1996) 'Model National Legislation for the Guidance of Governments in the Enactment of Further Legislation Against Racial Discrimination'.

broader but does not include health or social security, or participation in political, economic, social or cultural spheres.<sup>11</sup> Moreover, many of the legal instruments that exist at Member State level are rarely used.<sup>12</sup>

Given the ethnic conflict that preceded the birth of the EC, the lacuna in this area should have been filled long ago. It has been argued that racism and intolerance have a detrimental effect on third country nationals<sup>13</sup> and national ethnic minorities<sup>14</sup> in exercising the right to free movement within the internal market.<sup>15</sup> The failure to abolish institutionally racist barriers strikes at the very heart of the European idea in two fundamental respects. On a narrow internal market basis (the business case),<sup>16</sup> upwards of 13 million third country nationals are more or less discounted where questions of effectiveness of service delivery, markets and competition for the recruitment and retention of people. At the level of concerns over fairness and equity (the altruism model)<sup>17</sup> this necessitates that racial and ethnic groups are represented throughout society, so that the creation of 'harmonious societies characterised by ethnic and cultural diversity ... [as] a positive and enriching factor'<sup>18</sup> can be achieved. In the light of these difficulties, the Khan Commission recommended using EU law. This law would enshrine the principle that, 'all individuals, regardless of their colour, race, nationality, ethnic or national origin, or religion, should have the right of equal access to employment, equal pay and fair treatment.'<sup>19</sup> The Commission emphasised that the right to equal treatment should apply whether or not a person was a Community citizen.<sup>20</sup> It is argued that within a human rights

<sup>11</sup> The Human Rights Act 1998, incorporating the European Convention on Human Rights is likely to have an impact in these areas.

<sup>12</sup> See Bell, M 'Beyond European Labour Law? Reflections on the EU Racial Equality Directive', 8 (2002) *European Law Journal* 384. Also see Forbes & Mead, above n 9.

<sup>13</sup> Non-EC nationals in any EC country who have been legally admitted as residents. These include all residents from outside the EC, citizens of Commonwealth countries (if they have not registered or naturalised as British citizens), British nationals but not British citizens, see Dummett, A *Citizens, Minorities and Foreigners* (London, CRE 1994).

<sup>14</sup> Duncan, W 'Racism and Xenophobia in Europe', in Barrett, G (ed) *Justice and Cooperation in the European Union*, (Dublin, Institute of European Affairs 1997), 183. Also see European Monitoring Centre on Racism and Xenophobia, *Looking Reality in the Face*, Annual Report 1998, part 2, EUMC, Vienna.

<sup>15</sup> A freedom guaranteed by Art 39 of the EC Treaty but limited to the abolition of discrimination on grounds of nationality not race or ethnicity. Commission, 'European Social Policy—A way Forward for the Union' COM (94) 333 final, 27.7.94, ch VI. Also see Case 186/97 *Cowan v Tresor Public* [1989] ECR 195 where the Court held that the prohibition against discrimination on the grounds of nationality extended to recipients of services.

<sup>16</sup> For analysis of the 'business case model' in relation to ethnic minorities and the armed services see Dandeker and Mason, above n 6.

<sup>17</sup> *Ibid*, at 3.

<sup>18</sup> EU Anti-discrimination Policy. From Equal Opportunities Between Men and Women to Combating Racism, Working Documents, Public Liberties Series LIBE 102 EN, 3.

<sup>19</sup> European Council Consultative Commission (1995) Final Report, Ref 6906/1/95 Rev 1 Limite RAXEN 24.

<sup>20</sup> *Ibid*, 59.

framework this is justified. Additionally, the 1996 European Parliament asked the EC Commission to address the question of how the principle of equal treatment might be obtained beyond areas pertaining to the labour market.<sup>21</sup> This reflected an understanding that institutionally racist barriers might have a bearing on interstate and intrastate movement for 'racial' and 'ethnic' minorities. This understanding is important if the appropriate legislative tools are to be formulated in order to strike at the heart of institutionally racist practices (and, if needs be, at the individuals who operate them). Examples include the fact that in Austria and Germany distinctions drawn between EC nationals and non-EC nationals (including third country nationals who have permanent residence) are not seen as racially discriminatory. In Greece, public sector employment is not open to non-EC nationals and in Portugal a company with more than five employees can only employ foreign nationals as long as 90 per cent of the workforce remains Portuguese.<sup>22</sup>

Although proposals to amend the EC Treaty were advocated since the 1980s,<sup>23</sup> it was only in 1997 that the European Council at Amsterdam accepted the principle that the Community should combat racism. This was pursued by the implementation of Article 13.<sup>24</sup> This article empowers<sup>25</sup> the Council, acting unanimously on a proposal from the Commission,<sup>26</sup> to take appropriate action to combat discrimination on racial or ethnic grounds.<sup>27</sup> Article 13 is the main provision dealing with Community competence in tackling unlawful discrimination and equal opportunities in employment and other fields. Its existence is motivated by the belief that equal opportunities in the labour market are, to some extent, contingent on equality of access to

<sup>21</sup> Para 15, Resolution on the Communication from the Commission on Racism and Xenophobia and Anti-semitism, 9 May 1996 (OJ 1996 C 152/57).

<sup>22</sup> Wench, J 'Mechanisms of Exclusion: Ethnic Minorities and Labour Markets' 1 (1997) *Nordic Labour Journal* 16, 17.

<sup>23</sup> The European Parliament, Council, Representatives of member states and the Commission agreed the 1986 *Declaration Against Racism and Xenophobia*. A number of organisations have been actively engaged in compiling draft instruments aimed at the enhancement of the EC's competence in dealing with racial discrimination on a Community-wide basis. These have included the CRE, the Dutch National Bureau against Racism, Belgian Centre for Equal Opportunities, Churches Commission for Migrants in Europe, the Migrants Forum and Starting Line.

<sup>24</sup> Another amendment to the Treaties relating to racism was Art 29 EU aimed at preventing and combating racism and xenophobia in the provision on police and judicial cooperation in criminal matters.

<sup>25</sup> It has been unsuccessfully argued that the Community already had competence in this area under the old Art 235 of the Treaty of Rome see A Dummett.

<sup>26</sup> After consulting the European Parliament, Art 13 EC Treaty.

<sup>27</sup> Additional grounds of discrimination in the Article included sex, religion or belief, disability, age and sexual orientation. Contrast this with the equal treatment of men and women in relation to pay for instance under Art 141, formerly Art 119. Another difficulty is the requirement that the Council act unanimously in any appropriate action. It could lead to inaction or limited action. This was a problem that the CRE hoped to avoid in its proposal in the early 1990's that the Council act by qualified majority, see Dummett above n 13 at 12-13.

spheres that are contingent and simultaneous such as housing and health. Inequality in these spheres compound labour market discrimination.<sup>28</sup>

The European Monitoring Centre on Racism and Xenophobia<sup>29</sup> was set up with the express aim of providing the Community and its Member States with data at European level on racism, xenophobia and anti-Semitism, in order to help them in formulating policy in this area. It was not until 6 June 2000 that agreement was reached on a package of anti-discrimination measures put forward by the European Commission, which included the Race Directive.<sup>30</sup> The Race Directive was adopted by the Council of Ministers (Council)<sup>31</sup> on 29 June 2000. It is a European Union (EU) Community-wide instrument that will come into effect<sup>32</sup> on 19 July 2003 in all Member States.<sup>33</sup>

### III. THE RACE DIRECTIVE: KEY FEATURES

The object of the Race Directive is to lay down a common framework for combating racial or ethnic discrimination in Member States of the EU through the application of the principle of equal treatment

Member States are under a duty to implement measures at the domestic level to ensure compliance and must report to the Commission on their work in this regard.<sup>34</sup> They must designate a body or bodies charged with the promotion of equal treatment on the grounds of racial or ethnic origin and imbued with the legal competence to provide assistance for victims. These bodies must also have competence to conduct surveys and publish independent reports.<sup>35</sup> Sanctions for non-compliance with the objective of

<sup>28</sup>The extent to which this article can deal with racial discrimination wherever it may arise is questionable.

<sup>29</sup>On 2 June 1997 the Council of Ministers adopted regulation (EU No 1035/97) to set up this centre. For a critique of the limited objectives of the Centre, see Brennan, F 'Can the Institutions of the European Community Transcend Liberal Limitations in the Pursuit of Racial Equality?' in Brecher, B Halliday, J and Kolinska, K *Nationalism, Racism and the Liberal Order* (Ashgate 1998) 108.

<sup>30</sup>Council Dir 2000/43/EC adopted on 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin, above n 2. It may be useful to add that this directive was rushed through, precipitated by fears over the human rights situation in Austria due to the rise of the Far Right Freedom Party in 2000. See Douglas-Scott, S *Constitutional Law of the European Union* (Longman 2002) 435, fn 21 and Bell, M 'Beyond European Labour Law? Reflections on the EU Racial Equality Directive' 8 (2002) *European Law Journal* 384, 385. As part of the package of measures, provisions to deal with discrimination on the grounds of religion were adopted through Council Dir 2000/78/EC, establishing a general framework for equal treatment in employment and occupation, Official Journal L303/16.

<sup>31</sup>The Council of Ministers consists of representatives of each Member State at ministerial level imbued with authority to commit the government of that State.

<sup>32</sup>Art 249 EC Treaty provides that a Dir shall be binding as to the results to be achieved.

<sup>33</sup>Art 16 of the Race Directive above n 2.

<sup>34</sup>*Ibid.*

<sup>35</sup>Art 13, *ibid.*

the Race Directive must be developed that are *effective, proportionate and dissuasive*.<sup>36</sup> Provisions designed to deal with these matters must be notified to the Commission.<sup>37</sup> Whilst there are several areas aimed at the level of Member State obligation, how does the Race Directive help victims of racial discrimination?<sup>38</sup>

There are a number of articles in the Directive that purport to lay down a level playing field for *those who consider themselves wronged by failure to apply the principle of equal treatment*<sup>39</sup> on the grounds of racial or ethnic discrimination. These include the right not to be discriminated against either directly or indirectly<sup>40</sup> and protection from harassment<sup>41</sup> and victimisation.<sup>42</sup> This right applies in the context of both the private and public sectors and covers a number of areas such as employment, training, membership of organisations, social protection, security and healthcare.<sup>43</sup> Some important aspects involve the establishment of an independent body to provide individual assistance to victims,<sup>44</sup> a shift in the burden of proof to the respondent once a *prima facie* case of racial discrimination has been made out<sup>45</sup> and a duty to disseminate information to inform people of the existence of these provisions.<sup>46</sup> A directive was seen as the most feasible instrument to deal with a minimum level of protection from racial discrimination in Member States.

A directive as an instrument to provide minimum protection to victims of racial discrimination is useful. It can take account of the divergent legal<sup>47</sup> and cultural systems of Member States when measuring compliance with the obligation to implement the principle of equal treatment because it is binding *as to the results to be achieved*, leaving the *form or method* of attaining the objective to Member States. Regulations and decisions are *binding in their entirety* and their implementation might require complete uniformity. Reliance on the latter might prove problematic when pursuing complex EU social policy such as the integration of people in the single market, in countries with divergent legal and historic systems. From a political point of view, a directive is likely to be the most palatable instrument in seeking to achieve the consensus of 15 Member States.

<sup>36</sup> Art 15, *ibid.*

<sup>37</sup> *Ibid.*

<sup>38</sup> For analysis of the Race Directive as a model for worldwide mechanisms to combat racial discrimination see Brennan, F *The European Race Directive: A Bridge So Far?* (London, Consultative Council of Jewish Organisations 2001) discussion paper produced for the World Conference Against Racism.

<sup>39</sup> Art 7(1) of the Race Directive above n 2.

<sup>40</sup> Art 2(1) (a) and (b) *ibid.*

<sup>41</sup> Art 2(4) *ibid.*

<sup>42</sup> Art 9, *ibid.*

<sup>43</sup> Art 3(1), *ibid.*

<sup>44</sup> Art 12, *ibid.*

<sup>45</sup> Art 8, *ibid.*

<sup>46</sup> Art 10, *ibid.*

<sup>47</sup> For instance whilst Britain, the Netherlands and France have laws against discrimination, in other EC countries such protection amounts to a pittance.

The Race Directive requires a minimum standard of compliance across all Member States.<sup>48</sup> It is aimed at the protection of victims of racial discrimination by placing upon states a duty to provide national measures to give effect to this instrument. Where a Member State fails to implement a directive, individuals may rely on it directly.<sup>49</sup> This opens the door to *horizontal direct effect* as well as *vertical direct effect* claims. An individual may also bring an action in damages against the state if there is a causal link between the state's failure to implement a directive and the loss suffered.<sup>50</sup> The idea behind the Race Directive is to prevent the use of characteristics such as racial or ethnic origin, as a ground of discrimination in the single European market. It could be argued then that the Directive is a potentially powerful instrument in challenging both intentional discrimination and prejudice and the social construction and ideological justification of racism<sup>51</sup> when manifested in the form of racial discrimination in the Community market place. This may be dealt with at an individual, group or institutional level. Thus the Directive appears to place an obligation on Member States to perform a 'policing' function in terms of controlling direct discrimination<sup>52</sup> and it can be seen as an agent of social change, in the sense that it also prohibits discrimination<sup>53</sup> against groups and so has the potential to deal with the results of past discriminatory practices and/or a 'concern for distributive justice.'<sup>54</sup>

#### IV. TRANSPOSITION

At the time of writing few Member States have fully transposed the Race Directive into their domestic legal systems.<sup>55</sup> The following table sets out the stage reached by Member States.

<sup>48</sup> Member states may introduce more favourable provisions, but they cannot reduce levels of protection that were already afforded by them prior to the Directive, Art 6 of the Race Directive above n 2.

<sup>49</sup> 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, and 'indirect effect', Case 4/83 *Von Colson and Kaman v Nordrhein-Westfalen* [1984] ECR 1891, [1986] 2 CMLR 430.

<sup>50</sup> Art 1 Council Dir 2000/43/EC. Joined cases C-6/90 and C-9/90 *Francovich and Bonifaci v Italian State* [1991] ECR I-5357.

<sup>51</sup> As a set of beliefs or dogma that is used to justify the existence of groups, ie, natural and fixed biological criteria, inferior culture or religion, see Bowling, B and Phillips, C *Racism, Crime and Justice* (Pearson 2002), 21.

<sup>52</sup> A type of cleansing of the process of decision-making on behalf of the individual complainant, see McCrudden, C, Smith, DJ and Brown, C *Racial Justice at Work: The Enforcement of the Race Relations Act 1976 in Employment* (PSI, 1991) at 5-6.

<sup>53</sup> Art 2(2)(b) of the Race Directive above n 2.

<sup>54</sup> See McCrudden, Smith & Brown above n 52 at 6-7.

<sup>55</sup> See European Network Against Racism, ENAR Update on the Implementation of the Council Dir 2000/43/EC Implementing the Principle of Equal Treatment between Persons Irrespective of Racial or Ethnic Origin, January 2003 (based on information from ENAR 31 December 2003).

<i>Member State</i>	<i>Stage Reached in Transposition</i>	<i>Potential Problems</i>
Austria	Draft anti-discrimination law presented to main Parliamentary committee March 2001. No time found to discuss draft. Government has considered transposing the Race Directive through existing legislation such as the Federal Equal Treatment Act and Equal Treatment Act.	Will not be fully transposed.
Belgium	In December 2002 a law was adopted to implement Race Directive.	Only 80% of the content of the Directive has been covered by this law.
Denmark	Expert Committee overseeing the work and has proposed changes to existing law. There is no draft bill.	Independent bodies are unlikely to be given the legal competence to bring cases before the courts.
Finland	Draft law was submitted to Parliament in December 2002 but dropped due to the elections in March 2003. The draft law changes existing legislation.	Standards proposed only bring protection against racial discrimination to the level required by the Directive.
France	The Directive has been brought into force through laws of 16-11-2001 (employment) and 17-01-2002 (Housing).	The scope of the Directive is not all-encompassing. Powers of associations to bring action on behalf of victims is limited and indirect discrimination is not generally recognised.
Germany	In the process of preparing a new proposal after the first one was dropped.	Racism is not considered a major problem thus the proposal may reflect this.
Greece	No information available.	Does not associate negative practices with racism.
Ireland	Discussion on implementation by way of regulation.	Need for primary, rather than secondary legislation to avoid damage to the Race Relations (NI) Order 1997. The draft regulation adopts minimalist approach and restrictive approach, directly conflicting with the Single Equality Bill for NI that aims to protect and build on existing provisions.
Italy	An unofficial draft exists.	May lag behind and do little to transpose the Directive.
Luxemburg	No information available.	
The Netherlands	A bill was proposed that is in the process of discussion.	Whilst the bill is fairly comprehensive some areas remain unclear.
Portugal	No information available.	
Spain	There is a working group but no proposal from Government.	
Sweden	There are proposals from the Government that will be presented to Parliament in July 2003. There are also inquiries that are considering whether to have one all-embracing law or to combine existing legislation.	Whilst the proposals appear to encompass higher standards than required by the Directive, it is too early to determine how comprehensive the law will be.
United Kingdom	Draft Race Relations Act 1976 (Amendment) Regulations 2003 laid before parliament 8 May 2003 for discussion in June. <sup>56</sup>	One of the difficulties will be the possibility of inconsistencies between the Draft Regulation,

<sup>56</sup> Source Department of Trade and Industry, Equality and Diversity, 9 June 2003, [www.dti.gov.uk/er/equality](http://www.dti.gov.uk/er/equality). The full text can be found at <http://www.dti.gov.uk/er/equality/raceregs.pdf>.



existing Race Relations Act 1976 (amended to impose positive duties on institutions) and the Human Rights Act 1998. Moreover, it is difficult to assess the impact of the proposal for a Single Equalities Commission.

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Sources<sup>57</sup>

## V. TEXTUAL AMBIGUITY

Discrimination on the grounds of racial and ethnic origin is central to the problem that the EU perceives as dividing the internal market along unjustified discriminatory lines. To address this problem the Community has employed the principle of equal treatment. Accordingly, *the principle of equal treatment shall mean that there shall be no direct or indirect discrimination based on racial or ethnic origin.*<sup>58</sup> The Directive provides that harassment<sup>59</sup> and an instruction to discriminate<sup>60</sup> are prohibited as forms of discrimination as defined in paragraph 1,<sup>61</sup> based on racial or ethnic origin. Further, the instrument does not exclude a ‘... difference of treatment which is based on a characteristic related to racial or ethnic origin ...’<sup>62</sup> and Member States are encouraged to ‘... maintain or adopt measures to compensate for disadvantages linked to racial or ethnic origin.’<sup>63</sup> The difficulty here is that these provisions in the Directive appear to undermine its basic premise in relation to ‘race’ and ‘ethnicity’.

Candidate countries due to join the EU in May 2004 will also be expected to implement the race directive.

<sup>57</sup> European Commission Against Racism and Intolerance. [<sup>58</sup> Art 2\(1\) of the Race Directive above n 2.](http://www.coe.int/T/E/human_rights/Ecri/1-ECRI/, European Union Monitoring Centre on Racism and Xenophobia, European Network Against Racism, ENAR Update on the Implementation of the Council Dir 2000/43/EC Implementing the principle of equal treatment between persons irrespective of racial or ethnic origin, January 2003, http://www.enar-eu.org/en/events/racedirective/ENAR%20update%20on%20the%20implementation.pdf, ENAR Shadow Reports on the activities of Member States, http://www.enar-eu.org/en/national/, Northern Ireland Council for Ethnic Monitoring (NICEM), Submission to the OFMDFM in response to Draft Race Regulations in Implementing EU Equality Obligations in Northern Ireland, 31 March 2003, Belfast.</p>
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<sup>59</sup> Art 2(3) *ibid.*

<sup>60</sup> Art 2(4) *ibid.*

<sup>61</sup> Which states that ‘For the purposes of this Directive, the principle of equal treatment shall mean that there shall be no direct or indirect discrimination based on racial or ethnic origin.’

<sup>62</sup> Art 4 Genuine and determining occupational requirements. For an interesting critique of the use of Genuine Occupational Qualifications as a ground of discrimination see Pitt, G ‘Madam Butterfly and Miss Saigon: Reflections on Genuine Occupational Qualifications’ in Dine, J and Watt, B *Discrimination Law. Concepts, Limitations and Justifications* (London, Longman 1996) 198.

<sup>63</sup> Art 5 of Council Dir 2000/43/EC, above n 2, related to positive action.

### A. 'Race'

Regarding the question of 'race', the premise in the Directive is one that rejects theories of separate human races.<sup>64</sup> No doubt this is put in place to counter any suspicion that nineteenth century scientific racism and its re-emergence in mainstream politics and Far Right discourse is accepted by the EU. Such racism is based on hatred of the 'Other'<sup>65</sup> and a belief in the superiority of one racial group over another, drawing on somatic features such as skin colour, skull size and hair texture—linked to mental characteristics.<sup>66</sup> However, the use of language such as 'racial origin', 'related to racial origin' and 'linked to racial origin', in Article 1 and 2 is ambiguous. In transposing the Directive who is the Member State to target? Should they put in place provisions to protect 'racial' groups or prohibit perceptions that there are separate 'racial' groups? It may be argued that the provisions must be transposed in such a way that they get at perception of, rather than the existence of, separate 'racial' groups. However, this is not clear in the text of the Directive that uses the term 'based on racial origin'. Moreover, it could be contended that the acceptance of a difference in treatment based on a characteristic related to 'racial origin' contained in the provision covering genuine occupational qualifications, supports the argument that the EU impliedly accepts the notion of separate 'racial' groups. This may be further reinforced by the concept of positive action in Article 5.<sup>67</sup> This provision does not prevent Member States from using '... *specific measures to prevent or compensate for disadvantage linked to racial ... origin.*'<sup>68</sup> The obscurity may compound difficulties in the transposition of the Race Directive into the legal system of Member States that is likely to have negative consequences for victims of racial discrimination.

Problems regarding racism that have surfaced in Northern Ireland, Germany and Greece serve as timely reminders of these difficulties. A series of reports on Northern Ireland consider that characteristically the principal trigger for racially discriminatory behaviour is 'skin colour racism'.<sup>69</sup> That is the use of the colour of a person's skin as grounds for discriminatory and offensive behaviour. In Northern Ireland discriminators do not generally

<sup>64</sup> Para 6 of Preamble Council Dir 2000/43/EC.

<sup>65</sup> Fitzpatrick, P and Bergeron, JH *Europe's Other: European Law Between Modernity and Postmodernity* (Ashgate 1998).

<sup>66</sup> See Gearty, CA 'The Internal and External "Other" in the Union Legal Order: Racism, Religious Intolerance and Xenophobia' in Alston, P (ed) *The EU and Human Rights* (OUP 1999), 327.

<sup>67</sup> The Race Directive, above n 2.

<sup>68</sup> *Ibid.*

<sup>69</sup> NICEM, *Submission to the OFMDFM in Response to the Draft Race Regulations in Implementing EU Equality Obligations in Northern Ireland*, 31 March 2003, Belfast. Also see ECRI, *Second Report on Ireland*, Adopted 22 June 2001, 23 April 2003 where it is reported that people generally reject the idea that a person may be Irish and black, para 55.

know the ethnic or national background of victims. The tendency is to discriminate on the basis of 'visible' characteristics. Similar problems have arisen with people in Austria (whether or not they are native born).<sup>70</sup> These problems suggest that the failure to define 'race' to include discrimination on the basis of skin colour will present a problem for those seeking to rely on the transposition arrangements to protect them from racial discrimination.

'Rasse' the German word for 'race' tends to be perceived as a quintessential category in Germany. This concept represents the essence 'Wesen' of a tribe 'Volk' in public discourse. Discourse on racism in Germany manifests itself in the stigma attached to Colonialism and the Holocaust and thus is rarely discussed outside of those terms. This makes it difficult to consider contemporary forms of racism and how that might impact on market integration.<sup>71</sup> By contrast, it is suggested that in Greece, where the Christian Orthodox Church considers all children derive from 'Adam and Eve' and that to talk of racial ideas is heresy, a very low profile may be given to the question of 'race'. This poses difficulties since there is little in the public sphere to challenge the widely held notion that integration of 'races' may lead to degeneration.<sup>72</sup> This problem indicates that if the question of 'race' is not part of public discourse because it does not 'exist' on that level in Member States, it will not be taken seriously. Moreover a failure to define it in the Race Directive compounds this problem since member states will not have a duty to acknowledge something that they can deny exists at the conceptual level. Further, victims will not have an instrument that they can point to that is clear and precise in defining discrimination on the basis of racial origin, causing complaints to be harder to make and raising the issue of effective remedy at the international level.

This ambiguity in the Race Directive is likely to have an impact across a range of public services that are covered by the scope of the Race Directive, such as housing, education and health, since it fails to challenge racial discrimination along 'skin colour' lines for instance. This failure points to the problem earmarked by institutional racism. Institutional racism is the failure to provide a service to people because of, for instance, the colour of their skin. This failure is not one based on conscious racism, rather it arises from unconscious and unwitting racism that results in racial discrimination. It is suggested that in this respect at least the EU has failed to provide an adequate service to people subject to racial discrimination in the internal market. This would have been a more comprehensive instrument had it encompassed a meaningful definition of 'race'.

<sup>70</sup> See ECRI, Second Report on Austria, 3 April 2001.

<sup>71</sup> Hieronymus, A and Moses, M ENAR, Shadow Report 2002, *Talking 'Race' in Germany*, Institut für Migrations- und Rassismussforschung, Hamburg, Germany April 2003, para 1.1.

<sup>72</sup> See generally Roubani, N *ENAR Shadow Report—2001, for Greece*.

## B. 'Ethnicity'

The Race Directive prohibits both direct and indirect discrimination on the basis of 'ethnic' origin.<sup>73</sup> This prohibition includes harassment and an instruction to discriminate.<sup>74</sup> The converse is true where the question of genuine occupational qualification or positive action is the object of the discriminating factor. Here the Directive does not prohibit provisions that seek to provide for difference of treatment 'related to ethnic origin'.<sup>75</sup> However, it does not provide a definition of 'ethnic' origin. This omission is likely to raise issues regarding the question of what is an 'ethnic' group? Further, this may have implications for monitoring the effectiveness of the transposition arrangements for those subject to this form of discrimination.

In English legal jurisprudence the question of whether or not a person is a member of an ethnic group is problematic.<sup>76</sup> In *Mandla (Sewa Singh) v Dowell Lee and Others*<sup>77</sup> the House of Lords has held that for the purposes of the Race Relations Act 1976 (RRA), an ethnic group is one defined by reference to a long shared history and a cultural tradition of its own.<sup>78</sup> This definition has been criticised as being overly restrictive since certain groups are unable to take advantage of it in order to seek legal redress under the Act in cases of discrimination. Thus in *Cooper v British Rail*,<sup>79</sup> *CRE v Precision Manufacturing Services Ltd*<sup>80</sup> and *Dawkins v Department of the Environment*<sup>81</sup> the courts have consistently decided that certain groups such as Muslims and Rastafarians are not ethnic groups. By contrast, groups such as Jews<sup>82</sup> and Gypsies<sup>83</sup> have been afforded the benefit of the *Mandla* definition enabling them to seek legal redress under the RRA. Given the racism that Rastafarians and Muslims face, commentators have argued that it is illogical not to extend anti-racist legislation to them.<sup>84</sup>

<sup>73</sup> Art 2 of the Race Directive above n 2.

<sup>74</sup> The Race Directive, above n 2, Arts 2(3) and (4) respectively.

<sup>75</sup> *Ibid*, Arts 4 and 5.

<sup>76</sup> See Dobe, K and Chhokar, S 'Muslims, Ethnicity and the Law' 4 (2000) *International Journal of Discrimination and the Law* 369 and Poulter, S *Ethnicity, Law and Human Rights. The English Experience* (OUP 1998), ch 9.

<sup>77</sup> [1983] 2 AC 548.

<sup>78</sup> [1983] 2 AC 548 at 562.

<sup>79</sup> Unreported, Independent 27 November 1986.

<sup>80</sup> Case No 4106/91 where it was alleged that an instruction to discriminate against Muslims fell outside the Race Relations Act because Muslims did not constitute an ethnic group because the tribunal believed that Islam was a spread of faith rather than a group of people who could trace their descent from a common geographical origin. Also see *Nyazi v Ryamans*, EAT, 10 May 1998 (unreported), *Tariq v Young*, Birmingham IT, 19 April 1989 (unreported); *J H Walker Ltd v Hussain* [1996] IRLR 11.

<sup>81</sup> [1993] IRLR 284.

<sup>82</sup> *Seide v Gillette Industries Ltd* [1980] IRLR 427.

<sup>83</sup> *Commission for Racial Equality v Dutton* [1989] 1 All ER 306.

<sup>84</sup> See Gearty, C A 'The Internal and External "Other" in the Union Legal Order: Racism, Religious Intolerance and Xenophobia' in Alston above n 66, 335-339 at 327, (in relation to

The Race Directive might have resolved this anomaly had a comprehensive definition of ethnicity been provided.

In Portugal several ethnic minorities are often discriminated against in the internal market for jobs, goods and services on the basis of cultural factors. African ethnic minorities are particularly vulnerable because they are subject to 'latent racism'. However, an evaluation of the legal jurisprudence related to this area suggests a lacuna.<sup>85</sup> Discrimination is not dealt with by reference to 'ethnicity' rather issues are framed in terms of 'working' and 'living' conditions. This means that who is within and who without these parameters, in terms of ethnic groups, is difficult to decipher. Without a working definition of what an ethnic group might be, it is difficult to assess to what extent the transposition arrangements will effectively deal with discrimination against ethnic groups. By way of contrast, Austrian legal jurisprudence is familiar with the term 'ethnic origin'. This is dealt with through the Austrian Constitution's equality clause and takes its language from the International Convention on Elimination of all Forms of Racial Discrimination (ICERD): '*any distinction, exclusion, restriction or preference based on ... ethnic origin ...*'.<sup>86</sup> However, there is no definition of what is meant by ethnic origin. This means that the potential exists for certain groups to be excluded and thus not afforded protection from racial discrimination. An added complication in the Austrian context is the existence of 'special measures' for protected national minorities. Some groups of national minorities in Austria are so defined under the *Volksgruppengesetz* (National Minorities Act). This defines 'a national minority as one that comprises groups of Austrian citizens with a non-German mother tongue and a common autonomous cultural heritage who have their residence and home in a part of the Austrian Federal territory'.<sup>87</sup> Whilst anyone can affiliate to an ethnic group,<sup>88</sup> given the prevalence of skin colour racism in Austria<sup>89</sup> it seems highly unlikely that Austrian born Africans or Muslims could do so in the context of how national minorities are defined. The Race Directive might have been better served in terms of its desire to protect people from ethnic discrimination had it provided a way of dealing with the issue raised here.

Rastafarians and Muslims); Dobe, K and Chhokar, S 'Muslims, Ethnicity and the Law' 4 (2000) *International Journal of Discrimination and the Law*, 369 (regarding Muslims).

<sup>85</sup> Niessen, J and Chopin, I (eds), *Anti-discrimination Legislation in EU Member States. A comparison of national anti-discrimination legislation on the grounds of racial or ethnic origin, religion or belief with the Council Directives. Austria*, (Vienna, Austria, EUMC 2002).

<sup>86</sup> Art 1, para 1 of ICERD.

<sup>87</sup> Niessen and Chopin (eds), above n 85 at 20.

<sup>88</sup> *Ibid.*

<sup>89</sup> See ZARA, *Racism Report 2001. Case Reports on Racist Excesses in Structures in Austria*, Vienna Austria, 2001.

Recent events in relation to 'September 11' have brought to the fore the question of 'cultural racism'.<sup>90</sup> It has been argued that racism cannot be understood as based only on colour,<sup>91</sup> nor can the racism experienced by Muslims be side-stepped by construing the victimisation process as one based on religion—or indeed ethnicity.<sup>92</sup> There are developing sets of 'cultural racisms' that use cultural difference to denigrate or 'demand cultural assimilation from groups who also suffer colour racism.'<sup>93</sup> The Directive fails to provide a mechanism whereby this problem is both understood and dealt with in terms of national anti-discrimination legislation. It is argued that the issues raised in this section demonstrate the 'fractured' approach to the prohibition of racial discrimination at national level, using the Race Directive as a device to combat racism. Whilst well-meaning, such a strategy indicates that the Directive reflects a failure to provide a service to a significant proportion of people of the EC. This failure indicates the process of institutional racism because this blinkered approach tends to impact on people on the basis of ethnicity. A far more comprehensive approach to the breadth of the problem is to be welcomed.

#### V. SCOPE

Paragraph 21 of the preamble<sup>94</sup> to the Race Directive states that the Directive is to protect '*persons who have been subject to discrimination based on racial or ethnic origin*' and '*that they should have adequate means of legal protection.*' This paper assumes that such wording encapsulates the view of the Khan Commission that, 'all individuals, regardless of their colour, race, nationality, ethnic or national origin, or religion, should have the right of equal access to employment, equal pay and fair treatment.'<sup>95</sup> However, this broader approach appears watered down when compared with the provisions dealing with the Directive's scope. Article 3(2)<sup>96</sup> expressly provides that the directive '*does not cover difference of treatment based on nationality*', nor does it deal with, '*conditions relating to entry, residence and any treatment which arises from the legal status of third country national*'.<sup>97</sup> The difficulty is that problems flow from the apparent

<sup>90</sup> See Brennan, F 'Islamophobia: the Response of the Criminal Justice System', 2003 (forthcoming).

<sup>91</sup> Modood, T *et al*, *Ethnic Minorities in Britain: Diversity and Disadvantage* 'The Fourth National Survey of Ethnic Minorities in Britain' (Policy Studies Institute 1997).

<sup>92</sup> Religious discrimination is dealt with by the Framework Directive on Employment and Occupation.

<sup>93</sup> Fredman, S *Discrimination Law* (OUP 2002).

<sup>94</sup> A preamble is not binding but can be persuasive.

<sup>95</sup> European Council Consultative Commission (1995) Final Report, Ref 6906/1/95 Rev 1 Limite RAXEN 24.

<sup>96</sup> The Race Directive above n 2.

<sup>97</sup> Art 3(2) of the Race Directive, *ibid*.

contradiction between the general wish of the EU to protect persons from racial and ethnic discrimination<sup>98</sup> and the restrictions placed on its competence to do so, in the face of the discretionary power of states to admit people into the territories of the EU.<sup>99</sup> The whole question of the extent to which the legal regime of the EU confines its coverage to people in a way that impacts directly on third country nationals, may be summed up as an example of discrimination. This issue concerning discriminatory treatment of third country nationals in the EU also opens up disturbing questions about the rule of law and equality before it. It is argued that third country nationals are not treated equally before the law in this respect. They are included in the Race Directive, except in ways in which they are specifically excluded which are to do with immigration and statelessness. Prioritising status over the fact of racial and ethnic discrimination seems to put the cart before the horse in this sense. Racism does not respect immigration status or the condition of statelessness, its prime concern is to resurrect and maintain barriers along racially or ethnically discriminatory lines. A legal measure aimed at tackling racism cannot be fully effective if it allows Member States to pick and choose 'who' will be protected from discriminatory structures. Since the Race Directive does not prevent this selecting it can be argued that this provision is not really directed at racism at all. Rather, its aim is to prohibit racial discrimination only in so far as the object of it has first been identified as a European Community citizen. The difficulty with this approach is that it is status-determined groups who are afforded a remedy under EU law. This creates an algorithm that leaves those who fall on the wrong side of the 'yes' or 'no' column to the mercy of the inadequate protection of national laws. More fundamentally, from this point of view, racism as a fundamental basis for discriminating against people is allowed to survive.

#### A. Third Country Nationals

Many third country nationals<sup>100</sup> who legally reside in Member States experience racial discrimination in employment, housing and the provision of

<sup>98</sup>The Commission has expressed concern that if migrants are left to fend for themselves they will continue to occupy the bottom rungs of society and the larger society will continue to be hostile, develop mechanisms of rejection and stigmatisation reinforcing the vicious circle of exclusion. See Commission of the European Communities, *Policies in Immigration and the Social Integration of Migrants in the European Community*, SC (90) 1813 final (internal document, 1990).

<sup>99</sup>See Dummett, A 'Immigration and Nationality', in McCrudden, C and Chambers, G (eds) *Individual Rights and the Law in Britain* (Oxford, Clarendon Press 1994) where she argues that with few exceptions, international law takes for granted that each state determine its own immigration laws.

<sup>100</sup>'A term used to describe non-EC nationals in an EC country who have been legally admitted as residents', see Dummett A, *Citizens, Minorities and Foreigners* (London, CRE 1994).

goods and services. Despite their tax and employment burden, this is not balanced by a reciprocal distribution of resources. It is third country nationals that tend to occupy the poorest paid jobs and live in the poorest housing. They are less likely to receive secondary and higher education and most likely to suffer from the problems associated with poverty such as ill health. These problems are often linked to the immigration policies of member states related to historical demands of the labour market for a cheap labour force—often to do the low skilled, seasonal and low paid work that nationals reject.<sup>101</sup> Although they tend to be the most exploited they are often the most vulnerable and suffer from racial discrimination that national laws do not necessarily adequately deal with.<sup>102</sup> For instance in Germany, the UK and Northern Ireland several instances of racially motivated incidents are reported. This conduct is often based on a perception of difference based on a characteristic of the person—skin colour, hair type, dress—which is used to justify homicide, assaults, harassment or criminal damage.<sup>103</sup> The creation of an atmosphere of fear where the physical and mental well being of a person is put in jeopardy because of such characteristics is likely to impact on the exercise of the right to move freely for the purpose of work. Requiring member states to address this problem through adequate legal measures is defeated if the only victims that can rely on the transposed provisions are those who, by virtue of their status, are protected EU citizens. It is defeated because the problem of racially motivated crimes is not addressed, the problem that is considered is the status of the victim entitled to adequate protection.

The EC was empowered under Article 13 to ‘*take appropriate action to combat discrimination based on racial or ethnic origin*’.<sup>104</sup> The Race Directive reflects this competence. Moreover, this Directive obligates Member States to prohibit discrimination in the linked areas of employment, education, housing, health and service provision<sup>105</sup>—the very areas in which the *immigrati, stanieri*,<sup>106</sup> *Gastarbeiter, Auslander*,<sup>107</sup> and other people similarly placed in Member States are likely to suffer. The irony is that some of the most exploited are *least* likely to be protected by the directive

<sup>101</sup> See A Rudiger (ed) *A Voice of Change. European Minority Organisations in Civil Dialogue* (Berlin, Regional Arbeitsstelle für Ausländerfragen, Jugendarbeit und Schule 2001).

<sup>102</sup> See European Commission Against Racial Intolerance, [http://www.coe.int/T/E/human\\_rights/Ecri/1-ECRI/2-Country-by-country\\_approach/default.asp#TopOfPage](http://www.coe.int/T/E/human_rights/Ecri/1-ECRI/2-Country-by-country_approach/default.asp#TopOfPage), Rudiger above n 101 and Forbes and Meade above n 9. Also see ENAR Shadow Report 2002, *Racism and Race Relations in the UK* and ENAR Shadow Report 2002, *Talking ‘Race’ in Germany*.

<sup>103</sup> See Brennan, F ‘Racially Motivated Crime’ [1999] *Criminal Law Review*. 17, also see ENAR Shadow Report 2002, *Racism and Race Relations in the UK* and ENAR Shadow Report 2002, *Talking ‘Race’ in Germany*.

<sup>104</sup> *Ibid.*

<sup>105</sup> Art 3(1)(a)-(h) of the Race Directive above n 2.

<sup>106</sup> Immigrants or foreigners in Italy.

<sup>107</sup> Guest worker or foreigner in Germany.



because they are caught in a vacuum coveted by member states, one which strictly controls how people<sup>108</sup> acquire full citizenship within their territory. Until the EU addresses the power of Member States to determine nationality<sup>109</sup>—one that tends to operate along the lines of *ius sanguinis*<sup>110</sup> and *ius solis*<sup>111</sup>—and its acquiescence in this, the Race Directive is unlikely to live up to its claim to provide common minimum protection to persons within the Community because such instruments tend to favour the status quo and rarely address the concerns of the community at large in fighting discrimination.<sup>112</sup> The problem of vulnerability within the territory of member states also relates to asylum seekers and refugees.

### B. New Problems: Asylum Seekers and Refugees

Article 3(2) also excludes stateless persons from the remit of the Race Directive by stating that provision and conditions relating to entry and residence and any treatment arising from the legal status of stateless persons is not covered. This leaves in place state power to control the composition of its population and limit protection of groups such as asylum seekers and refugees. This is in stark contrast to the Commission's White Paper in 1985<sup>113</sup> which included proposed measures on refugees and asylum seekers, that envisaged EC action on immigration and asylum because it saw free movement provisions and the abolition of internal controls applicable to *all* people regardless of nationality.<sup>114</sup> Article 3(2) is a culmination of the

<sup>108</sup>Of the vast literature in this area see Cole, P *Philosophies of Exclusion. Liberal Political Theory and Immigration* (Edinburgh University Press 2000); Geddes, A *Immigration and European Integration. Towards Fortress Europe* (Manchester University Press 2000); Bellamy, R and Warleigh, A (eds), *Citizenship and Governance in the European Union* (London, Continuum 2001).

<sup>109</sup>Italian citizenship is based on Law n 91 of 5 February 1992 where citizenship may be acquired after 10 years of residence, however, foreign nationals must swear a loyalty oath to the Republic of Italy and renounce their original citizenship. In Spain, naturalisation is obtained under the Naturalisation Act of 1990 generally after 10 years of residence, and dual nationality is only possible in certain circumstances, whereas Luxembourg does not recognise dual citizenship although it requires a residence period of 10 years. German Citizenship Law 1999 now requires an 8-year residence qualification coupled with proof of adequate linguistic skills in German, a pledge to the German constitution and renunciation of any other citizenship. Under the British Nationality Act 1981, to be a British citizen, a child born in the UK must have at least one parent who is a British citizen or 'settled' in the UK (ie free of conditions of stay and ordinarily resident in the UK).

<sup>110</sup>The acquisition of nationality through bloodlines, ie parents' nationality.

<sup>111</sup>The acquisition of nationality through residence qualifications in a country.

<sup>112</sup>McCrudden, C 'Racial Discrimination', in McCrudden, C and Chambers, G (eds), *Individual Rights and the Law in Britain* (Oxford, Clarendon Press 1994).

<sup>113</sup>CEC (1985a) White Paper on the Completion of the Internal Market, (COM (85)) 310 final.

<sup>114</sup>Geddes above n 108, although this should be contrasted with the view of the European Council in 1992 that uncontrolled migration could be destabilising and lead to difficulties for the integration of third country nationals who have legally taken up residence in member states, see Declaration on principles of governing external aspects of migration policy, Edinburgh European Council Presidency Conclusions, *Bulletin-EC*, 12-1992, Annex 5, para I.31.

political tussle that emerged with the Single European Act 1968 (SEA) over free movement as a general right, Member State resistance to pro-integrationist policy within the single market and the ceding of asylum matters only on the basis of cooperation at the supranational level. However, the practical consequence for refugees and asylum seekers is that they are subject to national laws that are woefully inadequate as protection mechanisms<sup>115</sup> and tend to victimise.<sup>116</sup> This can be seen in the way entry to a Member State is restricted by denying that a well-founded fear of persecution exists.<sup>117</sup>

It has been argued at national and EU level that questions of asylum law and refugees should be kept separate from that of the racial discrimination faced by long term minority citizens.<sup>118</sup> For this reason questions concerning refugees and asylum seekers fall outside the terms of reference of the Race Directive. But this begs the question, how to protect people from racial discrimination when legal language is used to restrict this protection? Racism does not distinguish between a 'black' person, a 'brown' third country national with temporary residence and a 'dark' looking asylum seeker. Racial and ethnic discrimination does not seek to establish which type of group it should exclude since 'they' are all 'outsiders'. In a recent survey it was found that 95 per cent of African asylum seekers had suffered from racially motivated attacks.<sup>119</sup> Was it colour, nationality or the fact that they were asylum seekers that made them victims?<sup>120</sup>

According to a daily tabloid what is happening in the field of immigration and asylum has nothing to do with racism since most asylum seekers are white.<sup>121</sup> But if racism is not understood as merely biologically or culturally determined but as a process that 'marries up the worst racist practices throughout the western world: the segregation of asylum seekers mirrors the anti-black racism of apartheid, or of segregation in the U.S. ...'<sup>122</sup> then the notion that the management of asylum seekers and refugees is not racial discriminatory and/or that it should be excluded from the remit of the Race

<sup>115</sup> For instance see European Commission, *Legal Instruments to Combat Racism and Xenophobia* (1993).

<sup>116</sup> See Fekete, L, 'The Terrorism Act 2000 , an interview with Gareth Pierce' 43 No 2 (2001) *Race and Class* 43, at 95–103.

<sup>117</sup> Art 1A(2), of the Geneva Convention as amended by the 1967 Protocol, defines a refugee as any person who: 'owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable to or, owing to such fear, unwilling to avail himself of the protection of that country'. See Dummett above n 99 at 350.

<sup>118</sup> Commission, 'Communication from the Commission to the Council and the European Parliament on Immigration and Asylum Policy' COM (94) 23, 23 February 1994.

<sup>119</sup> *Irish Times*, 1 February 1999.

<sup>120</sup> See Bell, M 'Mainstreaming equality norms into European Union asylum law' 26 (2001) *European Law Review* 23.

<sup>121</sup> See Fekete, 'The Emergence of Xeno-Racism', *Race and Class* 43 No 2 (2001) , at 39.

<sup>122</sup> *Ibid.*

Directive must be brought into question. There is a moral crisis in a Union that professes human rights abroad but ignores these abuses at home. There is a type of xeno-racism that is festering unchecked when it comes to asylum seekers and refugees. This type of racism cannot be determined by skin colour alone or at all, since the categories of the dispossessed that are affected by 'the Europe that has helped to displace them'<sup>123</sup> include whites. Rather, in relation to refugees and asylum seekers we are witnessing a demonisation of people who are insecure and whom the Western world seeks to exclude. The fact that the Race Directive is silent on this only compounds the view that the prohibition of racial discrimination is skewed in favour of the few. The failure to provide a more comprehensive directive dealing with the racial discrimination of the perpetrator rather than focusing on 'those within and those outside the categories of protection', tends to lend credence to the argument that the Directive is built on an individualistic model of justice that cleanses the formal process of discrimination but leaves the substance intact.<sup>124</sup> On the other hand, built into the process by which the Directive is to take effect is the requirement that organisations 'may engage, either on behalf of or in support of the complainant'<sup>125</sup> suggesting that perhaps a group justice model is envisaged, one that looks beyond formal barriers of racial discrimination, to the requirement to redress past discrimination and/or one concerned with present redistributive justice.<sup>126</sup> The latter concern with the position of groups lends itself to the argument that there is little justification for choosing between groups when they all face racial discrimination and that the Race Directive should be understood as focusing on the conduct of the perpetrators rather than the status of victims.

## VI. COMPETING PERSPECTIVES AND INSTITUTIONAL RACISM

According to the Commission, 'The union must act to provide a guarantee for all people against the fear of discrimination if it is to make a reality of free movement within the single market.'<sup>127</sup> The Race Directive opens the door to dealing with the areas where effective social integration through 'legislative engineering' is likely to have some positive impact on the Community objectives of improved employment, improved living and working conditions and

<sup>123</sup> A Sivanandan, Introduction to *The Three Faces of British Racism: A Special Report*, in *Race and Class* 43 No 2 (2001), at 1-5.

<sup>124</sup> Fallon, M and Weiler, P 'Firefighters v Stotts: Conflicting Models of Racial Justice' (1984) *Supreme Court Review* 1.

<sup>125</sup> Art 7(1) of the Race Directive above n 2.

<sup>126</sup> See McCrudden, C, Smith, D and Brown, C *Racial Justice at Work*, 6-7.

<sup>127</sup> Commission, 'European Social Policy—A way Forward for the Union' COM (94) 333 final, 7July94, ch VI, para 27.

social protection.<sup>128</sup> Unfortunately this all-inclusive approach has become somewhat blurred despite contrary efforts.<sup>129</sup> The limitations written into the Directive in terms of its scope to deal with *all* victims of racial discrimination and the vagueness of the language leads one to conclude that it is the non-integrationist who have the upper hand.<sup>130</sup> Responsibility for this problem lies, in part, in the way the EU has evolved.<sup>131</sup> We have witnessed a 'classic case of federalism without federation.'<sup>132</sup> The EU is not a state but a complex of institutions with a Council and European Parliament that serves to represent the interests of Member States and the Union as a Union of states and peoples. The mass public is concerned that the shift of power towards Brussels has resulted in a zero-sum relationship.<sup>133</sup> The failure of the EU to provide a comprehensive anti-racist legal instrument is indicative of this unwillingness, particularly of national governments, to give ground to the centre at least on questions of the legal status of people within their borders. Whilst questions of how much 'control' to give to the centre of this loose federation are quite legitimate, Member States have done little to address the question of racism in their borders. In that sense arguments which hinge on the loss of sovereignty are weak since it could be argued that it is Member States' failure to deal with racism that has made them culpable and caused the EU to 'act'. Moreover, since they have agreed that Community action, rather than individual state action, is more appropriate, the balance of power in determining what constitutes sufficient action in the eradication of racism should lie with the Community, not Member States.

This is not to argue that the Race Directive has no validity. Despite the limitations that appear inherent in the text it is possible for member states to introduce or maintain provisions which are more favourable to the protection of the principle of equal treatment than those laid down in the Directive under Article 6.<sup>134</sup> It is argued that this provision might provide the tool by which the limitations raised in this paper could be resolved.

## VII. CONCLUSION

The Race Directive represents a start in some direction in terms of addressing questions of racial and ethnic discrimination. It certainly does not go

<sup>128</sup> See more generally Bell, M 'The New Article 13 EC Treaty: a Platform for a European Policy Against Racism?' in Moon, G (ed) *Race Discrimination. Developing and Using a New Legal Framework*, (Hart 2000).

<sup>129</sup> From NGOs, the European Parliament, the European Trades Union Confederation and the Economic and Social Committee calls for the adoption of anti-racial discrimination legislation during the 1996/7 Intergovernmental conference.

<sup>130</sup> Geddes, above n 108.

<sup>131</sup> Burgess, M *Federalism and the European Union: The Building of Europe, 1950-2000* (Routledge, 2000).

<sup>132</sup> *Ibid*, 28-29.

<sup>133</sup> *Ibid*, 31.

<sup>134</sup> Art 6(1) of the Race Directive, above n 2.

far enough. It is not as inclusive as it appears to be. Indeed, as I have attempted to demonstrate, a number of people may be left out. Some by design others because the language of the Directive is not sufficiently accommodating. Despite these limitations the Directive has the potential to play a symbolic role in creating a climate where racial discrimination will no longer be tolerated in the Union. It is not too naive to suggest that this symbolic role may have more of an impact on those who face racial discrimination (whether or not they are long-term third country nationals) than the process of litigation that the Directive is likely to engender. It is this, in the end, which may determine its success or failure.