

CONTEMPORARY FORMS AND MANIFESTATIONS OF RACISM AND RACIAL DISCRIMINATION AGAINST IMMIGRANTS

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I. GENERAL OBSERVATIONS

1. One thing is certain: the upsurge of racism, xenophobia and intolerance is increasingly apparent within societies which have the deepest democratic roots, in other words, European industrial societies which employ foreign workers. It naturally follows that the problem is regarded as linked to immigration. Since foreign workers are the most vulnerable group they are the ones most easily targeted by racism. In fact, the term 'minority' is more suitable than 'group', since migrant workers, by virtue of their ethnic origin, language, religion or culture, constitute true minorities within their host society, except for the fact that they lack the historical background to lay claim to that title. They are not covered by any of the legal instruments designed to protect minorities and promote their development. However, the European Social Charter, which is intended to ensure the protection and development of migrant workers and their families, appears to be the most suitable, if not the best, instrument to combat racial discrimination and other types of discrimination in European society. This short paper reflects that view.

2. The cornerstone of the European Social Charter (below referred to as the Charter) is the principle of equality and non-discrimination, and its application, as described in the reports submitted by governments and reflected in the jurisprudence of the Committee of Independent Experts (below referred to as the Committee) resulting from the consideration of these reports, constitutes a source of abundant information about steps taken to combat racial discrimination.

3. Racism is a complex phenomenon which is closely related to others, such as, xenophobia, discrimination, intolerance, cultural relativism, integrism and fundamentalism. Racism and related phenomena are functions of the social insecurity of the individual: "Racism and xenophobia spring from the individual's fear and insecurity about the future and are nurtured by unemployment and poverty".¹

4. Any form of racism implies discrimination. Traditional racism is the crudest form of ethnic and religious discrimination. The 'superior race' model is no longer sufficient for contemporary racism. The immigrant is hated not only because he belongs to an 'inferior race' but also for many other reasons connected with economic and social factors. It may be said that the new forms of racism are predominantly economic in nature, and that immigrant workers are its new victims.

5. Yet the problem is not simply one of the rejection of someone who is from abroad. The existence of concealed discrimination against women should not be overlooked. It is common knowledge that most part-time jobs are held by women. This constitutes a subtle and widespread form of economic discrimination based on sex. It may be argued that this is an aspect other than the one we wish to tackle. Whence the following question: since the fact of being a woman is already a handicap in society, does that handicap become even greater when the woman is an immigrant?

6. Labour and social discrimination is in general regarded as being connected with unemployment, and according to the advocates of this new approach, all forms of discrimination are connected with unemployment in the final analysis. Something as universal and complex as racial discrimination cannot be explained by a single reason. Like any other unilateral and exclusive approach, unemployment is simply a peripheral -albeit a major- factor in discrimination.

7. It is no easy matter to determine the role played by a given factor in the racial discrimination process. However, the mere existence of an economic minority is enough to explain that of a discriminatory practice or measure, since a minority of that nature is systematically exposed to

discrimination in its various forms. In other words, the social life of economic minorities has to be studied if racial discrimination is to be eliminated.

8. North Africans and Turks constitute the two largest groups of immigrant workers living in Europe, numbering about five million out of a total of 13 million foreign workers. Most of the North Africans (about 2.5 million) are in France whereas the Turks are in Germany. Both groups are Muslim. Since Islam is the second religion in Europe, it constitutes a common danger for both groups.

9. Since Islam is wrongly equated with integrism and fundamentalism, it becomes a risk factor for immigrant Muslim workers in Europe. One of the new forms of racism is its anti-Islam aspect. Islam is regarded as a threat to Christian civilisation by racist circles, as well as by conservatives and democrats.

10. Another phenomenon connected with immigration in certain countries is Turkophobia. Turkophobia, which dates back to the time of the Crusades, has become one of the new forms of racism with the arrival of Turkish immigrants in Europe since 1961-like anti-Semitism before the Second World War. It was painful to witness the upsurge of old hatreds that were thought to be things of the past during the war in Bosnia (1990-1993), when Muslims were called Turks. Almost every year a number of families of Turkish immigrant workers are victims of arson perpetrated by young racists.² The problem is not one of punishing those responsible for these criminal acts; it extends well beyond criminal law and permeates the entire range of European social law. If the problem was only one of a few terrible crimes, it could easily be resolved since each country has criminal legislation designed to curb the criminal excesses of racism. The real problem is that of racism in everyday life -creeping racial discrimination- as experienced day after day, in the form of the various types of discrimination at every level in society to which one rapidly becomes accustomed.

II. THE SALIENT FEATURES OF JURISPRUDENCE ON EQUALITY OF TREATMENT WITH NATIONALS (ART. 19, PARAS. 4, 5 AND 7 OF THE EUROPEAN SOCIAL CHARTER)

11. The question of the legal protection of migrant workers and of their families can be discussed under the five following headings: equality of treatment, family reunion, guarantees against expulsion, transfer of wages and savings, and protection of and assistance to migrants working on their own account. Only the question of equality of treatment will be discussed below, however.³

12. It should be noted that all the articles of the Charter, and particularly article 19, contain provisions providing specific protection for migrant workers and their families. This protection is sometimes twofold, since certain areas covered by article 19 are also dealt with in other articles. Yet for practical reasons, only certain provisions of article 19 will be referred to from the standpoint of the prevention of discrimination.

13. Article 19 (paras. 4, 5 and 7)⁴ obliges contracting states to secure for migrant workers "treatment not less favourable than that of their own nationals" in various fields. At first sight this wording could be regarded as a reasonable excuse for a Government which has done everything possible to ensure equality of treatment for nationals and foreigners but for plausible reasons failed in its efforts. On the other hand, the jurisprudence of the Committee of Independent Experts brings this point out by a progressive interpretation which does not hesitate to affirm that the scope of article 19:

"goes beyond merely guaranteeing equality of treatment as between foreign and national workers in the sense that, recognising that migrants are in fact handicapped, it provides for the institution by the Contracting States of measures which are more favourable and more positive in regard to this category of persons than in regard to the State's own nationals".⁵

According to the relevant jurisprudence, what must be done is not only to ensure non-discrimination between nationals and foreigners but also to develop positive and continuous action. In other words, article 19 advocates positive discrimination in favour of immigrant workers.⁶

14. Equality of treatment should cover all aspects of labour, namely, the right to fair remuneration, the right to just conditions of work, the right to safe and healthy working conditions (art. 4, 2 and 3), the effective exercise of the right to work (art. 1), as well as the right to vocational guidance, training and rehabilitation (arts. 9, 10 and 15). The elimination of discrimination in these areas constitutes a condition of ideal social peace. Such is not the case.

15. It must be explained first of all that in practice full employment is more in the nature of a directive than an obligation for contracting states to the European Social Charter. The inability of the authorities to do anything about unemployment is a long-established fact. It should be noted that the Committee of Independent Experts of the European Social Charter does not draw any conclusions on the basis of the reports submitted by governments under article 1, paragraph 1, on the undertaking of contracting states to attain full employment. This bold provision,⁷ which has been put to the test throughout Europe by an unemployment rate that has been rising since 1972, has not been of a peremptory nature since that date.

16. The Committee is extremely demanding in matters of discrimination. Any discriminatory measure, even if directed only at a number of migrant workers, is considered to be incompatible with the Charter⁸ (art. 19, para.4).

17. Thus when a state decides that young foreigners, citizens of other states bound by the Charter, can become apprentices only if they possess a work permit, it is regarded as practising discriminatory treatment, contrary to article 10, paragraph 2, of the Charter.⁹

18. The Committee's jurisprudence aims at ensuring the effectiveness of measures taken to curb discrimination. According to the Committee, it is not enough for a government to prove the absence of discrimination by reference to its legislation, since it must also prove that de facto discrimination is not practised or inform the monitoring body of the practical measures it has taken to remedy the situation.¹⁰

19. Complete respect for equality of treatment in employment is of great importance to the Committee. In practice, however, the legislation of a number of countries contains provisions on this subject that are unfavourable or even negative from the standpoint of foreign workers. For example:

The right of citizens of countries not members of the European Union to return to their jobs on completion of their military service is not recognised;

The lack of detailed regulations offering adequate protection against ethnic discrimination for job-seekers and migrant workers already holding jobs;

The withholding of certain advantages granted to national workers who change jobs or embark upon their first job, such as mobility allowances or installation grants.¹¹

20. It is evident that trade union membership and enjoyment of the advantages offered by collective agreements on a footing of equality with nationals constitutes one of the means of defence against discrimination for migrant workers. To have an accurate idea of the extent to which the rights in question are applied, the government concerned must reply to the following questions: Are foreign workers allowed to join trade unions in your country? Can the trade unions of your country reject a foreign worker's application for membership? Can collective agreements be extended to cover foreigners who are not members of trade unions? The Committee went out of its way to emphasise that there was no such thing as acceptable discrimination, and that a distinction could not be made between 'arbitrary' or 'unreasonable' discrimination and 'justified' discrimination. The wording of article 19, paragraph 4 of the Charter "does not only limit itself in the field specified to prohibiting such discrimination, but it excludes all forms of discrimination".¹² In other words, the areas listed in article 19, such as employment, vocational training, membership, etc., are not restrictive and there is no such thing as 'acceptable' discrimination.

21. Article 19, paragraph 4 (c) provides for equality of treatment, and even priority, for foreign workers in respect of accommodation. This provision is connected with article 16, which is intended to promote the construction of family housing. In the Committee's view, legal equality in housing matters implies both access to accommodation as well as subsidies or advantages granted in this connection. All the states do is to transmit concise information, which fails to offer a sufficient basis for determining whether adequate steps are being taken to ensure the exercise of this right, which is of prime importance in improving the social situation of immigrant workers and their families. Some countries, however, give priority to nationals in housing matters. According to the Committee, even where there is equality of treatment, equality of rights does not always and necessarily create conditions ensuring de facto equality. For that reason, additional action is necessary owing to the fact that migrants might be in a different situation from that of nationals.¹³

22. Inequality of treatment is not easy to envisage under express provisions of the Charter. Discrimination takes place under cover of equality and convincing reasons. The authorities often tend to apply measures which result in indirect discrimination or create unequal conditions for foreign workers. In these cases, governments, although not intending to pursue unfair policies, apply them indirectly or unintentionally.

23. Let us take the example of taxes -an area which demands objectivity. Article 19, paragraph 5, provides for equality of treatment with regard to employment taxes, dues and contributions payable in respect of employed persons. In Germany, under a revised so-called Tax Reduction Act of 25 June 1985, the income taxes of workers whose family members reside abroad have been increased and their unemployment and sickness benefits reduced. It is already clear and obvious that this act, for tax relief purposes, amends some of the provisions of the law concerning taxpayers with dependent children. Under this act, a taxpayer of German or foreign nationality can claim tax abatement provided that the child in question is domiciled in Germany. The Committee, wishing to clarify the situation, pointed out that:

"Account should be taken of the objective differences between the situation of foreign workers and their families and that of German citizens, as it was much more likely for migrant workers' children to be abroad than for children of German workers, in particular because German law permitted family reunion only in respect of children aged 16 or under. It therefore appeared that in practice there is inequality of treatment between foreign and German workers."¹⁴

24. Article 19, paragraph 7 provides for equality in respect of legal proceedings in all matters concerning the rights of migrant workers and their families. In other words, any inequalities in this respect must be prevented in order to eliminate discrimination. In this area, two points that should be mentioned are exemption from legal costs or their assumption by the community. The same is true of the reduction of the cost of proceedings. Two examples taken from the Committee's jurisprudence should be mentioned in this connection. First, the Charter does not require special treatment or deductions solely for immigrant workers. According to the Committee, if a measure of that nature were to be adopted, its application should not depend on the nationality of the parties in question. Second, the Committee recalls that article 19, paragraph 7 concerns migrant workers "lawfully established within their territories", their domicile not being mentioned. Exemption from the requirement to put up bail cannot be connected with the residence status of foreign workers. This approach is also in conformity with that adopted in the European Convention on Establishment of 1955.

III. CONCLUSION: ESTABLISHMENT OF LEGAL REMEDY PROCEDURE FOR INDIVIDUALS UNDER THE EUROPEAN SOCIAL CHARTER

25. A glance at the various regional and international instruments designed to combat racial discrimination reveals that only the monitoring machinery embodied in the International Convention on the Elimination of All Forms of Racial Discrimination (United Nations) and by the European Convention on Human Rights (European Commission) provide the individual with legal remedies. However, both of these instruments are, for different reasons ineffective in practice. The United Nations Convention contains the broadest possible definition of racial discrimination on human rights in the individual, political, economic, social and cultural spheres. Despite the vast field it covers, very little jurisprudence has been produced by the Committee on the Elimination of Racial

Discrimination. In this respect reference may be made to the example of a Turkish worker, Mrs. Doğan, which reveals the scope and practical value of individual remedies in efforts to combat discrimination.¹⁵

26. On 3 April 1981, Mrs. Doğan, employed by a firm operating in the textile sector in the Netherlands, was injured in a traffic accident and placed on sick leave. Allegedly as a result of the accident, she was unable to carry out her work for a long time; it was not until 1982 that she resumed part-time duty of her own accord. Meanwhile, in August 1981, she married Mr. Yılmaz. By a letter dated 22 June 1982, her employer requested permission from the Director of the District Labour Exchange in Apeldoorn to terminate her contract. On 14 July 1982, the Director of the Labour Exchange refused to terminate her contract on the grounds that an employer cannot terminate a labour contract during the pregnancy of his employee. He pointed out, however, that the employer could submit a request to the competent Cantonal Court. On 19 July 1982, the employer addressed the request to the Court in the following terms:

"When a Netherlands girl marries and has a baby, she stops working. Our foreign women workers, on the other hand, take the child to neighbours or family and at the slightest set-back disappear on sick-leave under the terms of the Sickness Act. They repeat that endlessly. Since we all must do our utmost to avoid going under, we cannot afford such goings-on."

The Cantonal Court granted the request by a decision on 29 September 1982 and terminated the contract with effect from 1 December 1982. Its decision could not be appealed. On 21 October 1982, Mrs. Yılmaz requested the prosecutor at the Supreme Court to seek annulment of the decision of the Cantonal Court in the interest of the law. By a letter of 26 October, she was informed that the Prosecutor saw no justification for proceeding in that way. The prosecutor also rejected the request for legal proceedings against the employer for the remarks he had made in his request. Other attempts by Mrs. Yılmaz to initiate criminal proceedings came to nothing. On 30 November 1983, the Court of Appeal, in its decision to reject the appeal, stated that it could not be determined that the defendant, by raising the issue of differences between foreign and Netherlands women workers with regard to absenteeism owing to childbirth and illness, intended to discriminate by race or that his actions resulted in racial discrimination. After examining the communication in the light of all the information made available to it by the parties, the Committee on the Elimination of Racial Discrimination reached the highly subtle conclusion that the final decision as to the dismissal of the petitioner pronounced by the Cantonal Court, had failed to take into account all the circumstances of the case. Consequently, her right to work as provided for in the Convention had not been protected. Concerning the alleged violation of articles 4 and 6 (refusal to initiate criminal proceedings), the Committee noted the petitioner's claim that the provisions of these articles required the state party actively to prosecute cases of alleged racial discrimination and to provide victims of such discrimination with the opportunity of judicial review of a judgement in their case. It should be added that this decision, although carefully worded, is much more progressive than the *Jersild* judgement pronounced by the European Court of Human Rights.

27. Mr. Jersild, a television reporter, who was found guilty of allowing young racists to express their views in the course of one of his missions, wanted to assert his right to freedom of expression. The court, by a majority of 12 to 7, decided that freedom of expression had been violated and that Mr. Jersild had not expressed his personal opinions during his television mission and had therefore simply been exercising his profession of reporter, which consisted in informing the public about the view of young racists.¹⁶ This judgement constitutes a breach in the repression of indirect incitation to racism through the media. However, the court, in making a distinction between the journalist and his interlocutors, did not consider that the condemnation of the journalist together with the young racists was necessary in a democratic society.¹⁷

28. The scope of Article 14 of the European Convention on Human Rights, which proclaims the principle of non-discrimination, is limited. This so-called 'parasite' article can be invoked only through one of the rights recognised in the Convention. The insertion of a general provision on equality at the outset was found undesirable by those who drafted the Convention, in view of the amplitude of the subject. This concept is at present in force, since the anticipated link between the framework Convention for the Protection of National Minorities and the machinery of the European Convention on Human Rights was not achieved. Thought had therefore to be given to the creation of

other machinery to prevent racial discrimination. This resulted, after the Vienna Summit of 1993, in the establishment of the European Commission against Racism and Intolerance (ECRI). However, the ECRI was intended to be a body that undertook studies and submitted proposals, and not a monitoring organ. It is also to be noted that efforts to draw up a European convention to combat racial discrimination came to nothing. We are therefore forced to conclude that the structure and monitoring machinery of the Charter constitute the best possible framework for the effective monitoring of discrimination in society. It would be enough to prepare an additional protocol providing for individual remedies based on the provisions of the Charter (ideally of the revised European Social Charter). It is also worth remembering that an Additional Protocol to the European Social Charter, providing for a system of collective complaints, has been drawn up and will enter into force after the fifth ratification. This procedure would complement the consideration of government reports, which constitutes the basic machinery. A limited number of national and international bodies are recognised as having the rights to submit complaints¹⁸ alleging unsatisfactory application of the Charter, for example. These complaints, in view of their collective nature, may be submitted in respect of all the rights provided for by the Charter on condition that they do not refer to individual situations. Since this procedure is of a rather adversarial nature, it is an essential innovation designed to increase the effectiveness of the present monitoring system based exclusively on the consideration of government reports. Although it represents considerable progress, the collective complaints procedure is an abstract form of monitoring designed to determine whether legal provisions are in conformity with the Charter. The Committee has, of course, invariably taken de facto situations into account. But its evaluation of the facts is based on general and not individual situations. Yet these general situations might well conceal individual cases that are not in conformity with the Charter. Most of them involve discrimination. Since increasing emphasis is nowadays being placed on the individual nature of social rights and their complementarity with traditional individual rights, it is not too early to review and establish an individual remedy procedure designed to enforce the principle of non-discrimination at the social level, which represents the core of anti-racist legislation.

1 *Crespo, Enrique Baron (1993), Introduction to the Report drawn on behalf of the Committee of Inquiry into Racism and Xenophobia, European Parliament.*

2 *The recent tally is as follows: on 23 November 1992, three Turkish immigrants burnt alive at Mölln (Germany); on 28 May 1993, five persons belonging to the same family were burnt and died at Sollingen (Germany).*

3 *For the other aspects of this subject see 'Migrant Workers and Their Families: Protection within the European Social Charter', Social Charter Monographs, No. 4, Council of Europe, Strasbourg 1996.*

4 *"4. to secure for such workers lawfully within their territories, insofar as such matters are regulated by law or regulations or are subject to the control of administrative authorities, treatment not less favourable than that of their own nationals in respect of the following matters: (a) remuneration and other employment and working conditions; (b) membership of trade unions and enjoyment of the benefits of collective bargaining; (c) accommodation;*

"5. to secure for such workers lawfully within their territories treatment not less favourable than that of their own nationals with regard to employment taxes, dues or contributions payable in respect of employed persons;

"7. to secure for such workers lawfully within their territories treatment not less favourable than that of their own nationals in respect of legal proceedings relating to matters referred to in this Article."

5 *See Conclusions I, Collection of Case Law of the Committee published by the Council of Europe, p. 81.*

6 According to the Committee, "The obligation ... to grant the migrant worker equality of treatment in respect of employment is increasing in importance and poses particular problems in a period when most Contracting Parties are suffering from economic recession. The countries concerned should take specific action to avoid discrimination to the extent that an increase of the level of unemployment is likely to have a particular impact on this category of workers".

7 Article 1: The right to work: With a view to ensuring the effective exercise of the right to work, the Contracting Parties undertake:

"1. To accept as one of their primary aims and responsibilities the achievement and maintenance of as high and stable a level of employment as possible, with a view to the attainment of full employment; ...".

8. This point concerned access to vocational training in the United Kingdom, where an insignificant number of foreign workers were deprived of this right. Cf. Conclusions VII, p. 109.

9. Conclusions XIII-3, p. 166.

10. Conclusions II, p. 68 and Conclusions III, p. 101.

11. Conclusions III, p. 103.

12 Conclusions IV, p. 125.

13 Conclusions II, pp.67 and 68.

14 Conclusions X-2, pp. 152 and 153.

15 Cf. Committee on the Elimination of Racial Discrimination, Geneva, Opinion of 10 August 1988, Communication No.1/1984, A. Yılmaz Doğan, State party concerned: Netherlands, in RUDH 1990, vol. 2, No. 3, pp. 110 et seq.

16 Cf. case of *Jersild v. Denmark* (36/1993/431/510), series A, No. 298.

17 Stephen Roth, "Legal measures and other policy measures to combat racism and anti-Semitism", Seminar on Racism and Anti-Semitism, Istanbul, 19-20 January 1995. He specifies that, according to the jurisprudence of the European Commission on Human Rights, the prohibition or suppression of racist activities constitute lawful restrictions on the freedom of expression. According to Mr. Roth, a shadow was cast upon this case law by the recent *Jersild* decision.

18. According to the explanatory report, complaints may be submitted, sometimes subject to certain conditions, by international and national employers' and workers' organisations, as well as by other international and national non-governmental organisations (in the latter case, a declaration by the state implicated recognising this right is necessary).