

*The Race Directive,
Institutional Racism and Third
Country Nationals*

FERNNE BRENNAN*

THIRD COUNTRY NATIONALS have been the victims of Institutional racism in a number of member states of the EU.¹ In current vogue this phenomena is understood 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’.² In order to eradicate racism in general in the member states the EU has brought forth measures such as the European Council Directive 2000/43/EC (Race Directive). However, this paper argues that this legislation does not go far enough in meeting the European unions’ concern to combat racism in the market and related areas. Rather the measure tends to perpetuate double standards in relation to third country nationals. This may be a travesty if a more purposive interpretation of the directive is not developed in the transposition and/or application of this essential measure.

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¹ M Kamali, ‘Conceptualising the “Other”, Institutionalized Discrimination and Cultural Racism’, European Commission, Improving Human Research Potential and the Socio-economic Knowledge Base, Socio-Economic Research, Racism and Xenophobia: Key Issues, Mechanisms and Policy Opportunities, 5-6 April 2001, (Centre Brochette, Rue Froissart 36, Brussels), also see I F Haney Lopez, ‘Institutional Racism: Judicial Conduct and a New Theory of Racial Discrimination’, (2000) 109 *Yale Law Journal*.

² See Sir William Macpherson of Cluny, *The Stephen Lawrence Inquiry. Report of an Inquiry* (London, Stationery Office, 1999) CM 4264-1, para 6.34.

INTRODUCTION

This millennium witnessed a turning point in the European Union's legislative commitment to combating racism with the adoption of Council Directive 2000/43/EC (Race Directive). The Race Directive endeavours to proscribe discrimination aligned to racial or ethnic origin³ against people in the EU. Innovatively, the provision also prohibits racial harassment.⁴ The latter reflects growing recognition that harassment, e.g., name calling, veiled threats, body language and the like are often the kind of tort that tend to remain outside the paradigm of legal prohibition.⁵ For instance, in Luxembourg it is reported that the concept of harassment as defined in the directive does not exist in the law of Luxembourg. Legislation would be required to accommodate it whilst Swedish law does employ this concept but it is not deemed to be discrimination.⁶ Such discrepancies do not bode well for the Community in its commitment to provide the same general level of protection for victims of racism within the EC. Thus the measure obligates Member States to establish a 'common *minimum* level of legal protection from discrimination in public and private sectors'.⁷

The justification for bringing forward this directive lies in the fact that people are discriminated against on the basis of the aforementioned criteria. This prejudice is the antithesis of the principle of equal treatment,⁸ a principle the EU has strived to achieve in the context for instance of workers, goods, services and capital.⁹ The Race Directive applies to a variety of areas where such discrimination is likely to occur including employment and occupation, training and education, membership of work related organisations and professions, healthcare, social advantages and goods and services including housing.¹⁰ Until recently¹¹ the EU has not

³ Art 1 Council Directive 2000/43/EC, OJ, L180/24.

⁴ Art 2(3) Council Directive 2000/43/EC, OJ, L180 L180/24.

⁵ In relation to racial harassment and crime see F Brennan, 'Racially Motivated Crime: the Response of the Criminal Justice System, [1999] *Crim LR*, 17–35. Also see EUMC Project 2000–200, *Study on the comparison of the adopted Article 13 Council Directives with existing national legislation in the EU Member States*.

⁶ See Report on Luxembourg prepared by A Fatholhazadeh and O Lang, in J Niessen and I Chopin (eds) *Migration Policy Group*, (Vienna, 2002, EUMC). Compare Luxembourg's position with that of Sweden where there exists legislative provision dealing with ethnic harassment, however the directive may improve on this position in that harassment is stated as a ground of discrimination and not just an issue related to racial discrimination, see Report on Finland prepared by P Lappalainen in Niessen and Chopin (eds) *ibid*.

⁷ See M O'Brien 'The European Race Directive—Our plans for implementation', (2000) 3 *European Lookout*, 2.

⁸ Art 1 and Preamble 3 Council Dir 2000/43/EC/ OJ, L180/24, which deals with the right to equality before the law and protection against discrimination as enshrined in international law.

⁹ See EC Treaty generally and decisions of the ECJ.

¹⁰ Art 3 Council Dir 2000/43/EC, OJ, L180/24.

¹¹ Council Dir 2000/43/EC, OJ L180/24 adopted on 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin, Council Dir 2000/78/EC, OJ L303/16, establishing a general framework for equal treatment in employment

demonstrated any legislative commitment to anti-racist discrimination. Instead the unsatisfactory state by state approach has left a yawning gap in this area.¹² In Austria, for instance, there is specific legislation prohibiting incitement to hatred on racial or religious grounds and general constitutional provisions, whilst the British Race Relations Act 1976 is broader but does not include health or social security, or participation in political, economic, social or cultural spheres.¹³ Moreover, many of the legal instruments that exist at Member State level are rarely used.¹⁴ This paper maintains despite the European Union's well intentioned commitment to the eradication of racial discrimination, including institutional forms, there may be a serious shortfall in the achievement of its goal. This deficit relates to third country nationals and institutional racism. It is argued that the exclusion of '... a difference of treatment based on nationality from the Race Directive ...'¹⁵ may present a major stumbling block and is illogical whatever the political justification might be. One way in which institutional racism manifests itself is by discrimination on the grounds of nationality, moreover it is often difficult to know whether the motivation for unfair treatment is race, ethnicity or nationality. The EU has produced a relatively proactive instrument which can be used to remove the rot caused by institutional racism but success is likely to be partial and unsatisfactory until this hurdle has been dealt for all persons.

and occupation and an Action Programme. 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 S Douglas-Scott, *Constitutional Law of the European Union* (Harlow, Longman, 2002) 435, n 21 and M Bell 'Beyond European Labour Law? Reflections on the EU Racial Equality Directive' 8 (2002) *European Law Journal* 384, 385, originally referred to in F Brennan, 'The Race Directive: Recycling Racial Inequality' [2004] *Cambridge Yearbook of European Legal Studies*. 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. 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.

¹²International 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. Also see I Forbes and G Mead *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).

¹³The Human Rights Act 1998, incorporating the European Convention on Human Rights is likely to have an impact in these areas.

¹⁴See M Bell above n 11, 384. Also see Forbes and Mead above n 12.

¹⁵Art 3(2) Council Dir 2000/43/EC, OJ L180/24.

TRANSPPOSITION OF THE RACE DIRECTIVE INTO
THE DOMESTIC LAW OF MEMBER STATES

As of 19 July 2003 the Race Directive required Member States to bring its provisions into their domestic legal systems.¹⁶ At the time of writing there has been relatively little movement in this direction. Anna Diamantopoulou, Employment and Social Affairs Commissioner, commented that 'I am dismayed that most Member States have failed to integrate the Racial Equality Directive into national law. Let us not forget that this Directive was agreed unanimously by the Council three years ago'.¹⁷ Furthermore, this sluggishness sets a poor example for new Member States to follow.¹⁸ Below is the position regarding implementation of the Directive in the legal systems of Member States.

Member State	Stage Reached in Transposition	Potential problems
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 the law was adopted to implement the 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 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.

Table Continued ...

¹⁶ Art 16 Council Dir 2000/43/EC, OJ L180/24.

¹⁷ Commission concerned at Member States' failure to implement new racial equality rules, DN: IP/03/1047 Date: 18/07/2003.

¹⁸ New Member States were required to change their domestic law by May 2004 in order to incorporate the Race Directive before they join the EU. Czech Republic, Cyprus, Estonia, Hungary, Latvia, Lithuania, Malta, Poland, Slovakia, Slovenia, see IP/03/1047, Brussels, 18 July 2003, also see European Commission, Enlargement Strategy Paper. Report on progress towards accession by each of the candidate countries (Com (2000) 700 final).

Table Continued ...

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 N.I. 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	Race Relations Act 1976 (Amendment) Regulations 2003 laid before Parliament 8 May 2003 for discussion in June. ¹⁹ Made 20 June and in force 19 July 2003.	One of the difficulties will be the possibility of inconsistencies between the Draft Regulation, 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.

THIRD COUNTRY NATIONALS AS VICTIMS OF INSTITUTIONAL RACISM

The term 'third country national' is used in a variety of ways depending on the particular circumstances. Thus 'alien',²⁰ 'Other'²¹ and 'undesirable immigrants'²² are words used to describe those people who are subject to a process proliferated by member states in their dealings with third country

¹⁹ Source: Department of Trade and Industry, Equality and Diversity, 9 June 2003, www.dti.gov.uk/er/equality/raceregs.pdf. The full text can be found at <http://www.dti.gov.uk/er/equality/raceregs.pdf>.

²⁰ Blanca Vila Costa, 'The Quest for a Consistent Set of Rules Governing the Status of non-Community Nationals', in P Alston (ed) *The EU and Human Rights* (Oxford, OUP, 1999) 411-12.

²¹ S Douglas-Scott, 'The Common Foreign and Security Policy of the EU: Reinforcing the European Identity?' in P Fitzpatrick and JH Bergeron (eds) *Europe's Other: European Law Between Modernity and Postmodernity* (Aldershot, Ashgate, 1998), 131-33.

²² A Geddes, *Immigration and European Integration. Towards Fortress Europe?* (Manchester, Manchester University Press, 2000) 6.

nationals that tends to produce varieties of economic and political exclusion and poor social integration.²³ This works against Community policy geared towards the racial desegregation of markets in labour, services and goods. Within this process institutional racism tends to be perpetuated. The plight of third country nationals has been the subject matter of much scholarly work²⁴ however there has been insufficient analysis of the impact of institutional racism in this area.

It has been argued that this form of racism can be seen or detected in processes.²⁵ What precisely does this mean and what are the implications for third country nationals? Is the Race Directive comprehensive enough to deal with this problem? It is also argued that institutional racism can be seen in attitudes and behaviour which amount to discrimination.²⁶ The question must be asked, what does it mean to say that an institution has a racist attitude or demonstrates racist behaviour? Moreover, how do such attitudes and behaviour impinge on third country nationals and what are the implications for the operation of the Race Directive?

INSTITUTIONAL RACISM AS DETECTED IN PROCESSES

The allocation of public services in member states such as housing, education and health are areas of concern to the EU in relation to its commitment to equality in the field of race relations. This is indicated by Article 12 of the preamble to the Race Directive that states the need for '... specific action in the field of....areas such as education....and access to the supply of goods and services'.²⁷ To this end Article 3 of the directive provides that the concept of discrimination²⁸ 'shall apply to....public bodies ...'²⁹ in relation to education³⁰ and 'access to and supply of goods and services which are available to the public, including housing'.³¹ The EU appears to have taken account of international human rights obligations³² in relation to these areas recognising that equality before the law cannot come about if

²³ *Ibid.*, 21–27; Douglas Scott above n 21, 132–33.

²⁴ Fitzpatrick and Bergeron (eds) above n 21 and Douglas-Scott above n 21.

²⁵ See Macpherson above n 2.

²⁶ See Macpherson, above n 2.

²⁷ Preamble 12 Council Dir 2000/43/EC.

²⁸ Defined in Art 2 Council Dir 2000/43/EC.

²⁹ Art 3(1) Council Dir 2000/43/EC.

³⁰ Art 3(1)(g) Council Dir 2000/43/EC.

³¹ Art 3(1)(h) Council Dir 2000/43/EC.

³² Thus Preamble 2 and 3 of Council Dir 2000/43/EC refers to human rights, the Universal Declaration of Human Rights, the International Covenant on the Elimination of all forms of Racial Discrimination, the United Nations Covenants on Civil and Political Rights and Economic, Social and Cultural Rights and the European Convention for the Protection of Human Rights and Fundamental Freedoms.

areas where racial discrimination is manifest but are beyond traditional notions of the discrimination in the employment market, are not simultaneously addressed.³³ This is an area of great concern especially given the presence of racism and prejudices in public institutions that the ECRI has deplored and has expressed regret that not enough energy has been invested in combating this area of racism.³⁴

Although there is nothing explicit in the Race Directive in regard to dealing with institutional racism, it is argued that the focus on public institutions is an important step in developing mechanisms to tackle this phenomenon.³⁵ This is because institutional racism may be endemic in an organisation in terms of its policies and practices, and, more critically, appear as a 'normal' part of institutional culture. This type of racism cannot be adequately handled by focusing on individual fault primarily because it takes little account of the fact that individuals are '... clothed with the attributes of the dominant culture ...'.³⁶ This means that individual discriminatory behaviour may be a manifestation of discriminatory processes at work in institutions.³⁷

It is argued that access to public housing for third country nationals may be an area where institutional racism can be detected in the processes.

For instance, the process of public housing allocation in some member states may serve to keep people '... locked in dilapidated slum [housing]',³⁸ and subject to the dangers that arise from being placed in residential areas where third country nationals may fall prey to racist attacks and general hostility.³⁹ This may be due to a policy that specifically allocates housing for vulnerable groups or it may arise from a lack of awareness of the impact on third country nationals of placing them in particular areas. This type of process has been termed 'unwitting' racism⁴⁰ because there is little evidence to suggest that conscious racism is at play, rather, it can be argued that this type of racism operates in 'respected and established forces in the society, and thus receives far less ...'⁴¹ attention. Disproportionately high

³³ See Preamble 12 Council Dir 2000/43/EC.

³⁴ CRI (2003) 23 Annual report on ECRI'S activities covering the period from 1 January to 31 December 2002 Strasbourg, 20 March 2003.

³⁵ In Britain the Race Relations (Amendment) Act 2000 has imposed legal obligations on public bodies to promote equality of opportunity, further, it is unlawful for such bodies to discriminate whilst carrying out their functions and it is a duty that such bodies promote equality of opportunity and good race relations.

³⁶ S Fredman, *Discrimination Law* (Oxford, OUP, 2002) 16.

³⁷ Macpherson above n 2; also see A Hieronymus and M Moses, ENAR Shadow Report 2002, *Talking 'Race' in Germany*, April 2003, part 3, p 14.

³⁸ S Carmichael and CV Hamilton, *Black Power. The Politics of Liberation* (New York, Vintage Books, 1967) 4.

³⁹ See EUMC Annual Report 1998, *Looking Reality in the Face. The Situation Regarding Racism and Xenophobia in the European Community* (Vienna, EUMC, 1988) 7-17.

⁴⁰ Macpherson above n 2, 6.34.

⁴¹ Carmichael and Hamilton, above n 38.

numbers of immigrants and people of immigrant origin live in disadvantaged areas and in inadequate private and public accommodations. Although this is partially due to a lack of resources, which are often more modest among this category of persons, racial discrimination also contributes to this situation.

In France, the ECRI has urged the French authorities to strengthen their efforts to combat discrimination in this field. Furthermore, although ECRI realises that housing policies are primarily designed to help those who are economically disadvantaged, it suggests that the need of immigrants could be better met by making provision for the additional obstacles they encounter.⁴² Whilst in Denmark it is reported that the dispersal system where third country nationals are sent to live in various areas on the basis of a quota system is problematic. Penalties are imposed if the person dispersed moves from the area for which they are designated, further, they are expected to 'become Danish' without any acknowledgement by state municipalities of the need to be housed in areas where they would obtain strength from being able to identify with cultural, linguistic and religious communities similar to their own.⁴³ Similar articles describe the German situation where cases of discrimination are not taken seriously—which may account for the dearth on reported cases in this area—and where those who do complain are seen as either 'hypersensitive' or 'psychotic'.⁴⁴ In the UK housing patterns show that third country nationals tend to live in the most deprived areas compared to their 'white' counterparts. This problem is particularly prevalent amongst the Pakistani and Bangladeshi communities.⁴⁵ Whilst it might be argued that access to housing that enables people from similar communities to live together may be a positive thing for the well being of third country nationals, and for social integration more generally, thus in this sense this is a preferable situation to the Danish one, it should not follow that housing need results in occupying the most undesirable of housing stock.

More recently, access to *decent* housing has been an issue of concern for the global community.⁴⁶ In international human rights terms poor access to this resource raises questions of state commitment to non discrimination and equality in housing provision,⁴⁷ which is of particular importance given state commitment to international human rights legal instruments

⁴² CRI (2000) 31 Second Report on France, Adopted on 10 December 1999.

⁴³ B Qurashy, ENAR Shadow Report 2002, *Racism and Discriminatory Practices in Denmark*.

⁴⁴ Hieronymus and Moses, above n 37.

⁴⁵ G Moon, ENAR Shadow Report 2002, *Racism and Race Relations in the UK*.

⁴⁶ United Nations Centre for Human Settlements, *Cities in a Globalising World. Global Report on Human Settlements 2001* (UN-HABITAT 2001).

⁴⁷ B Thiele and M Gomez, *Non-discrimination and Equality in the Cities. Applying International Human Rights and Housing Rights Standards*, (Human Rights Tribune, Winter 2002, Vol. 8, No 3).

such as Article 25 of the Universal Declaration of Human Rights⁴⁸ and Article 11(1) of the International Covenant on Economic, Social and Cultural Rights.⁴⁹ In the context of the Race Directive the focus on areas such as housing, that go beyond discrimination in the employment market demonstrates that the EU takes human rights obligations seriously and is committed to ensuring member states meet their international legal obligations.

The Race Directive, which may be understood as a mechanism for implementing international legal obligations,⁵⁰ should ensure that institutions examine their internal processes and cultural practices with a view to wiping out this form of racism. However the provision as it stands presents difficulties for third country nationals to challenge institutional racism. This is not because the provision in itself could not incorporate this form of discrimination.

If one considers the concept of discrimination as defined in Article 2(2) of the Race Directive the measure it states that:

Direct discrimination shall be taken to occur where one person is treated less favourably than another is, has been or would be treated in a comparable situation on grounds of racial or ethnic origin.⁵¹

It is not improbable that public institutions will have to take account of institutionally racist processes in relation to matters such as access to housing and education. Indeed, Article 3 (1) makes particular reference to the public sector and public bodies as coming within the perimeters of the directive.⁵²

Furthermore, the instrument covers indirect discrimination—‘... where an apparently neutral provision, criterion or practice would put persons of a racial or ethnic origin at a particular disadvantage, compared with

⁴⁸ Art 25 of the Universal Declaration of Human Rights reads that ‘Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control’.

⁴⁹ Art 11 (1) of the International Covenant on Economic, Social and Cultural Rights provides: ‘The States Parties to the present Covenant recognize the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions. The States Parties will take appropriate steps to ensure the realization of this right, recognizing to this effect the essential importance of international co-operation ...’

⁵⁰ See preamble 2,3 and 4 Council Dir 2000/43/EC where reference to international legal obligations are made.

⁵¹ Art 2(2) Council Dir 2000/43/EC.

⁵² Art 3(1) Council Dir 2000/43/EC dealing with the scope of the provisions states that, ‘Within the limits of the powers conferred upon the Community, this directive shall apply to all persons, as regards both the public and private sectors, including public bodies ...’.

other persons ...⁵³ and harassment which is stated to relate to '...an unwanted conduct related to racial or ethnic origin....with the purpose or effect of violating the dignity of a person and of creating an intimidating, hostile, degrading, humiliating or offensive environment.'⁵⁴ The same argument would apply to public institutions in relation to this form of discrimination. What is problematic is the fact that unless a third country national could show that the institutional process was racially discriminatory (and not based on nationality) they would not be able to rely on the provision.

Article 3(2) of the Race Directive states that 'the Directive does not cover differences of treatment based on nationality ...'.⁵⁵ As scholars have pointed out this is likely to be a troublesome area because it is difficult to determine whether discrimination occurred on the basis of nationality or race.⁵⁶ Since the two are often intertwined some Member States have encompassed discrimination on the grounds of nationality as a ground of racial discrimination.⁵⁷ It is argued that such inclusive analysis might avoid the kind of problems that have plagued the American courts where the question of motivation is difficult to prove.⁵⁸ Taking the Dutch example referred to above, it would be hard for an African⁵⁹ subject to the dispersal system for residential purposes to establish (even as a prima facie case)⁶⁰ that they have been treated less favourably on the grounds of racial discrimination by the Dutch municipality in comparison with other persons. This is likely to be because the process of dispersal is geared to third country nationals who have narrowly defined rights of residence. It is not explicitly based on race but has a disproportionate impact on third country nationals who are not 'traditional Danes'.⁶¹ Furthermore, since the Race Directive does not rely on motivation but can determine racial discrimination on the basis of indirect discrimination, not to include nationality as a

⁵³ Art 2(2)(b) Council Dir 2000/43/EC which also further states '... unless that provision, criterion or practice is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary'.

⁵⁴ Art 2(3) Council Dir 2000/43/EC.

⁵⁵ Art 3(2) Council Directive 2000/43/EC.

⁵⁶ JA Goldston, *The European Union Race Directive* (Open Society Justice Initiative, 2003) http://www.justiceinitiative.org/publications/russia_ec/moscow_workshop/goldston_

⁵⁷ For instance Section 3(1) Race Relations Act 1976 refers to 'racial grounds' as including colour, race or national group and 'racial group' as persons defined by reference to colour, race, nationality or ethnic or national origins.

⁵⁸ See Goldston, above n 56.

⁵⁹ There are 38,000 Africans in Denmark; the highest proportion are Somalian followed by Moroccans. See B Quraishy, *Racism and Discriminatory Practices in Denmark*, ENAR Shadow Report 2000, 5.

⁶⁰ Art 8 Council Dir 2000/43/EC dealing with the burden of proof affords a lesser burden of proof on the complainant. Providing a prima facie case is made out the burden shifts to the respondent to prove that there has been no breach of the equal treatment principle.

⁶¹ As opposed to 'new Danes' that is refugees and immigrants united with refugees or other immigrants through family reunification, see Quraishy, above n 59, 5.

ground of racial discrimination is a missed opportunity to hold institutions to account. Since this is precisely the type of complaint that is difficult to prove otherwise. Moreover, it is suggested that the Race Directive appears to create a false premise namely, that only discrimination on the grounds of race or ethnicity constitutes racial discrimination. Such a paradigm will make it seem as though institutions have complied with the obligation to 'part-company' with institutionally racist practices, when in fact, this might only be partially accurate.

INSTITUTIONAL RACISM AS DETECTED IN ATTITUDE AND BEHAVIOUR

One particular intellectual discourse on institutional racism has raised the issue of institutional attitude or behaviour towards non-dominant ethnic minorities.⁶² Such behaviour is replicated in institutional dealings with third country nationals more generally,⁶³ reflecting a disturbing pattern of 'deep-seated discriminatory structures'⁶⁴ that domestic legislation has, hitherto, found hard to address.⁶⁵ The type of attitude or behaviour may be discernible in the manner, for instance, in which police forces in many member states 'handle' certain categories of persons perceived by the institutional culture as lacking the credentials that would entitle them to fair and just treatment.⁶⁶ Employing institutions may encourage an employment culture that favours 'home' nationals compared to those from third countries. For example the presumption that third country nationals do not want to work for organisations, or that they are an unknown quantity and thus a potential economic risk, that their loyalties might not lie with the organisation or that employing them may lead to a cultural clash within the organisation. None of this is borne out with hard fact, but conjecture, fed no doubt by the institutional habit of 'what looks "good"'. The difficulty with such a climate of opinion is that it has historical roots based on notions of 'outsiders' as being inferior to the dominant group. Such a sense of group position '... guides, incites, crows and coerces ...'⁶⁷ individual behaviour.

⁶² See Macpherson above n 2, 6.34. Also see S Carmichael and Hamilton, above n 38 and PJ Williams, *Seeing a Colour-Blind Future. The Paradox of Race*. The 1997 Reith Lecture (London, Virago, 1997).

⁶³ See ECRI Second Report on Spain, CRI (2003) 40, para J and M, ECRI Second Report on France, CRI (2000) 31, 2000, para M, ECRI Second Report on Germany, CRI (2001) 36, para K and M, 2001, ECRI Second Report on Italy, CRI (2002) 4, para I and ECRI Second Report on the UK, CRI (2001) 6, 2000, para K.

⁶⁴ S Fredman, *Discrimination Law* (Oxford, OUP, 2002) 6.

⁶⁵ Fredman, at 6.

⁶⁶ See ECRI Second Report on Spain, CRI (2003) 40, ECRI Second Report on France, CRI (2000) 31, 2000, ECRI Second Report on Germany, CRI (2001) 36, 2001, ECRI Second Report on Italy, CRI (2002) 4, and ECRI Second Report on the UK, CRI (2001) 6, 2000.

⁶⁷ H Blumer, 'Race Prejudice as a Sense of Group Position' (1958) *Pacific Sociological Review*.

Yet, recent reports show that this institutional attitude defies logic. In labour market terms there is often a shortage of people with the skills that third country nationals may possess.⁶⁸ Consequently, this can lead to a skewering of the labour market to the detriment of third country nationals who are unlikely to participate in the labour market at the rate one might expect.⁶⁹

Institutional attitudes are also reinforced by 'blindness' to structural and historical inequalities that they may have had a hand in creating. When patterns of inequality are detected where there are disproportionate numbers of third country nationals occupying the lowest rungs in terms of employment, and poor access to education and health services, it is often the individual that is blamed.⁷⁰ However, it can be argued that 'blaming the victim'⁷¹ loses sight of some of the institutional attitudes that are really the source of complaint. Moreover, it is difficult to make complaints that will be taken seriously if the pathogen is perceived by institutions at the level of the individual psyche.⁷² A relevant example can be seen in the case of *Hakunila*⁷³ where the defendant (a Somali) was forced to reverse his car, injuring one Finn, after he had been attacked by several Finnish youths wielding base ball bats. The perpetrators had attacked the windscreen of the car with an axe and completely smashed the side windows. The defendant unsuccessfully pleaded that his conduct was caused by a 'forced situation, in which he was in panic because of the threatening attack, and was therefore unable to do anything, but to escape from the scene by all means necessary'. He was found guilty of attempted assault, sentence to a term of imprisonment of four years and required to pay an indemnity of 80,000 marks.⁷⁴ Equally critical of the Hakunila's response to the situation he faced were the Local Court of Vantaa and the Court of Appeal of Helsinki. The local court focused on what it saw as lack of pity and deliberate and cruel motive whilst the Court of Appeal thought there were no circumstances that warranted the defendant's behaviour.⁷⁵ The decision has raised public disquiet because of the judiciary's apparent failure to recognise the general racist and xenophobic context as well as the particular circumstances within which Hakunila reacted.⁷⁶ It is argued that where justice fails to

⁶⁸ Quraishy, above n 59.

⁶⁹ In Denmark, for example, only 47% of third country nationals were employed compared to 80% Danes, see Quraishy, above n 59.

⁷⁰ S Isal, *Racism and Race Relations in the UK*, ENAR Shadow Report, April 2002.

⁷¹ S Pinto, 'Padded Walls', (2002) Autumn, *Connections*.

⁷² This clinical approach to racism has been discussed in relation to perpetrators; see F Brennan, 'Can the Institutions of the EC Transcend Liberal Tendencies in the Pursuit of Racial Equality?' in B Brecher, J Halliday and K Kolinska (eds), *Nationalism and Racism and the Liberal Order*, (Aldershot, Ashgate, 1998), 108–23.

⁷³ Vantaa Local Court R 00/3085, p 16.

⁷⁴ The sentence was reduced on appeal to two and a half years imprisonment.

⁷⁵ For a full account of this case see ENAR Shadow Report for Finland 2001, March 2002.

⁷⁶ ENAR Shadow Report for Finland 201, March 2002, p 8.

pierce the veil of 'colour blindness'⁷⁸ it compounds the institutional attitude that determines matters according to the dominant culture norm.⁷⁹ This colour blindness now requires understanding in the context of xenoracism, a 'natural fear' of strangers which goes beyond dark skin colour, because racism is '... meted out to impoverished strangers even if they are white.'⁸⁰ This '... new racism...marries up the worst practices throughout the Western World'.⁸¹ This is one way in which '... racism continue[s] to evolve....post-equality....legislation, across....geographic, temporal and political distance'.⁸²

THE NEED FOR INSTITUTIONAL ACTIVISM

The extent to which the Race Directive will be able to pick up on institutional racism in terms of process, attitude, behaviour, raises some concern about the effectiveness of the measure. Whilst the concept of discrimination can take account of individual conduct and the conduct of a group for instance, this is unlikely to penetrate racism at the institutional level how is this issue to be dealt with?

READING THE 'SPIRIT' OF THE PROVISION

There are a number of ways in which a healthier approach to the eradication of institutional racism in relation to the protection of third country nationals could be afforded through the Race Directive. One is to read the provisions when transposed at the national level as if they covered all persons regardless of nationality. The Race Directive provides a minimum not maximum playing field. A perusal of the text shows that 'Member States may introduce or maintain provisions that are more favourable to the protection of the principle of equal treatment than those laid down ...'⁸³ The strength in this approach lies in breaking the hypocrisy that would otherwise be maintained if people of similar nationalities were treated differently on the basis of nationality for the purpose of the directive. For instance, the new British Race Relations Act 1976 (Amendment) Regulations 2003, includes reference to discrimination on the basis of national origins as a

⁷⁸ Williams, above n 62.

⁷⁹ M. Kamali, above n 1 and Haney Lopez, above n 1.

⁸⁰ A Sivinandan, IRR *European Race Bulletin* (No 37, June 2001) from a workshop paper for the Institute of Race Relations.

⁸¹ L Fekete, 'The Emergence of Xeno-Racism' in *The Three Faces of British Racism: a Special Report*, (2001) 43 *Race and Class*, 23-40.

⁸² Williams, above n 62, 13.

⁸³ Art 6 Council Dir 2000/43/EC.

prohibited ground of discrimination (the inclusion of third country nationals is not new since the Race Relations Act 1976 included nationality). Thus if an applicant applies for credit from an institution, and as a condition of the loan, the applicant is required to be registered on the electoral roll, so that the institution can carry out credit checks. This may discriminate indirectly against non-UK nationals who are not eligible to vote.⁸⁴ The British approach may be used as an example of 'good practice' that other Member States might be persuaded to follow, particularly, the judiciary in determining whether or not a third country national should, as a matter of the principle of equality and fairness, be able to rely on the transposed provisions.

A more purposive approach might also meet the concerns of the Khan Commission, a body that recommended the use of EU law in combating racism in the EU. According to the Commission, this law should preserve international principles 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'.⁸⁵ Furthermore, the Commission was adamant that the right to equal treatment should apply whether or not a person was a Community citizen.⁸⁶ Unfortunately, this is likely to be a slow process. As things stand the rate of progress in Member States implementation of the Race Directive, given the 19 July 2003 deadline is deplorable. Political commentators have said, 'This foot-dragging is a betrayal of one of the most progressive and essential steps forward in anti-discrimination taken by the European Union in recent years. It's clear that many governments are only prepared to pay lip service to their basic obligation to protect millions of their citizens from racism'.⁸⁷ They point out that only three of the fifteen member states—the UK, Sweden and Belgium might meet their obligations in terms of implementation.

Nevertheless, slothfulness in the implementation of instruments concerning social law is not uncommon. The argument remains that third country nationals should be protected by the provisions of the directive. This would give more meaning to the human rights framework to tackle racism addressed in the preamble to the directive. This approach would also give better meaning to the idea that the Race Directive is a mechanism for transposing international anti-racist human rights obligations that states have signed up to but which fail to adequately protect individuals.

⁸⁴ See CRE at http://www.cre.gov.uk/legaladv/trr_a_regs_indirect.html.

⁸⁵ European Council Consultative Commission (1995) Final Report, Ref. 6906/1/95 Rev 1 Limite RAXEN 24.

⁸⁶ *Ibid.*, 59.

⁸⁷ Mel Read & Phillip Whitehead, East Midlands Labour MEPs, the site for European, National & Local Government and Politics, 11 June 2003 <http://www.labmeps-emids.fsnet.co.uk/index.htm>.

LINKING NATIONALITY TO INSTITUTION RACISM
THROUGH POSITIVE ACTION

Another area where activism is possible is in relation to Article 5 which covers positive action. According to this article:

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.⁸⁸

This could prove a very useful provision because it prepares the legislature and those key actors seized with the duty to implement the Race Directive, with an opportunity to *ensure full equality in practice*. A principle that should not be applied in an ad hoc manner based on race or ethnicity (rather than nationality) but determined despite it. The possibility lies in the language of Article 5 itself: to *adopt specific measures to prevent or compensate for disadvantage linked to racial or ethnic origin*. The key word here is 'linked'. This word may be ambiguous in that it is unclear what is meant but herein lies its strength. It could be argued that not using the words 'of a racial or ethnic group' which is found elsewhere in the directive,⁸⁹ but instead importing the term *linked to racial or ethnic origin*⁹⁰ makes the use of the Race Directive as a weapon in the fight against institutional racism in relation to third country nationals potentially strong. Member States are not obligated to use positive action as a means for addressing institutional racism. Article 5 states that 'the principle of equal treatment shall not prevent any Member State from maintaining or adopting specific measures ...'⁹¹ Nevertheless, such measures are recommended as a way of addressing '... structural and institutional discrimination based on race'.⁹²

CONCLUSION

If one takes a literal reading of the Race Directive it appears to expressly exclude third country nationals from its ambit. This may raise general

⁸⁸ Art 5 of Council Dir 2000/43/EC.

⁸⁹ For instance see Art 2 Council Dir 2000/43/EC.

⁹⁰ Art 5 of Council Dir 2000/43/EC.

⁹¹ Council Dir 2000/43/EC.

⁹² M Martiniello, *Affirmative Action and Racism: Affirmation Action as a Tool or Hinder*, Socio-Economic Research, Racism and Xenophobia, Key Issues, Mechanisms and Policy Opportunities Socio-economic Research, Racism and Xenophobia as Challenges to the European Integration Process, 5-6 April 2001, (Centre Borchette, Rue Froissart 36, Brussels).

problems for third country nationals as victims of racial discrimination, particularly because national legislation in this area (where it exists) is not particularly strong,⁹³ and has very little bearing when the issue is one of institutional racism. All the same it is argued that activism is essential at Member State level from the judiciary, polity and civil society if the directive in its transposed form is to have any bearing on the position of third country nationals. It is hoped that 'tinkering' with some of the provisions such as positive action under Article 5 may go a long way to addressing some of the concerns raised in this paper.

⁹³Forbes, 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).