Immigration and Discrimination Law

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IMMIGRATION AND DISCRIMINATION LAWS

CANADA

Executive Summary

Canada has a Department of Canadian Heritage which is responsible for implementing a Multiculturalism Act. Canada also has a Race Relations Foundation which sponsors events and initiatives. Canada's immigration policies favor skilled workers, and Asian countries dominate the list of top source countries. Nevertheless, the number of African-Canadians has been growing steadily. Most of these persons live in the major cities. The Government is attempting to promote integration in other parts of the country. Advocating genocide and public incitement of hatred are both Criminal Code offenses in Canada. Complaints respecting racist behavior can also be taken to the federal and provincial human rights commissions. These commissions can issue orders that are enforceable through contempt proceedings.

I. Government Initiatives

In 1982, Canada adopted the Canadian Charter of Rights and Freedoms.[1] This document has much in common with the American Bill of Rights, but differs from it in significant respects. One major way in which it differs from the Bill of Rights is in its guarantees respecting equality rights. Section 15(1) of this document states as follows:

> 15. (1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

While this section is similar to provisions found in many constitutions, section 15(2) qualifies section 15(1) by expressly allowing for affirmative action programs in the following terms:

> (2) Subsection (1) does not preclude any law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups including those that are disadvantaged because of race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

In 1984, a special parliamentary committee entitled Equality Now called for the creation of a Canadian Multiculturalism Act and the establishment of a national research institute on multiculturalism and race relations issues. In 1988, Parliament enacted the Canadian Multiculturalism Act,[2] and in 1996,

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[1] Part I of the Constitution Act, 1982, being Sched. B to the Canada Act, 1982 c. 11 (U.K.)

[2] R.S.C. c. 24 (4th Supp. 1988), as amended (official source); http://www.pch.gc.ca/progs/multi/policy/act_e.cfm (unofficial source, last visited Apr. 5, 2008).

the Government established the Canadian Race Relations Foundation.[3] In 1997, a renewed Multiculturalism Program was announced.[4]

The Canadian Multiculturalism Act is designed to promote multiculturalism in the federal government and in federal institutions. However, it is not limited to the activities of the federal government. The Act also gives the Minister of Canadian Heritage specific mandates, including:

> 5. (1) The Minister shall take such measures as the Minister considers appropriate to implement the multiculturalism policy of Canada and, without limiting the generality of the foregoing, may
> (*a*) encourage and assist individuals, organizations and institutions to project the multicultural reality of Canada in their activities in Canada and abroad;
> (*b*) undertake and assist research relating to Canadian multiculturalism and foster scholarship in the field;
> (*c*) encourage and promote exchanges and cooperation among the diverse communities of Canada;
> (*d*) encourage and assist the business community, labour organizations, voluntary and other private organizations, as well as public institutions, in ensuring full participation in Canadian society, including the social and economic aspects, of individuals of all origins and their communities, and in promoting respect and appreciation for the multicultural reality of Canada;
> (*e*) encourage the preservation, enhancement, sharing and evolving expression of the multicultural heritage of Canada;
> …
> *g*) assist ethno-cultural minority communities to conduct activities with a view to overcoming any discriminatory barrier and, in particular, discrimination based on race or national or ethnic origin;
> (*h*) provide support to individuals, groups or organizations for the purpose of preserving, enhancing and promoting multiculturalism in Canada; and
> (*i*) undertake such other projects or programs in respect of multiculturalism, not by law assigned to any other federal institution, as are designed to promote the multiculturalism policy of Canada

Of these provisions, section 5(g) is of particular significance to African-Canadians. Under the Multiculturalism Program, the Department of Canadian Heritage has supported a number of special projects relating to primarily or specifically to African-Canadians. Among these are:

- The Colour of Your Money
- Working Group on Racial Equality in the Legal Profession
- Seminar on Dissemination of Hate in Canada via Computer Technology
- Demographic Profiles of Black communities in Canada
- Demographic Contours of Poverty Among Canadian Ethnic Groups
- Intermarriage Workshop
- Promoting Good Relations in the Markham and Richmond Hill Areas
- Publication and Teachers' Guide to Combat Racism

The Department of Canadian Heritage also sponsors Black History Month events during the month of February.[5] Recently, the Secretary of State (Multiculturalism and Canadian Identity)

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[3] 1991 S.C. c. 8 (official source); http://laws.justice.gc.ca/en/C-21.8/32663.html (unofficial source, last visited Apr. 5, 2008.

[4] *See* Department of Canadian Heritage, *Multiculturalism: Policy and Legislative Framework*, http://www.pch.gc.ca/progs/multi/ policy/framework_e.cfm (last visited Apr. 5, 2008).

[5] Department of Canadian Heritage, *Black History Month*, *http://www.pch.gc.ca/progs/multi/black-noir/even/index_e.cfm* (last visited Apr. 5, 2008).

recognized the winners of the 2008 Racism: Stop It! National Video Competition, which was held for persons between the ages of 12 and 18.[6]

The Canada Race Relations Foundation, a Crown Corporation that receives no money from the federal government, has a number of related functions. It awards research contracts, sponsors initiatives against racism, gives awards for excellence to individuals and organizations, and provides education and training services. The Foundation's stated goal is to bring "about a more harmonious Canada which acknowledges its racist past."[7]

II. Immigration and Integration

Canada accepts a high percentage of immigrants. Between 2001 and 2006, the number of persons accepted for permanent residence ranged between approximately 220,000 and 262,000.[8] These persons were admitted in several different categories. The largest number of immigrants was the group admitted as economic immigrants. This category accounts for over half of all immigrants and is primarily composed of skilled workers who are assessed on a points system. Canada does not have racial, country, or hemispheric quotas. Each applicant for a skilled worker visa must accumulate a required number of points awarded for work experience and education, language abilities, family relations, age, adaptability, and offers for employment in Canada. Persons who acquire the required number of points are granted admission. The current philosophy is to try to attract persons that Canada believes will most likely be able to become successfully settled in Canada.

The second largest class of immigrants is composed of family members. Approximately 60,000 to 70,000 persons are admitted to Canada annually in this category. This is a much smaller percentage of the overall total than is found in the United States. Canada primarily limits the family class by restricting it to spouses and partners, parents and grandparents, and dependent children.[9]

The third major category of immigrants is refugees. Between 2001 and 2006, the number of refugees admitted annually ranged from approximately 25,000 to 35,000 persons.[10]

Citizenship and Immigration Canada's statistics show that more than 30,000 immigrants were accepted from China and India in 2006. Other top source countries were the Philipines, Pakistan, the United States, Iran, the United Kingdom, South Korea, Colombia, France, Sri Lanka, Romania, Russia, Taiwan, Hong Kong, and the former Yugoslavia. There were no Caribbean or African countries in the top fifteen source countries. In the Caribbean, the only countries with population that are primarily of African descent that contributed more than 1,000 immigrants in 2006 were Jamaica, Haiti, and Guyana. In sub-Saharan Africa, only Nigeria, Ethiopia, and the Congo contributed more than 1,400 immigrants.[11]

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[6] Department of Canadian Heritage, *Racism. Stop It! National Video Competition*, http://www.pch.gc.ca/march-21-mars// index_e.cfm (last visited Apr. 5, 2008).

[7] Canadian Race Relations Foundation, *Programs*, http://www.crr.ca/Load.do?section=23&type=2 (last visited Apr. 5, 2008).

[8] Citizenship and Immigration Canada, *Facts and Figures 2006, available at* http://www.cic.gc.ca/english/resources/statistics/facts2006/index.asp.

[9] *Id.*

[10] *Id.*

[11] *Id.*

There do not appear to be any statistics on what percentage of Canada's immigrants are of African or African-Caribbean origin. However, the available statistics indicate that the total is much lower than it is for Asian countries. One of the major reasons for this is that the points system encourages the immigration of persons with educational and work experience opportunities that are not as available in poorer nations as they are in the larger Asian and European countries. Nevertheless, the African-Canadian population has grown significantly over the past twenty years. Many of these new immigrants were admitted as refugees from African countries experiencing civil strife. Another large group of new African-Canadians entered the country in the family class category. This is particularly true of African-Canadians from the Caribbean.

One long-term problem Canada has had with integrating its immigrants is that nearly three-quarters of all new immigrants settle in the three major cities of Toronto, Montreal, and Vancouver. The mobility rights provision of Canada's Charter of Rights and Freedoms prohibits the federal government from requiring immigrants to move to and stay in any particular region of the country.[12] This has resulted in immigrants forming relatively tight-knit communities in the major cities. The crime rates in these communities have been a major concern. Canada no longer keeps statistics that identify criminals by race, but well-publicized incidents of gang wars, drive-by shootings, and drug trafficking have raised public awareness of increasing violence.

One step the federal government has taken to try to promote integration in Canada is to provide funding to other cities. These funds are designed to help new immigrants get settled and to support development of mutual awareness, understanding, and appreciation. Two of the latest cities to receive such funding are Saskatoon, Saskatchewan and Peterborough, Ontario.[13]

III. Anti-Discrimination Laws and Hate Crimes

In 1966, the Cohen Committee, named for a former dean of McGill's Law School and composed of members who included future Prime Minister Trudeau, released a report recommending the criminalizing of certain types of hate speech.[14] Parliament responded to this report in 1970 by creating three new Criminal Code offenses. The first of these is generally referred to as "advocating genocide," and the other two fall under the heading of "public incitement of hatred."

Under section 318 of the Code, advocating or promoting genocide is punishable with a maximum sentence of five years' imprisonment. The term "genocide" is defined to mean "acts committed with intent to destroy in whole or in part any identifiable group, namely, (a) killing members of the group; or (b) deliberately inflicting on the group conditions of life calculated to bring about its physical destruction."[15] The term "identifiable group" means "any section of the public distinguished by colour, race, religious, or ethnic origin." It does not appear that anyone has been convicted of promoting genocide in Canada since the hate propaganda sections of the Criminal Code were created, though at present one person is being tried in Montreal for crimes committed in Rwanda.[16]

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[12] Part I of the Constitution Act, 1982, being Sched. B to the Canada Act, c. 11, s. 6 (U.K).

[13] Citizenship and Immigration Canada, *The Government of Canada Invests in Saskatoon to Help Newcomers Settle and Integrate*, http://www.cic.gc.ca/english/department/media/releases/2008/2008-03-28a.asp (last visited Apr. 8, 2008).

[14] REPORT OF THE SPECIAL COMMITTEE ON HATE PROPAGANDA IN CANADA, Ottawa. 1966.

[15] R.S.C. c. C-46, s. 318(2) (1985).

[16] *Rwanda/Canada – Muyaneza Trial – Some Testimonies Considered Irrelevant,* AFRICA NEWS, Feb. 26, 2008, LEXIS/NEXIS, NEWS Library, AFRNWS file.

Section 319(1) of the Criminal Code makes it a criminal offense to communicate statements in any public place to incite hatred against any identifiable group where that incitement is likely to lead to a breach of the peace. This offense is punishable with up to two years' imprisonment if prosecuted by way of an indictment and up to six months' imprisonment if the Crown elects to proceed against the accused in summary proceedings. The distinction between indictable and summary offenses in Canada is similar to the distinction between felonies and misdemeanors in the United States. As in the case of section 318, there do not appear to have been any convictions under section 319(1).

In contrast to the other two sections, section 319(2) has been used successfully by the Crown to prosecute persons for illegally distributing hate propaganda in several well-publicized cases. Section 319(2) makes it a crime to communicate statements that willfully promote hatred against an identifiable group, except in private conversation. The maximum punishments under section 319(2) are the same as they are for section 319(1), but the former recognizes four defenses that can be asserted by the accused. Under these defenses, no person can be convicted of violating section 319(2) if:

1. the statements were true;
2. in good faith, [the accused] expressed or attempted to establish by argument an opinion on a religious subject;
3. the statements were relevant to any subject of public interest, the discussion of which was for the public benefit, and if on reasonable grounds [the accused] believed them to be true; or
4. [the accused] intended to point out for the purpose of removal, matters producing or tending to produce feelings of hatred toward an identifiable group.[17]

The second defense respecting opinions on religious subjects was not recommended by the Cohen Committee [18] and could pose a problem for the Crown in a cases involving a person claiming to be expressing religious beliefs even if the Crown can counter that the accused's religious opinions were not expressed "in good faith." Both the Canadian Bar Association Special Committee on Racial and Religious Hatred and the Law Reform Commission have recommended that the defense respecting religious opinions be dropped from the list of allowable defenses.[19] While this has not been done, one protection built into the legislation is that no person can be prosecuted under section 319(2) without the consent of the provincial Attorney General.

The legal question that has received the most consideration with respect to Canada's hate propaganda is what constitutes "willful" promotion of hatred.[20] In the leading case of R. v. Keegstra, the Supreme Court of Canada found that the definition covers statements made with the intention of promoting hatred, but that it does not include statements made recklessly.[21] Mr. Keegstra, a former school teacher in Alberta, was found to have made many anti-Semitic statements and remarks that were illegal under section 319(2), and his conviction was upheld by the Supreme Court of Canada. Several other convictions under section 319(2) have also been upheld by the courts. However, a native leader was recently granted a new trial by Saskatchewan's Court of Queen's Bench on the grounds that the anti-Semitic statements he had made to a reporter did not rise to the level of willfully promoting hatred against Jews.[22] The Crown appealed this decision, and a new trial was granted.[23]

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[17] *Id.*

[18] Philip Rosen, *Hate Propaganda*, Web site of the Library of Parliament, Parliamentary Information and Research Service, 2000, *available at* http://www.parl.gc.ca/information/library/PRBpubs/856-e.htm.

[19] *Id.*

[20] *Id.*

[21] R. v. Keegstra, [1990] 3 S.C.R. 397.

[22] R. v. Ahenakew, 2006 Sask. Q.B. 272.

In addition to the three Criminal Code offenses described above, section 320 of the Criminal Code authorizes the police to obtain and execute court orders to seize and confiscate hate propaganda. The police are only required to demonstrate that the material is, indeed, hate propaganda. They are not required to show that the material may be considered to be dangerous.[24]

Also relevant to the regulation of hate speech in Canada is section 13 of the Canadian Human Rights Act. This provision prohibits the use of the telephone to communicate racial hatred and has been described by a senior analyst in the Library of Parliament's Parliamentary Information and Research Service as follows:

> To fall under s. 13, the communication by telephone or telecommunications facility must be repeated and it must be likely to expose a person or persons to hatred or contempt in that they belong to an identifiable racial, national, ethnic or religious group or a group defined by reason of age, sex, family, or marital status, disability or pardoned conviction. Unlike the Criminal Code's hate propaganda provisions, it is not necessary to prove specific intent to succeed in showing the discriminatory practice and there are no special defenses available to a respondent to such a complaint.[25]

Subsequent to the writing of this description of the law, section 13 of the Canadian Human Rights Act was amended to make it applicable to computer and Internet communications.[26] However, the amendment expressly states section 13 does not apply to broadcasting. A Special House of Commons Committee on Visible Minorities recommended that the Human Rights Commission should be given jurisdiction to deal with hate propaganda disseminated by radio or television as well as by mail and other forms of communications, but this has not been followed by Parliament. Broadcasters do, however, risk losing their licenses for broadcasting offensive material. The licensing authority in Canada is the Canadian Radio-Television and Telecommunications Commission. This body holds periodic reviews of applications for renewals of broadcasting licenses.

The Canadian Human Rights Act is not a criminal statute and does not provide for the imposition of criminal penalties. However, a failure to comply with an order of a Human Rights Tribunal can be enforced through contempt proceedings filed with the Federal Court of Canada.

Canada's laws prohibiting certain forms of hate speech were almost entirely created before the adoption of the Charter of Rights and Freedoms. Since the Charter contains a guarantee respecting freedom of speech, the relevant legislation was challenged in the courts for being an unconstitutional infringement upon that fundamental right. In R. v. Keegstra, the Supreme Court of Canada upheld the legislation by relying on the first section of the Charter, which states that the rights the Charter guarantees are subject to "such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society."[27] The Supreme Court found that the Government had met its burden of proof in this case, and the legislation was therefore constitutional.

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[23] *Embattled Native Leader Turns Down Offer to Rejoin Federation*, NORTH BAY NUGGET (Ontario), Apr. 14, 2008, at A9.

[24] Rosen, *supra* note 18.

[25] *Id.*

[26] Canadian Human Rights Act, R.S.C. c. H-6 (1985), as amended by 2001 S.C. c. 41, s. 88.

[27] Part I of the Constitution Act, being Schedule B to the Canada Act 1982, c. 11 (U.K.), s. 1.

In another famous case, in 1992, the Supreme Court struck down another provision of the Criminal Code prohibiting the spreading of false news. This provision stated that "every one who willfully publishes a statement, tale or news that he knows is false and that causes or is likely to cause injury or mischief to a public interest is guilty of an indictable offence and liable to imprisonment for a term not exceeding two years."[28] The case that reached the Supreme Court involved a person who published material denying that the Holocaust had occurred. The Supreme Court essentially found that, unlike the hate propaganda provisions, the prohibition of publishing false news was overly broad.[29] Because the offense itself was vague, it could not be saved by being found to be reasonable in a democratic society

Prepared by Stephen Clarke
Senior Foreign Law Specialist
April 2008

[28] R.S.C. c. C-46 (1985).

[29] R. v. Zundel, [1992] 2 S.C.R. 731.

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IMMIGRATION AND DISCRIMINATION LAWS

EUROPEAN UNION

Executive Summary

Migrants from Africa and their descendants who live legally within the territory of the European Union fall within the ambit of the term "third-country nationals/residents," which is commonly used at the European Union level. They are subject to the EU legislation and policies on immigration, integration, and discrimination.

There is no common immigration policy due to the differing views of the EU Members. The EU is legally authorized to legislate on certain issues on immigration and it has done so. Its Members retain the right to decide on the number of immigrants admitted to their territories.

The EU currently faces an imminent labor shortage of skilled and unskilled workers. In October 2007, the European Commission introduced two new Directives in order to alleviate this problem and also to ensure that European Union countries become more appealing to skilled professionals. The first one is designed to lure third-country nationals who are highly qualified for employment. It also prohibits active recruitment of skilled workers from sub-Saharan countries, with the objective of avoiding "brain drain." The second introduces a fast-track procedure for qualified applicants. Another important component of the second Directive is its objective to establish a common set of rights and conditions of migrants legally residing within the EU territory.

Development and implementation of policies on the integration of migrants fall primarily within the domain of the EU Members. The EU plays a limited role in providing support and complimenting the policies pursued by its Members. In the areas of immigration, employment, education, and discrimination, which have an impact on the integration policies of the Members, the EU has adopted several legislative measures. The crux of the EU's position is to eventually grant third-country nationals rights and obligations comparable to those enjoyed by EC nationals. Only then is integration of third country nationals within the EU attainable.

The EU lacked competence to legislate in the area of discrimination. In 1999, the Treaty of Amsterdam established the legal basis for the EU to do so respecting discrimination on the grounds of race, ethnic origin, religion, or belief. In 2000, the EU adopted a Directive 778/EC, for Equal Treatment in Employment and Occupation and Directive 43/EC, implementing the principle of equal treatment between persons irrespective of racial or ethnic origin.

I. Introduction

The European Union is home to a large number of "third-country nationals or residents." The term "third–country nationals" is commonly used to broadly cover any person who is a national of another country other than one of the twenty-seven Member States, whereas the term "third-country resident" refers to a person who does not have the citizenship of an EU Member State, but has the right to

reside legally in an EU state. Often, in the EU terminology, the two terms are used interchangeably.[1] Only third-country nationals living legally within the EU territory are granted certain rights and obligations. Migrants from African countries and their descendants who reside legally within the territory of the European Union are included within the term "third–country nationals or residents." Consequently, any EU legislation on third-country nationals applies to them as well. The basic underlying principle in developing legislation and policies involving third-country nationals is that the longer such a person remains in a host Member State, the more rights and obligations he should acquire.[2] According to the European Commission, there are approximately 18.5 million third-country nationals who are residents in the EU, which is 3.8 percent of the total population of almost 493 million. Most of these people come from Turkey (2.3 million), Morocco (1.7 million), Albania (0.8 million), and Algeria (0.6 million).[3] During the last few years, the European Union has experienced a large influx of immigrants from the African continent.[4] Italy, Malta, and Spain, which border the Mediterranean sea, have been the most affected. While these countries adopted several measures to tackle the problem on their own, they also put pressure on the EU for financial assistance and increased sharing of responsibilities.[5]

There is no common immigration policy at the European Union level yet, due to the diverse opinions of the Member States.[6] Based on the Treaty of Amsterdam, certain immigration issues fall within the competence of the EU. In particular, article 63.3 of this treaty grants the Council the authority to adopt measures on immigration policy, specifically in the areas of: a) conditions of entry and residence and standards on procedures for the issue by member states for long-term visas and residence permits, including those for the purpose of family reunion, and b) illegal immigration and illegal residence. On the other hand, member states *inter alia* retain the right to decide on the number of immigrants entering their territory.[7]

Development of integration policies for third-country nationals and implementation issues fall within the jurisdiction of the Member States. Thus, each EU Member employs its own integration policy based on its own traditions, culture, and geo-political and historical background. The EU lacks legal competence to initiate legislation to harmonize the integration policies of its twenty-seven Members.

Even though, integration *per se* does not fall within the EU competence to legislate, the European Union has employed a number of instruments in order to meet its objectives of improving employment

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[1] *See EUROPA-Justice and Home Affairs Glossary*, http://europa.eu.int/comm./justice_home/glossary/glossary_t_en.htm (last visited Apr. 21, 2008).

[2] Communication from the Commission to the Council, the European Parliament, the European Economic and Social Committee, and the Committee on the Regions on Immigration, Integration and Employment COM(2003) 336 final, http://europa.eu/scadplus/leg/en/cha/c10611.htm (official source, last visited Apr. 16, 2008).

[3] *Third Annual Report on Migration and Integration*, Communication from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions, COM(2007) 512 final, Sept. 11, 2007.

[4] See the European Commission's Communication of Nov. 30, 2005, on A Global Approach to Migration: Priority Actions Focusing on Africa and the Mediterranean. On Jan. 30, 2006, the Brussels European Council in its Presidency conclusions endorsed this Communication and identified a number of priority actions, including working with key countries of origin in Africa and working with EU countries in the Mediterranean region. *See Brussels European Council, Presidency Conclusions* (Jan. 30, 2006), *available through* Council of the European Union, http://www.consilium.europa.eu.

[5] Julia Choe, *African Migration to Europe*, Web site of the Council of Foreign Relations, July 10, 2007, *available at* http://www.fcr.org/publication/13726/african_migration_to_europe.html.

[6] For instance, in 2001, the Commission proposed a Directive on Conditions of Entry and Residence of Third-Country Nationals for the Purpose of Paid Employment and Self-Employed Economic Activities. The EU institutions took a favorable approach to the proposal with the exception of the Council, which did not reach an agreement after the first reading. It was officially withdrawn in 2006. See Communication COM(2007) 638 final (Oct. 23, 2007), *available at* http://eur-lex.europa.eu/en/treaties/dat/11997D/htm/11997D.html (official source).

[7] Treaty of Amsterdam, OFFICIAL JOURNAL (O.J., an official source) (C 340) Nov. 10, 1997**,** *available at* http://eur-lex.europa.eu/en/treaties/dat/11997D/ htm/11997D.html (official source).

levels and promoting economic and social cohesion: a) legislation in the areas in which the EU has legal competence to legislate, such as immigration, asylum, and anti-discrimination; b) the open method of co-ordination (OMC) that combines national action plans along with commission's initiatives, [8] in other areas in which the EU has the treaty-based mandate to support and compliment the practices and policies of its members, such as employment, social protection, and social exclusion; [9] and c) the European Social Fund and other financial instruments that provide community funds to support national agendas in the areas of the labor market and social inclusion. The Commission proposed two additional directives designed to attract skilled migrants from developing countries: provide a fast-track procedure for qualified applicants, and introduce a common set of rights and conditions of migrants who reside legally in the EU.

The European Commission has often emphasized the "link between legal migration policies and integration strategies,"[10] and has reiterated that strengthening the legal framework on conditions of entry and stay of third-country nationals is a critical step for the development of a sound EU approach to integration.[11] At the EU level, there are already two Directives that have a positive impact on integration of migrants; one on family reunification and one on long-term residents. At the end of 2007, the Commission proposed two additional directives

The Lisbon Treaty, which was signed in December 2007 and is in the process of ratification by the EU Members, builds upon the language of previous treaties on immigration, discrimination, and integration issues. Thus it provides that decisions on asylum, immigration, and integration will be taken by a qualified majority, rather than unanimity, after the Treaty enters into force in 2009. The Treaty also reiterates the clause that Member states retain the prerogative to decide on the number of foreign nationals admitted to their territory; furthermore, it contains a clause stating that EU Members are required to support any EU country that encounters a large and sudden flow of refugees. As far as integration, the Lisbon Treaty provides that the Parliament and the Council may establish measures to support and promote integration of third-country nationals who reside legally within the territory of the Member States. However, the European Union has no legal authority to harmonize the national laws on integration.[12]

II. Immigration

Currently, the EU faces a critical challenge. The European Commission estimates that 5.5 million jobs will be created in 2007 and 2008, while the aging population will create a big void in skilled and unskilled labor. The EU attracts mostly unskilled to medium-skilled workers from the Maghreb nations. In the Commission's view, eighty-seven percent of such immigrants come to the EU, while fifty-four percent of highly qualified immigrants from the same region enter the United States and Canada.[13] The Commission believes that the EU will need to attract twenty million skilled migrants during the next twenty years in order to tackle the issue of skill shortages in certain areas.[14]

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[8] This refers to a voluntary process under which the EU Members agree on certain common objectives, commit themselves to translate them into national policies, and publish reports on their activities. *See Employment, Social Affairs and Equal Opportunities*, http://europa.eu.int/comm/employmnet_social/social-inclusion/index_en.htm (last visited Apr. 21, 2008).

[9] As introduced by the Amsterdam Treaty, arts. 136 & 137.

[10] Third Annual Report on Migration and Integration, supra note 3, at 4.

[11] *Id.*

[12] Art. 79, ¶¶ 4 & 5, Lisbon Treaty, Dec. 13, 2007, *available at* http://eur-lex.europa.eu/JOHtml.do?uri=OJ:C:2007:306:SOM:EN:HTML (official source).

[13] Proposal for a Council Directive on the Conditions of Entry and Residence of Third-Country Nationals for the Purpose of Highly Qualified Employment, COM(2007) 637 final, Brussels, Oct. 23, 2007, *available at* http://eur-lex.europa.eu/Result.do?T1=V5&T2=2007&T3=637&RechType=RECH_naturel&Submit=Search (official source).

[14] Hugo Brady, EU MIGRATION POLICY: AN A-Z 14 (Center for European Reform, Feb. 2008).

Against this background, and in an effort to make Europe more attractive to highly skilled workers and at the same time improve the rights and conditions of legally residing and working migrants, on October 23, 2007, the European Union adopted proposals for two Directives:

- the Framework Directive on the Conditions of Entry and Residence of Third-country Nationals for the Purposes of Highly Qualified Employment;[15] and
- the Directive on a Single Application Procedure for a Single Permit for Third-Country Nationals and a Common set of Rights of Third-Country Workers Legally Residing in a Member State.[16]

Both proposed Directives contain language to the effect that Member States must implement them without discrimination on the grounds of sex, race, color, ethnic or social origin, language, religion or belief, or membership of a national minority.[17] These anti-discrimination rules are embodied in two previous Directives, described later: a) Directive 2000/43/EC on the Principle of Equal Treatment Between Persons Irrespective of Racial or Ethnic Origin;[18] and b) Directive 2000/78/EC establishing a general framework for equal treatment in employment and occupation.[19]

a) Proposal for a Directive to Attract Highly Qualified Employees – Blue Card

The Directive applies only to third-country nationals who have applied or are in the process of applying to be admitted to the territory of a member State with the purpose of engaging in highly qualified employment. Member States retain the right to decide as to the number of third-country nationals for highly qualified employment, based on their demand.

It introduces a fast-track procedure, based on common criteria. Once admitted, a third-country national will receive a special residence and work permit, called a "Blue Card." The Card, which will be valid for two years initially and can be renewed, will grant a third-country national the following:

- Several socio-economic rights;
- More favorable conditions for family reunification; and
- Easier access to the labor market.

The Directive urges the EU Members to abstain from engaging in active recruitment in developing countries.[20] Two other innovations are included: a) adoption of ethical recruitment policies

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[15] Proposal for a Council Directive on the Conditions of Entry and Residence of Third-Country Nationals for the Purpose of Highly Qualified Employment, COM(2007) 637 final, Brussels, Oct. 23, 2007, *available at* http://eur-lex.europa.eu/Result.do?T1=V5&T2=2007&T3=637&RechType=RECH_naturel&Submit=Search (official source).

[16] Proposal for a Council Directive on a Single Application for a Single Permit for Third-Country Nationals to Reside and Work in the Territory of a Member State and on a Common set of Rights for Third-Country Workers Legally Residing in a member State COM(2007) 638 final, http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM: 2007:0638:FIN:EN:PDF (last visited Apr. 23, 2008).

[17] Preamble of Directive on the Conditions of Entry and Residence of Third-Country Nationals for the Purpose of Highly Qualified Employment, ¶ 24, COM(2007) 637 final, Brussels, Oct. 23, 2007, *available at* http://eur-lex.europa.eu/Result.do?T1=V5&T2=2007&T3=637&RechType=RECH_naturel&Submit=Search (official source) & Directive on a Single Application Procedure for a Single Permit for Third-Country Nationals, ¶ 19, *id.*

[18] 2000 O.J. (L 180) 22.

[19] 2000 0.J. (L 303) 16.

[20] Proposal for a Council Directive on the Conditions of Entry and Residence of Third-Country Nationals for the Purpose of Highly Qualified Employment, COM(2007) 637 final, Brussels, Oct. 23, 2007, *available at* http://eur-lex.europa.eu/Result.do?T1=V5&T2=2007&T3=637&RechType=RECH_naturel&Submit=Search (official source).

and principles, especially in the health sector; and b) adoption of guidelines to facilitate circular and temporary migration.[21]

The Directive introduces reporting mechanisms, so that Member States must report data on quotas and on annual statistics with specifics on professions and the nationality of highly qualified immigrants, through the network established by Council Decision 2006/688/EC.[22] As the Preamble to this Decision indicates, the objective of this obligation is to identify and possibly counteract the adverse impact of immigration "in terms of brain drain in developing countries, especially in Sub-Saharan Africa."[23] Based on the data, the Commission will be able to monitor recruitment in developing countries, including Africa.

b) Proposal for Single Application for a Single Permit for Third-Country Nationals and Establishing a Common Set of Rights

This Directive aims to simplify procedures for all immigrants who apply for residence and work permits in a Member State. Thus, by providing a "one-stop shop" system, it facilitates the admittance of qualified applicants. The national authorities are required to issue a single document. Based on this document, the applicant will be authorized to stay and work without the need for an additional permit to work.

Under this Directive, third-country nationals who have not acquired the status of long-term residents yet shall enjoy equal treatment with nationals at least with regard to: a) working conditions, including pay, dismissal, health, and safety; b) education and vocational training; c) social security and payment of acquired pensions when moving to a third country; d) tax benefits; and e) access to goods and services.[24]

Family Reunification

The Directive on the Right to Family Reunification views family reunification as a key element in creating socio-cultural stability and facilitating the integration of third country nationals.[25] The Directive defines "family reunification" as the entry and residence in a Member State of family members of a third-country national who resides lawfully in that Member State, which is permitted in order to preserve the family unit. It applies to all family situations, regardless as to whether the family relationship arose before or after the resident's entry. In implementing this Directive, EU Members are bound by the anti-discrimination provisions at the EU level and by national provisions. Member States retain discretion in the area of providing authorizations for family members to unite in case of relatives of the direct ascending line, adult unmarried children, or minor children of additional spouses, in case of polygamous marriage.[26]

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[21] For a definition of circular migration, see *On Circular Migration and Mobility Partnerships Between the European Union and Third Countries*, Communication from the Commission to the European parliament, the Council, the European Economic and Social Committee, and the Committee of the Regions, COM(2007) 248 final, (May 16, 2007).

[22] 2006 O.J. (L200) 37.

[23] See ¶ 21 of the Preamble to the Directive. The Joint Africa-EU Declaration on Migration and Development, adopted in Tripoli, Nov. 22, 2006, underlined the need to mitigate the effects of large number of skilled African professionals moving to European Union countries. Migration was at the top of the agenda when EU and African leaders convened in Lisbon in Dec. 2007.

[24] Art. 12, Proposal for a Council Directive on a Single Application for a Single Permit for Third-Country Nationals to Reside and Work in the Territory of a Member State and on a Common set of Rights for Third-Country Workers Legally Residing in a member State COM(2007) 638 final, http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2007:0638:FIN:EN:PDF (last visited Apr. 23, 2008).

[25] Preamble no. 4 of Council Directive 2003/86/EC, Sept. 2003, on the Right to Family Reunification, 2003 O.J. (L 251) 12.

[26] See Preamble No. 10., *id.*

Long-Term Residence Status

In 2003, the EU achieved a legal milestone through the adoption of Council Directive109/EC, concerning the status of third-country nationals who are long-term residents. The EU Members, except for the UK, Ireland, and Denmark who have opted out,[27] are obliged to grant long-term resident status to those who have resided legally and continuously within their territory for a period of five years.

The Directive prescribes two basic conditions under which third-country nationals qualify to acquire long-term resident status. They must be able to provide evidence that they have:

1. stable and regular financial means to support themselves and their families, so that they do not become a burden to the social system of the Member of residence;

2. health insurance; and

3. compliance with integration policies. This last requirement is left to the discretion of the Member States.[28]

The EU Members retain the right to refuse to grant long-term resident status to a third-country national on the grounds of public security and public policy.

III. Integration

The EU, as a supranational organization, is established upon certain fundamental legal principles that are common to all Members, such as liberty, democracy, and respect for human rights for all people living within its territory.[29] Consequently, as a rule, the EU Members are bound not only by their own obligations arising from human rights instruments and other international law principles, but also by certain minimum standards in the way they treat third-country individuals residing legally within their territory. The Charter of Fundamental Rights of the European Union, proclaimed in Nice in 2000, provides for a wide range of rights that are applicable to all persons within the EU territory, irrespective of nationality.[30] The Charter will acquire binding force upon ratification of the Lisbon Treaty by the member States. The European Charter of the Council of Europe signed at Turin on October 18, 1961, establishes also a number of social rights for those living within the Union.[31]

A critical point in the EU's approach towards integration of third country residents[32] occurred in 1999 at the meeting of the European Council in Tampere. The Council identified for the first time the need to tackle the issue of integration of third-country residents, along with the necessity to establish a

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[27] *See* articles 1 and 2 of the Protocol on the Posisiton of the United Kingdom, Ireland and Denmark annexed to the the Treaty on European Union and to the Treaty Establishing the European Community, http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2006:321E:0001:0331:EN:pdf (official source, last visited Apr. 22, 2008)..

[28] For a critique of this Directive *see* Sergio Carrera, "*Integration" as a Process of Inclusion for Migrants? The Case of Long-Term Residents in the EU*, CEPS Working Document No 219/Mar. 2005, *available at* http://www.ceps.be

[29] Art. 6(2) of the Treaty on European Union provides that the Union shall respect fundamental rights, as guaranteed by the European Convention on the Protection of Human Rights and Fundamental Freedoms, signed in Rome, Nov. 4 1950, and as they result from the constitutional traditions common to the Member States, as general principles of Community law.

[30] *See* Charter of Fundamental Rights, as it appeared in O.J., Dec. 14, 2007, *available at* http://eur-lex.europa.eu/JOHtml.do?uri=OJ:C:2007:303:SOM:EN:HTML.

[31] European Social Charter, Turin, 1961, *available at* http://conventions.coe.int/treaty/en/treaties/html/035.htm (official source).

[32] See also Resolution of the European Parliament adopted Oct. 27, 1999, which urged prompt action in fair treatment for third–country nationals legally residing in the Member States and on establishing a definition of their legal status. 2000 OJ (C154) 63

legislative framework on immigration and asylum. At that time, the Member States endorsed the following two objectives: a) "a more vigorous integration policy" that "should aim at granting third country nationals that reside legally rights and obligations comparable to those of EU citizens;" and b) the principle that long term residents be offered the opportunity to apply for nationality in the State in which they reside.[33]

On March 23-24, 2000, the Lisbon European Council, as part of its general strategy for the Union in the next decade, agreed to establish "a competitive and dynamic knowledge-based economy … with more and better jobs and greater social cohesion."[34] The Council reached the conclusion that the fact that within the EU there were a large number of individuals who were socially excluded and living below the poverty line was unacceptable. It established a series of objectives designed to raise the employment level of underrepresented groups, including migrants and ethnic minorities, and to combat social exclusion. All the goals were endorsed by the Nice European Council, December 7-9, 2000. Similarly, the European Commission, the EU's executive body, emphasized the need for "a holistic approach," that is an approach that takes into consideration the economic and social aspects of integration, as well as other aspects, such as cultural and religious diversity, participation in political life, and citizenship.[35]

A policy statement known as the Hague Program which was adopted by the European Council on November 4-5, 2004, is a multi-annual program which contains the EU's agenda on migration and aims to ameliorate the standards of living and quality of life of individuals in an area of freedom, security, and justice. This Program urged the Member States to adopt a number of basic principles designed to establish a general framework on the integration of third-country nationals and their descendants. Some of the key principles were that integration:

- is "a continuous two-way process involving both legally resident third-country nationals and the host society;"
- requires acquisition of basic skills for active participation in a society; and
- needs constant interaction and intercultural dialogue between all individuals in a society to reach a common understanding.[36]

Despite the earlier pronouncements and rhetoric on this subject, a 2004 research study indicates that immigrant integration across EU is a slow process. The study compared the practices and policies of the fifteen EU Members in five key policy areas: labor market inclusion, long term residence, family reunion, naturalization, and anti-discrimination. It concluded that the immigration practices vary considerably among the EU Members and on average are "less favorable" than they ought to be on immigrant inclusion in the above areas. The study also indicates that Members with a long history in immigration policy do not differ greatly in their immigration policies from Members that have only recently experienced an immigration influx.[37]

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[33] Tampere European Council, Oct. 15-16, 1999, Presidency Conclusions, *available at* http://ue.eu.int/ ue/Docs/cms-Data/docs/pressdata/en/ec/00200-rl.en9.htm. It stated *inter alia* the following:

> The European Union must ensure fair treatment of third –country nationals who reside legally on the territory of its member states. A more vigorous integration policy should aim at granting these individuals rights and obligations comparable to those of EU citizens. It should also enhance non-discrimination in economic, social and cultural life and develop measures against racism and xenophobia

[34] Lisbon European Council Presidency Conclusions, http://www.europarl.europa.eu/summits/lis1_en.htm (last visited Apr. 23, 2008).

[35] See two previous communications adopted in 2000 and 2001, as summarized in *Immigration, Integration and Employment*, COM(2003) 336, http://www.europa.eu.int/scadplus/leg/en/cha/c10611.htm (last visited Apr. 21, 2008).

[36] *The Hague Programme - Ten Priorities for the Next Five Years*, May 10, 2005, at 389, *available at* http://ec.europa.eu/justice_home/news/information_dossiers/the_hague_priorities/index_en.htm.

[37] *European Civic Citizenship and Inclusion Index*, http://www.britishcouncil.org/brussels-europe-inclusion-index.html (last visited Apr. 21, 2008). See also, Andrew Geddes, *Europe and Immigrant Inclusion: from Rhetoric to Action*, THE SUD-DEUTSHE ZEITUNG , Apr. 20, 2005, *available at* http://fpc.org.uk/articles/324.

At the EU level, integration of third-country nationals has, however, gained momentum. Since 2002, the Member States have been required to establish National Contact Points (NCPs) on integration.[38] NCPs forward to the Commission reports on national legislative initiatives and policies. At a request of the European Council in June 2003, the European Commission, which is closely monitoring the progress in integration policies made by the EU Members, prepared its first annual report on Migration and Integration.[39] The recent Third Annual Report on Migration and integration adopted by the European Commission in September 9, 2007, provides an overview of actions and measures taken by the member States on admission and integration of third-country nationals. The Commission stated that the European Fund for the Integration of Third-Country-Nationals for the period of 2007-2013 will support the integration efforts of the EU Members.[40]

In 2004, in an effort to address the issue of integration of third-country nationals in a more comprehensive and integrated manner, the EU accomplished several new initiatives. For instance, in November 2004, the HANDBOOK ON INTEGRATION FOR POLICY-MAKERS AND PRACTITIONERS was published by the NCPs. The Hague Program, adopted by the European Council of November 2004, emphasized the importance of better coordination of national integration policies and EU initiatives.[41] The Justice and Home Affairs Council of November 19, 2004 adopted Common Basic Principles with the objective of providing the foundation for consistent integration principles to be pursued by the EU Members.[42] The Commission prepared a GREEN PAPER ON MANAGING ECONOMIC MIGRATION, advocating the adoption of "strong integration policies" to accompany admission procedures.[43]

It should be also noted that the Fundamental Rights Agency, which became operational on March 1, 2007,[44] and replaced the European Monitoring Centre on Racism and Xenophobia, is tasked to provide assistance to the EU institutions and the Members States to ensure compliance with fundamental rights in implementing EU legislation.

IV. Anti-Discrimination Legislation

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[38] This was an initiative of the Justice and Home Affairs Council (JHA). *See* Communication from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions, A Common Agenda for Integration Framework for the Integration of Third- Country Nationals in the European Union COM(2005) 389 final, Sept. 1, 2005, available at http://eur-lex.europa.eu/Result.do?T1=V5&T2=2005&T3=389&RechType=RECH_naturel&Submit=Search (official source).

[39] The report identifies some recent trends in immigration policies of the EU Members. *See* Communication from the Commission to the Council, the European parliament, the European Economic and Social Committee and the Committee of the Regions, First Annual Report on Migration and Integration COM(2004) 508 final, July 16, 2004, *available at* http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2004:0508:FIN:EN:PDF (official source).

[40] COM(2007) 512 final, http://eur-lex.europa.eu/Result.do?T1=V5&T2=2004&T3=811&RechType=RECH_naturel&Submit=Search (last visited Apr. 23, 2008).

[41] The Hague program also advocated the development of a Internet Web site on immigrant integration. The Commission is pursuing the issue, *supra* note 36.

[42] A few key principles are noted: a) integration implies respect for the basic values of the EU; b) employment is a key part of the integration process and is central to the participation of contributions immigrants make to the host society; c) basic knowledge of the host society's language, history, and institutions is indispensable; d) access for immigrants to institutions, as well to public and private goods, without discrimination is a critical foundation for better integration; and e) the participation of immigrants in the democratic process and in the formulation of measures, especially at the local level, supports their integration. *See* Press Release, Integration of Third Country Nationals MEMO/05/290/ (Jan. 9, 2005), *available at* http://europa.eu/rapid/pressReleasesAction.do?reference=MEMO/05/290&format=HTML&aged=0&language=EN&guiLanguage=en.

[43] COM(2004) 811 final, http://eur-lex.europa.eu/Result.do?T1=V5&T2=2007&T3=512&RechType=RECH_naturel&Submit=Search (last visited Apr. 23, 2008).

[44] Council Regulation No. 168/2007, Feb. 15, 2007, Establishing a European Union Agency for Fundamental Rights, *available at* http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2007:053:0001:0014:EN:PDF (official source).

Prior to the adoption of the Treaty of Amsterdam, which entered into force in 1999, the EU lacked the legal authority to legislate in the area of discrimination. Article 13 of the Treaty of Amsterdam contains a general anti-discrimination clause. It grants to the Council the authority to take action, based on a Commission proposal, to combat discrimination *inter alia* on the grounds of sex, racial or ethnic origin, and religion or belief. In 2000, the EU adopted two directives to fight discrimination: a) the Directive for Equal Treatment in Employment and Occupation;[45] and b) Directive 43/EC implementing the Principle of Equal Treatment Between Persons Irrespective of Racial or Ethnic Origin.[46]

Directive for Equal Treatment in Employment and Occupation

Pursuant to this Directive, whose scope includes third-country nationals, the principle of equal treatment requires that no direct or indirect discrimination is permitted based on racial or ethnic origin, religion, or belief, *inter alia*. Consequently, public and private sectors in the EU Member States are required to apply the equal treatment principle in the following areas:

- Conditions for access to employment, self–employment or occupation; This also includes criteria for selection and recruitment, as well as promotion.
- Access to vocational guidance, training, and retraining;
- Employment and working conditions, including dismissals and pay; and
- Membership and involvement in an organization of workers.[47]

In 2000, Directive 43/EC, implementing the Principle of Equal Treatment Between Persons Irrespective of Racial or Ethnic Origin was adopted.[48] Under its provisions which also apply to third-country nationals, Member States are required to implement the principle of equal treatment, regardless of racial or ethnic origin, to put an end to discrimination on the above grounds, and to provide legal redress to victims. The implementation deadline for the Member States was set for 2003.

On June 27, 2007, the European Commission, acting under its authority to ensure that EU Members implement EU legislation at the national level, forwarded a "reasoned opinion" to fourteen Member States, including the Czech Republic, Estonia, France, Greece, Ireland, Italy, Latvia, Poland, Portugal, Slovakia, Slovenia, Spain, Sweden, and the United Kingdom. The Commission argued that these Members failed to implement the directive correctly, and it identified three problem areas: a) national legislation implementing the Directive only in the workplace; however, the Directive also prohibits discrimination in social protection, education, and access to goods and services, including housing; b) inconsistency of national legislation with the provisions of the Directive designed to assist victims of discrimination, for example against victimization, and to assist individuals to seek redress and in meeting the burden of proof in discrimination suits; and c) a definition of discrimination incompatible with that of the Directive.[49]

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[45] 2000 O.J. (L30) 16.

[46] 2000 O.J. (L180) 22.

[47] 2000 O.J. (L303) 16.

[48] 2000 O.J.(L 180) 22.

[49] Press Release, European Commission, Commission Acts to Close Gaps in Race Equality Rules, IP/07/928 (June 27, 2007), *available at* http://europa.eu/rapid/pressReleasesAction.do?reference=IP/07/928&format=HTML&aged=0&language=EN&gui.

If the Member States fail to provide a satisfactory reply to the reasoned opinion within two months, the Commission has the right to bring the national governments to the European Court of Justice in Luxembourg.

Employment and Social Inclusion

Promotion of employment, as a critical element for economic and social cohesion, constitutes one of the key objectives of the EU. The First Annual Report on Migration and Integration prepared by the European Commission in July 2004 identified the lack of access to employment "as the greatest barrier to integration and thus the most important political priority within national integration policies."[50] The Third Annual Report, adopted in 2007, stated that during the last decade, the unemployment rate of third-country nationals, who are concentrated in a few sectors, was higher than that of EU-nationals.[51] In particular, the employment rate for recent migrants, especially women from Turkey and from African countries, is significantly lower than for EU nationals.[52]

The employment guidelines adopted by the EU are designed to achieve a high level of employment for all groups of workers. The new revised Employment Guidelines adopted in 2003[53] urged the EU Members to integrate migrants into the labor market and to reduce the unemployment gap between EU nationals and migrants.

The Social Inclusion Process, which was approved by the Copenhagen European Council in December 2002, emphasized the "high risk of poverty and social exclusion faced by some men and women as a result of immigration." It encouraged the Member States to particularly address the issues faced by ethnic minorities and migrants in their national plans for social inclusion.

Social Protection

Until 2003, the various social security schemes of the EU Members applied only to certain third-country nationals.[54] As of 2003, all third-country nationals who are in an EU Member nation are entitled to some social protection, including unemployment benefits, as long as they reside legally within the EU and meet other requirements provided by law[55]. As the 2003 Directive regarding the status of third-country nationals who are long term residents clarifies, social protection encompasses some core social benefits, at least minimum income support, assistance in case of illness or pregnancy, parental assistance, and long-term care.[56]

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[50] Communication from the Commission to the Council, the European Parliament, the European Economic and Social Committee, and the Committee of the Regions, First Annual Report on Migration and Integration, 5 COM(2004) 508 final, July 16, 2004, *available at* http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2004:0508:FIN:EN:PDF (official source).

[51] *Id.* at 14.

[52] *Id.* at 15.

[53] Council Decision 2003/578/EC, July 22, 2003, on Guidelines for the Employment Policies the Member States, *available at* http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2003:197:0013:0021:EN:PDF. See Guideline No 7 that states, "Member States will foster the integration of people facing particular difficulties on the labor market, such as early school leavers, low-skilled workers, people with disabilities, immigrants, and ethnic minorities, by developing their employability, increasing job opportunities and preventing all forms of discrimination against them."

[54] See Council Regulation No 1408/71, on the application of social security schemes to employed persons and their families moving within the Community; & Council Regulation (EEC) No. 574 /72, Mar. 21, 1972, laying down the procedure for implementing Regulation (EEC) No. 1408/71. 1971 O.J. (L149) 2 & 1972 O.J. (L74)1, respectively.

[55] Council Regulation (EC) No 859/2003, May 14, 2003, extending the provisions of Regulation (EEC) No 1408/71 and Regulation (EEC) No 574/72 to nationals of third countries who are not already covered by those provisions solely on the ground of their nationality. 2003 O.J. (L 124) 1.

[56] *See* Preamble No. 13, 2000 O.J. (L 180) 22.

Education

Since early 1980s, pursuant to Directive 77/486 on the education of the children of migrant workers,[57] Member States have been required to provide free education in the official language of the host state to facilitate the initial reception of those children in the territory. Additionally, they are required to promote, along with the regular education curriculum, the teaching of the native language and culture of the country of origin of these children. The Directive applies to children who are dependants of an immigrant worker and reside in the Member State where the worker is employed. Moreover, EU Members are required to train the teachers who will provide the education.

A report adopted by the Committee on Culture and Education of the European Parliament on Integrating Immigrants in Europe Through Schools and Multilingual Education endorses, the following:

> a) school age children of immigrants have a right to state education, irrespective of the legal status of their families, and have a right to learn the language of the host state along with their right to learn their mother tongue;
> b) second and third generation immigrants, even when they have mastered the language of the host country, still have a right to learn the language and the culture of the country of origin;
> c) primary and secondary schools must provide educational support to immigrant children, especially when they lack knowledge of the language of the host country, to prevent their social exclusion.[58]

The report called on the Commission to increase its financial support to train teachers in the existing different methods of promoting integration through multinlingualism. For example, there are two main programs used by the Member States, known in English as CLIL (Content and Language Integrated Learning) and BILD (Bilingual Integration of Languages and Disciplines) and in French as EMILE (Enseignement d'une Matiere par l'integration d'une Langue Etrangere)[59]

V. Hate Crimes Law

Proposal for a Framework Decision Against Racism and Xenophobia

In November 2001, the European Commission introduced a proposal for a framework decision on the fight against racism and xenophobia.[60] The proposal has a twofold objective: a) to ensure that the same racist and xenophobic acts are punishable similarly in all European Union Members; and b) to facilitate judicial cooperation on this issue among the Members.

Until recently, no consensus could be reached by the EU Members, due to various disagreements as to definition of what constitutes a racist or xenophobic act that should be included in the scope of the proposal. Germany, which was in charge of the EU presidency during the first half of 2007, worked hard to smooth out differences between the EU Members. Finally, in April 2007, after a lot of political maneuvers between the three institutions involved in the legislative process – the European Commission, the Parliament, and the Council - the Council of the EU reached agreement on the text. Subsequently, in November 2007, the European Parliament made several amendments. The final text has been altered significantly, especially the list of offenses, compared to the initial 2001 proposal of the Commission.

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[57] Council Directive 77/486/EEC, July 1977, on the Education of the Children of Migrant Workers, 1977 O.J. (L 199) 32.

[58] European Parliament, Committee on Culture and Education, *On Integrating Immigrants in Europe Through Schools and Multilingual Education* (2004)/2267(INI), 9/7/2005.

[59] *Id*.

[60] COM(2001) 664, 2002 O.J. (C 75E) 269.

Members States are required to give full effect to the provisions of this Decision by harmonizing their domestic legislation within two years after the decision is adopted. The Decision has reached the final stage and only action by the Council is required at this point.

Scope

The decision criminalizes the following intentional conduct by individuals or legal persons, as provided in article 1, paragraph 1:

a) Public incitement to violence or hatred, even by dissemination or distribution of tracts, pictures, or other materials, directed against a group of persons or a member of such a group, which is defined by race, color, religion, descent, or ethnic or national origin;

b) Publicly condoning, denying or grossly trivializing

- crimes of genocide, crimes against humanity, and war crimes as these are defined in the Statute of the International Criminal Court (arts. 6-8) directed against a group of persons or a member of such a group defined by reference to race, color, religion, descent, or national or ethnic origin; and
- Crimes defined by the Tribunal of Nuremberg (art. 6 of the Charter of the International Military Tribunal, London Agreement of 1945) directed against a group of persons or a member of such a group defined by reference to race, color, descent, religion, or ethnic or national origin.

Bases of Jurisdiction

The decision requires Member States to establish jurisdiction on the territoriality and the nationality principle:

- when the conduct has been committed in its entirety or in part within its territory; or
- when the conduct was committed by one of its nationals.

In case the offence is committed by a legal person, the head office of the legal person that is situated in the territory of a Member State may be held liable.[61]

Penalties

The decision requires Member States to ensure that the above conduct shall be punishable by criminal penalties of at least one to three years of imprisonment.

Amendments Adopted by the Parliament

In November 2007, the European Parliament inserted a number of changes to the recitals and text of the Decision. The most significant of these amendments are:[62]

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[61] *Id.*, art. 9, ¶ 1.

[62] European Parliament Legislative Resolution, Nov. 29, 2007, on the Proposal for a Council Framework Decision on Combating Certain Forms and Expressions of Racism and Xenophobia by means of Criminal Law, *available at* http://www.europarl.europa.eu/oeil/FindByProcnum.do?lang=2&procnum=CNS/2001/0270.

Recitals

- The decision establishes a minimum level of harmonization and its effectiveness is limited by the derogations it provides, including those in Article 1(2);
- In a democratic society the criminal law is always the last resort and legislative policy should reflect all the values at stake, including the right to free expression;
- Commission of a racist or a xenophobic act by one who holds office is an aggravating circumstance.

Main text

To Article 1, paragraph 1, point (f), which has a specific reference to religion and which is intended to cover at least conduct which is a pretext for directing acts against a group of persons or a member of such group, the European Parliament added the following: "A Member State should not, however, exempt from criminal liability speeches or behavior liable to stir up hatred. Respect for freedom or religion shall not hinder the effectiveness of this Framework Decision."[63]

It also added that Member States may choose to punish only conduct which is either carried out in such a manner that is "likely to disturb public order."[64]

The Parliament also added the following provisions.

- Member States may adopt or maintain a higher level of protection in the fight against racism and xenophobia;
- Implementation of this Decision under no circumstances shall constitute grounds for lowering the level of protection already ensured by the Members in the areas covered by this Decision; and
- Nothing in this Decision may be interpreted as affecting obligations of the Member States arising under the International Convention on the Elimination of All Forms of Racial Discrimination of March 7, 1966.[65]

Finally, it added a review clause that the Parliament must be consulted during the review of this Decision.[66]

Prepared by Theresa Papademetriou
Senior Foreign Law Specialist
April 2008

[63] Id.

[64] Id.

[65] Id.

[66] Id.

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IMMIGRATION AND DISCRIMINATION LAWS

FRANCE

Executive Summary

France has approximately two million black residents. An estimated 1.5 million are French citizens. A large number of them are concentrated in low income housing in immigrant-populated suburbs in a few major cities. They face widespread discrimination, particularly in housing and in the employment market, despite comprehensive anti-discrimination legislation.

Based on constitutional principles, France has been reluctant to officially recognize ethnic minorities with distinct needs and rights that the state would have to take into account. President Sarkozy has advocated "positive discrimination" based on economic and social criteria, but not on race, in an effort to combat high unemployment and discrimination.

The new immigration policy favors skilled workers and sets forth more stringent conditions for family reunification. It limits the residence of nationals of one of the countries belonging to a priority solidarity zone set forth by the French government to a maximum of six years. Countries included in that zone are primarily in Africa. Immigrants also are expected to adhere to France's traditional values and upon arrival sign a mandatory integration contract.

Hate crime legislation was strengthened in 2003, following a sharp rise in the number of anti-Semitic acts from late 2000 through 2002.

I. Background

It is difficult to enumerate the number of black residents in France today, as the law forbids census takers from asking about one's religion or ethnicity. This prohibition was recently reaffirmed by the Constitutional Council, which struck down a provision of a 2007 Law on Controlling Immigration, Integration and Asylum that had allowed the gathering of statistics showing the ethnic or racial origin of a person for the purpose of measuring discrimination. The Council found that provision contrary to article 1 of the Constitution, which states, "France is an indivisible, secular, democratic and social Republic. It ensures the equality of all citizens before the law, without distinction of origin, race or religion."[1]

A recent study prepared by a leading French research group at the request of the Representative Council for Black Associations estimates that 3.8 percent of individuals above the age of eighteen residing in France and its overseas departments (French Guiana, Guadeloupe, Martinique, and Reunion Island) consider themselves black, approximately 1,865,000 persons.[2] Another study concludes that France has approximately two million black residents and that an estimated 1.5 million are French

[1] Conseil Constitutionnel, Decision 2007-557DC, Nov. 15, 2007, JOURNAL OFFICIEL DE LA REPUBLIQUE FRANÇAISE (Official Gazette of France, J.O.), Nov.21, 2007, at 19001.

[2] TNS Sofres, *Les discriminations à l'encontre des populations noires de France,* [Discrimination against Black Populations in France], Jan. 31, 2007, *available at* http://www.tns-sofres.com/etudes/pol/310107-cran.pdf.

citizen.[3] According to a 2004-2005 immigration survey prepared by the French National Institute of Statistics, there were 570,000 immigrants as of mid-2004 who had been born in sub-Saharan Africa, an increase of forty-five percent over the 1999 census. Among them, seven out of ten come from France's former African colonies, in particular, Congo, Ivory Coast, Mali, and Senegal.

France has been reluctant to officially recognize ethnic minorities with distinct needs and rights that the state would have to take into account. Rights are recognized at the individual, not at the group level.[4] Article 1 of the Constitution is interpreted as excluding recognition of groups enjoying a special status. The Conseil d'Etat (France' highest administrative court) gave the following interpretation of minority:

> The fundamental principles of French law, such as they are registered in the Constitution, prohibit any distinction between citizens according to their origin, race or religion. The existence of rights exerted collectively, based on such considerations, would not therefore be recognized in France, where respect for every group's characteristics-religious, cultural, linguistic or other is guaranteed by the protection of the individual members of these groups.[5]

On numerous occasions, President Nicolas Sarkozy has advocated affirmative action, referred to as "positive discrimination" in France, not based on race, but on economic and social criteria, in an effort to combat high unemployment and discrimination against blacks and Muslims.[6] A large part of the black and Muslim communities is concentrated in urban, low-income zones in a few major cities, where they lives in difficult social-economic conditions, facing widespread discrimination, particularly in housing and in the employment market, despite comprehensive anti-discrimination legislation.[7]

President Sarkozy recently unveiled an ambitious plan to revitalize immigrant-populated suburbs. His plan includes experimenting with busing to take children out of underperforming schools, creating "second chance" schools for young adults who have failed to earn diplomas, spending €500 million (about US$786.6 million) to improve transportation to better link communities, providing three-year job training courses for 100,000 youths, and increasing police enforcement to fight drug trafficking in the neighborhoods affected by it.[8]

II. Recent Legislation on Immigration and Integration

Creation of a New Ministry

Until recently, there was no central authority in charge of immigration and integration. Responsibilities were divided among several ministries (Employment, Interior, Justice, and Foreign Affairs), which often had different constraints and priorities.[9] On June 1, 2007, under the initiative of the

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[3] Salvator Erba, Une France Pluriculturelle, le debat sur l'integration et les discriminations, 57, 58, (Librio 2007).

[4] EUMAP (EU Monitoring and Advocacy Program), *Monitoring Minority Protection in EU Member States*, Nov. 2002, at 111, *available at* http://www.eumap.org/reports/2002/eu.

[5] *Id.*

[6] Présidence de la République, *Discours de Monsieur le Président de la République: une nouvelle politique pour les banlieues*, http://www.elysee.fr/documents/index.php?mode=cview&press_id=1019&cat_id=7&lang=fr (last visited Apr. 2, 2008).

[7] Cour des Comptes [National Audit Court], L'accueil des immigrants et l'intégration des population issues de l'immigration 387,388, Nov. 2004, http://www.ladocumentationfrancaise.fr/rapports-publics/044000576/index.shtml (last visited on Apr. 2, 2008).

[8] Présidence de la République, *supra* note 6.

[9] Cour des Comptes, *supra* note 7, at 67.

President of the Republic and the Prime Minister, a new ministry was created: the Ministry of Immigration, Integration, National Identity, and Co-development.[10] The Ministry has four missions:[11]

1. to control migration fluxes;
2. to encourage immigrants to give back to their countries of origin some of the benefits of their professional experience acquired in France and promote bilateral cooperation agreements containing "re-admission" clauses under which a country must automatically take back its nationals who unlawfully enter or remain in France;
3. to facilitate integration through access to lodging, education, and professional training. The immigrant is expected to learn French and respect the principles of the French Republic, in particular, secularism and gender equality, to obtain a ten-year resident card; and
4. to promote and protect the core values, culture, and identity of France.

To further mission number two, recent co-development agreements containing "re-admission" clauses have been signed with Benin, Gabon, Congo[12] and Senegal.[13] The agreement with Benin, for example, favours health care. France will encourage the return of at least 100 doctors after completing their training in France, by financing their establishment in Benin. The French government will also provide €5 million in aid, with €3 million to be used to fight malaria.

Law 2006-911 on Immigration and Integration

General Policy

France had a liberal immigration policy until August 1974. The oil crisis and its ensuing economic fallout changed that policy. It was replaced by a virtual freeze on the employment of foreign nationals other than those of the European Union Member States. As a result, France ended its labor immigration programs. The legislation, however, remained favorable to asylum seekers and family reunification. The latter became the main source of legal immigration.[14]

In January 2006, France shifted to a policy of selected immigration designed to bring the most qualified migrants to France. Parliament passed a new immigration law reflecting this approach in July 2006.[15] Among other changes, the Law creates a new type of residency card: the skills and talents residency card. The Law also sets forth more stringent conditions for family reunification. These conditions include respect for the fundamental principles of the French Republic, in particular, secularism and equality between men and women; the applicant having sufficient means to support his family through work and not through social benefits; and the obligation to sign an integration contract.

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[10] Decree 2007-999, May 31, 2007, J.O., June 1, 2007, at 9964 (official source).

[11] Premier Ministre, *Le Ministère de l'immigration, intégration, de l'identité nationale et du co-développment*: *Missions st rôle*, http://www.premier-ministre.gouv.fr/iminidco/ministere_830/missions_role_56625.html (last visited Apr. 2, 2008).

[12] Ministère de l'immigration, intégration, de l'identité nationale et du co-développement, *Déplacement au Mali et au Bénin, Brice Hortefeux concrétise la nouvelle politique d'immigration concertée de la France*, http://premier-ministre.gouv.fr/iminidco/actualites_829/deplacement_mali_benin_brice_58426.html (last visited Apr. 2, 2008).

[13] *Brice Hortefeux étend au Sénégal la politique d'immigration choisie et concertée de la France*, http://www.premier-ministre.gouv.fr/iminidco/actualites_829/brice_hortefeux_etend_senegal_59372.html (last visited Apr. 2, 2008).

[14] FRANÇOIS JULIEN-LAFERRIERE, DROIT DES ETRANGERS 217 (Presses Universitaires de France 2001); Ministère de l'économie, *2006 Report on Selective Immigration and the Needs of the French Economy*, http://www.ladocumentation francaise.fr/rapports-publics/064000160/index.shtml.

[15] Law 2006-911, July 24, 2006, on Immigration and Integration, J.O., July 25, 2006, at 11047 (official source).

The Skills and Talents Card and the Priority Solidarity Zone

Specific provisions concerning the skills and talents card impact immigrants who are nationals of member countries of a priority solidarity zone.[16] The priority solidarity zone comprises countries for which the French government believes that development assistance may produce a significant effect and contribute to the sustainable development of the institutions, society, and the economy. Most of these countries are in Africa, and many of them are former French colonies.[17]

The card may only be granted to a national from a member country of the priority solidarity zone where such country has a co-development agreement with France or when the foreign national agrees to return to his country after a maximum period of six years spent in France.[18] Furthermore, such a card holder must, during the validity period of the card, participate in a cooperation or economic investment project defined between France and his country. Failure to respect this obligation will be considered when the card is up for renewal. [19]

Such restrictions do not exist for countries outside the priority solidarity zone, as the general rule provides that the card is granted for three years and is renewable. According to the government, the new immigration policy must not result in a brain drain from these selected countries. As stated by President Sarkozy, then Minister of Interior:[20]

> Those whom we will welcome will have to give back to their county of origin, in some form or other, the benefits of the training and professional experience they will gain in France. We will take into account the needs of the country of origin when delivering residency permits. This a major difference from the policies of some of our partners and I wish that France will take this debate to European and international bodies. The development of poor countries must remain a major objective.

The Integration Contract

France has promoted a model of integration where immigrants are expected to adhere to France's traditional republican values. Another major reform brought by the 2006 Law on immigration is the generalization of a reception and integration contract. This contract is entered into between the state and the immigrant and has been mandatory since January 1, 2007. The state provides several services, including a language assessment, an interview with a social worker, language training adapted to the needs of the new immigrant, a civic training day presenting fundamental rights and the major principles and values of the French Republic, information on access to employment and professional training, a day of information on life in France and monitoring and assessment of experiences, and information on

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[16] Code de l'entré et du séjour des étrangers, art. L.315-1, LEGIFRANCE, http://www.legifrance.gouv.fr/ (Les Codes) (unofficial source, French government legal Web site, last visited Apr. 2, 2008).

[17] The priority solidarity zone includes the following countries: Near East - Lebanon, Palestinian Territories ,and Yemen; North Africa - Algeria, Morocco, Tunisia; Sub-Saharan Africa and the Indian Ocean - Angola, Benin, Burkina-Faso, Burundi, Cameroon, Cape Verde, Central African Republic, Chad, Comoros, Congo, Cote d'Ivoire, Democratic Republic of the Congo, Djibouti, Eritrea, Ethiopia, Gabon, Ghana, Gambia, Guinea, Guinea-Bissau, Equatorial Guinea, Kenya, Liberia, Madagascar, Mali, Mauritania, Mozambique, Namibia, Niger, Nigeria, Uganda, Rwanda, Sao-tome and Principe, Senegal, Sierra-Leone, South Africa, Sudan, Togo, and Zimbabwe.

[18] Code de l'entré et du séjour des étrangers, art. L.315-2, LEGIFRANCE, http://www.legifrance.gouv.fr/ (Les Codes) (unofficial source, French government legal Web site, last visited Apr. 2, 2008).

[19] *Id.*, art. L.315-6.

[20] Press Release, Interior Minister Nicolas Sarkozy, New Year's Greetings (Jan. 12, 2006), *available at* http://www.u-m-p.org/site/index.php/ump/s_informer/discours/voeux_a_la_presse_de_nicolas_sarkozy_12_janvier_2006. Translated by the author of this report.

problems encountered (training, housing, schools, health). In return, the new immigrant agrees to attend a civic training day, prescribed language courses, and any interviews scheduled for the monitoring of the contract.[21]

Recent statistics show that 95,554 integration contracts were signed in 2006. A review of the nationalities of the signatories shows that forty-two percent were originally from the Maghreb countries (Algeria, Morocco, and Tunisia). Fewer came from sub-Saharan Africa; they came from Congo (4%), Cameroun (3%), Ivory Coast (3%), Senegal (2%), and Mali (2%).[22]

Public authorities have paid particular attention to the situation of female immigrants. The integration contract and any nationality documents are handed to each woman personally. Courses on equality between men and women are conducted at reception centers and in schools. Seminars have been organized in Morocco and Algeria by the *Haute authority de lutte contre les discriminations et pour l'égalité* (High Authority Against Discrimination and for Equality) on women's civil rights and their place in the society. [23]

This Authority was created in March 2005;[24] it fights any form of discrimination including those regarding sex, ethnic origin, sexual orientation, religion, age, or handicap. It is tasked with receiving and providing advice to victims of discrimination and promoting equality by organizing awareness campaigns and training programs. It also will investigate, mediate, and make recommendations in relation to claims by alleged victims of discrimination.

Law 2007-1631 on Controlling Immigration and on Integration and Asylum

The 2007 Law further tightens the requirements for family reunification. Applicants older than sixteen years of age who seek to join family members are required to take a test in their country of origin to demonstrate a good knowledge of the French language and the values of the French Republic. If needed, the applicant may be asked to attend language courses before obtaining a long-term visa.[25] Applicants also have to prove that their family could support them and that the family income providers earn at least the minimum wage.[26] The integration contract now requires parents to attend training on the rights and duties of parents in France and to agree to send their children to school.[27]

The law also provides recourse to DNA testing to fight fraud in family reunion cases. When the applicant does not have a birth certificate or has been notified by the French consular officer that there is serious doubt regarding the authenticity of the document presented, he or she may ask for DNA testing. The DNA test is limited to showing the relationship with the mother, to avoid potentially embarrassing revelations about paternity. The consular officer transfers the DNA request to the competent court to rule

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[21] Agence Nationale de l'Acceuil des Etrangers et des Migrations, *Contrat d'accueil et d'intégration*, http://www.anaem.fr/contrat_d_accueil_et_d_integration_47/presentation_et_formations_21.html (last visited Apr. 2, 2008).

[22] Haut Conseil à l'Intégration, *Rapport Statistique 2006 de l'Observatoire Statistique de l'Immigration et de l'Intégration*, Feb. 2008, *available at* http://www.hci.gouv.fr/article.php3?id_article=113.

[23] Haut Conseil à l'Intégration, *Analyse comparative de différents modèles d'intégration en Europe*, http://www.hci.gouv.fr/article.php3?id_article=100 (last visited Apr. 2, 2008).

[24] Law 2004-1486, Dec. 30, 2004, on Creating the High Authority against Discrimination and for Equality, J.O., Dec. 31, 2004, at. 22567 (official source).

[25] Code de l'entré et du séjour des étrangers, art. L.411-8, LEGIFRANCE, http://www.legifrance.gouv.fr/ (Les Codes) (unofficial source, French government legal Web site, last visited Apr. 2, 2008).

[26] *Id.*, art. 411-5.

[27] *Id.*, art. L. 311-9-1.

on its necessity. The French government is to pay for the test. Recourse to DNA testing is subject to a trial period until December 31, 2009. Parliament then will reexamine the provision.[28]

III. Anti-Discrimination Legislation

France has fairly comprehensive anti-discrimination legislation. The principle of non-discrimination is contained in the Preamble to the 1946 Constitution that prohibits discrimination with regard to the criteria of sex, race, belief, and trade union activity. This preamble has been incorporated into the current Constitution of 1958. This Constitution also contains a provision stating that "the nation ensures equality before the law of all citizens, whatever their ethnic origin, race, or religion."[29]

Provisions concerning discrimination also can be found in both the Penal Code and the Labor Code. The Penal Code contains several provisions punishing acts of discrimination carried out against persons based upon their national origin, sex, family situation, state of health, handicap, genetic characteristics, morals, political opinions, trade union activities, or whether or not they belong (actually or supposedly) to a well-specified ethnic group, nation, race, or religion.[30]

The relevant section of the Labor Code reads: [31]

> No person can be excluded from a recruitment process or from access to a training course or a period of training in a company; sanctioned or dismissed; or be the subject of a discriminatory, direct or indirect measure, in particular as regard to remuneration, profit sharing or distribution of actions, training, reclassification, assignment, qualification, classification, professional promotion, transfer from one workplace to another or renewal of a contract due to their origin; sex; lifestyle; sexual orientation; age; family situation; pregnancy; membership or non-membership, whether genuine or assumed, in an ethnic group, nation, or race; political beliefs; trade union activities; religious beliefs; physical appearance; surname [last name]; or state of health or disability.

The provision concerning the burden of proof in discrimination cases was modified in 2001. It is no longer only the employee's responsibility. The burden of proof now falls equally upon the employer.[32] The right to bring a discriminatory action to court has been extended to trade unions, provided that they have representative status either nationally or in the relevant workplace.[33]

In 2006, the practice of discrimination testing as a form of evidence was allowed to show discrimination in the following areas: supply of goods or services, obstructing the normal exercise of any given economic activity, and employment.[34] In addition, the anonymous resume was introduced in companies of fifty employees or more.[35]

In matters of housing, the right to decent housing was elevated to a constitutional right by the Constitutional Council in 1995.[36] In addition, Law 2002-73 of January 17, 2002, on Social

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[28] *Id.*, art. L. 111-6.

[29] Constitution, 1959, LEGIFRANCE, http://www.legifrance.gouv.fr/ (La Constitution) (unofficial source, French government legal Web site, last visited Apr. 2, 2008).

[30] CODE PENAL (C. PEN.), arts. 225-1 to 225-4 (Dalloz, 2008) (unofficial source but used by French attorneys and judges).

[31] CODE DU TRAVAIL (C. TRAV.), art. L.122-45 (Dalloz, 2007) (unofficial source but used by French attorneys and judges). Translated by the author of this report.

[32] *Id.*

[33] *Id.*, art. 122-45-1.

[34] C. PÉN., art. 225-3-1.

[35] C. TRAV., art. L. 121-6-1.

[36] Conseeil Constitutionel, Decision no. 94-359DC, Jan. 19, 1995, J.O., Jan. 21, 1995, at 1166 (official source).

Modernization clearly prohibits housing discrimination.[37] In regard to health care, all legal residents of France are covered by public health insurance (*Assurance maladie*) as a branch of the social security system. Workers and their families are affiliated with public health insurance funds determined by their social and/or professional category, while the neediest members of society are covered under Law 1999-641 of July 27, 1999, on Universal Health Insurance. The universal health coverage provides basic services to all those residing lawfully in France, irrespective of their employment situation or insurance contribution record.[38]

Despite all this legislation, a report published by the Labor Ministry in 2005[39] shows that:

> discrimination against immigrants from the Maghreb countries or blacks, to name them, whether they are French citizens or not, is in the employment domain largely practiced and with impunity. The ethnic origin revealed by the face, name, or address is a specific handicap that is particularly disabling and this is so whatever the level of education or qualification of the candidate.[40]

In relation to housing, unequal access to subsidized housing, concentrations in the peripheries of large towns, and poor housing conditions continue to affect immigrants.[41]

The High Authority against Discrimination and for Equality tested access to housing in three regions of France. Three applicant profiles, North African origin, sub-Saharan African origin, and single parent were compared with a benchmark applicant. All applicants were employed, had the same level of resources, and were French nationals. The results showed that on the initial phone call, the benchmark applicant and the single parent were invited to visit the apartment in thirty-five percent of the cases, compared with twenty percent for the applicant of North African origin, and fourteen percent for the applicant of sub-Saharan African origin. After visiting the apartment, it was rented in seventy-five percent of cases to the benchmark applicants, twenty-six percent to the single parents, twenty-two percent to the sub-Saharan African origin applicants, and seventeen percent to the North African applicants.[42]

Finally, another study published in 2007 by the International Labor Office shows that when employers had to choose between a non-minority candidate and a black candidate of African origin, four times out of five, they chose the non-minority candidate.[43]

IV. Hate Crime Legislation

The 1881 Law on the Freedom of the Press, as amended in 1992,[44] which governs all offenses committed through the press or any other medium of publication, punishes any direct incitement to voluntary manslaughter, violence against the person, sexual offenses, terrorist acts, discrimination and hatred, or violence against persons based on racial, religious, ethnic, or national origin, even in cases

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[37] Law 2002-73, Jan. 17, 2002 on Social Modernization, J.O., Jan. 18, 2002, at 1008, art. 158 (official source).

[38] Law 99-641, July 27, 1999, J.O., July 28, 1999, at 11229 (official source).

[39] Ministère de l'Emploi de la Cohésion Sociale et du Logement, *Roger Fauroux: la lutte contre les discrimination éthniques dans le domaine de l'emploi*, July 2005, *available at* http://www.ladocumentationfrancaise.fr/rapports-publics/054000466/index.shtml.

[40] *Id.*, at 1. Translated by the author of this report.

[41] Cour des Comptes, *supra* note 7, at 206.

[42] Haute Autorité de Lutte contre les Discriminations et pour l'Egalité, *Rapport annuel 2006*, http://www.halde.fr/rapport-annuel/2006/ (last visited Apr. 2, 2008).

[43] Bureau International du Travail, *Les discriminations a raison de l'origine dans les embauches en France* [Discrimination in Employment on Grounds of Foreign Origin in France], http://www.ilo.org/public/french/bureau/inf/download/discrim_france.pdf (last visited Apr. 2, 2008).

[44] Law of July 29, 1881 on the Freedom of the Press, C. PÉN., App., at 2191.

where such incitement is not acted upon. It also prohibits the defense of war crimes, crimes against humanity, and terrorist acts. Offenses are punishable by five years of imprisonment and a fine of €45,000 (about US$70,800). When an incitement to commit one of the offenses listed above is acted upon, the 1881 Law provides that the instigators shall be charged as accomplices.[45] In addition, the amended Law prohibits the denial of one or several crimes against humanity.[46]

The Penal Code provides that the violation or profanation, by whatever means, of tombs, sepulchers, or monuments erected to the memory of the dead, where committed by reason of the deceased person's belonging or not belonging (true or supposed) to a well-specified ethnic group, nation, race, or religion, is punishable by a three-year imprisonment term and a €45,000 fine. If it is accompanied by an infringement of the integrity of the corpse, the penalty is increased to five years of imprisonment and a €75,000 fine.[47] In one recent incident, 136 tombs of Muslims were desecrated under particularly sordid conditions. The President sent the Deputy Secretary for Defense and Veterans to the cemetery and has asked to be kept informed about the judicial investigation that was initiated.[48]

Finally, following a sharp rise in the number of anti-Semitic acts from late 2000 through 2002, Parliament passed Law 2003-88 of February 3, 2003, on Increasing the Penalties for Certain Offenses with Racist, Anti-Semitic, or Xenophobic Characteristics.[49] The Law adds an article to the Penal Code under the section defining "circumstances bringing about the aggravation of penalties."[50] It provides as follows:

> Penalties incurred for a *crime* or a *délit* are increased when the perpetrator of the offense bases his motive on the real or erroneous supposition that the victim belongs or does not belong to a specific ethnicity, nation, race, or religion.
>
> The aggravating circumstance defined above is constituted when the commission of the offense is preceded, accompanied, or followed by remarks, writings, images, objects, or acts of any nature defaming the honor or the regard for the victim or for a group that the victim belongs to, by reason of their belonging or not belonging to a specific ethnic group, nation, race, or religion, whether this membership is real or supposed.

The maximum prison terms for the offenses specified in the Law are increased as follows:

- murder: from thirty years to life imprisonment;[51]
- torture and barbarous acts: from fifteen years to twenty years;[52]
- violence unintentionally causing death: from fifteen years to twenty years; [53]
- violence resulting in mutilation or permanent infirmity: from ten to fifteen years; [54]

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[45] *Id.*, arts. 23 & 24.

[46] *Id.*, art. 24 *bis*.

[47] C. PÉN, arts. 225-17 & 225-18.

[48] Press Release, President de la Republique (Apr. 6, 2008), *available at* http://www.elysee.fr/documents/index.php?mode=list&cat_id=5&lang=fr&page=2.

[49] Law 2003-88 of Feb. 3, 2003, J.O., Feb. 4, 2003, at. 2104 (official source).

[50] C. PÉN, art. 132-76. Translated by the author of this report.

[51] *Id.*, art. 221-4

[52] *Id.*, art. 222-3.

[53] *Id.*, art. 222-8.

[54] *Id.*, art. 222-10

- violence resulting in a total incapacity to work for more than eight days: from three years to five years (violence resulting in an incapacity to work for less than or equal to eight days or not resulting in incapacity to work will be punished by three years' imprisonment).[55]

Prepared by Nicole Atwill
Senior Foreign Law Specialist
April 2008

[55] *Id.*, art. 222-12.

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IMMIGRATION AND DISCRIMINATION LAWS

THE NETHERLANDS

Executive Summary

Both Dutch criminal law and a prosecution directive can be considered consistent with a serious endeavor to combat discrimination on racial grounds. Dutch legislation also allows for affirmative action to remedy the situation of underprivileged groups as defined by characteristics like race. However, the Dutch government has been judged to discriminate against black youngsters originating from the Dutch Antilles, viewing them as potentially criminal; they could be identified by the proposed Reference Index Antilleans.

I. Introduction

Article 1 of the Dutch Constitution[1] contains the principle of equal treatment and non-discrimination; it reads: "All persons in the Netherlands shall be treated equally in equal circumstances. Discrimination on the grounds of religion, belief, political opinion, race, or sex or on any other grounds whatsoever shall not be permitted."[2] Symbolically, the fact that the commitment to equality is written down in the basic law of the Netherlands marks an attachment to the fight against discrimination.

The first article of the Dutch Constitution contains both the principle of equality and the ban on discrimination. It stipulates that all individuals living in the Netherlands are to be treated equally under equivalent circumstances, thus discrimination, including racial discrimination, is not permitted. The article provides the citizen with protection in his or her relationship with the government, but it cannot be directly invoked in the horizontal relationships between citizens themselves. This legal relationship is provided for in the Equal Treatment Act (Algemene Wet Gelijke Behandeling),[3] detailing the first article of the Dutch Constitution.

The Equal Treatment Act forbids discrimination in labor relationships, the professions, and the provision of goods and services. The concept of labor relationships is broad and includes volunteers, interns, and flexi-workers. The labor process covered by this protection begins with recruitment and selection; continues to remuneration, treatment, and promotion; and ends in termination. The offering of goods and services includes health care, housing, education, and advice on school and career choices. Discrimination in the above-mentioned areas is forbidden under article 1 of the Act, if based on religion, belief, political conviction, race, sex, nationality, hetero- or homosexual orientation, or civil status. Under legal precedent, race should be understood to include skin color, descent, or national or ethnic origin.[4] Article 2, paragraph 3 of the Equal Treatment Act[5] contains the following exception:

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[1] Feb. 2, 1983, Stb [Bulletin of Acts and Decrees] at 70.

[2] Mar. 2, 1994, Stb. at 230. European Commission against Racism and Intolerance, THIRD REPORT ON THE NETHERLANDS 45 (Strasbourg: ECRI, Feb. 12, 2008), *available at* http://www.coe.int/t/e/human_rights/ecri/1-ecri/2-country-by-country_approach/netherlands/Netherlandspercent20thirdpercent20reportpercent 20-percent20cri08-3.pdf (last visited Apr. 2, 2008)

[3] ANALYTICAL REPORT ON LEGISLATION. RAXEN NATIONAL FOCAL POINT NETHERLANDS, 2004 20 (Vienna: EUMC), http://fra.europa.eu/fra/material/pub/RAXEN/4/leg/R4-LEG-NL.pdf (last visited Apr. 2, 2008).

[4] *Id.*, at 20. The term "race" is defined by precedent of the Supreme Court of the Netherlands [HR], 15.06.1976, NJ 1976, 551 (ann. Th.W.v.V.).

[5] Feb. 21, 2004, Stb. at 119.

> The prohibition on discrimination contained in this Act does not apply if the aim of the discriminatory measure is to place women or persons belonging to a particular ethnic or cultural minority group in a privileged position in order to eliminate or reduce existing inequalities connected with race or sex and the discrimination is in reasonable proportion to that aim.[6]

According to this exception to the prohibition on discrimination, affirmative action, or positive discrimination as it is also called, is only allowed for women and minorities if under-representation can be established.

One scholar describes and compares the development of positive discrimination in the United States and the Netherlands. First, he defines the concept of discrimination in the framework of "distributive justice" and, using the criterion race as the paradigm example, distinguishes two kinds of negative and positive discrimination: direct and indirect. Secondly, describing the development of positive discrimination in the United States and the Netherlands, he points out some important differences. In contrast to the United States, in the Netherlands policies have focused on the mode of indirect positive discrimination within the framework of the Dutch welfare state, and the standard justification for positive discrimination has been social backwardness instead of the elimination of the effects of past discrimination. Moreover, positive discrimination in the Netherlands has been implemented through political and bureaucratic mechanisms, rather than through the intervention of the courts. Finally, positive discrimination has not evoked so much public controversy in the Netherlands as in the United States.[7]

II. Criminal Provisions

One key issue is the definition of the concept of "discriminatory crime," often referred to as hate crime. The latter term was coined in the United States, but is increasingly used in European countries, including the Netherlands. The concept of "hate crime," however, differs from what the Dutch understand by "discriminatory crime." In the United States, criminalization of specific discrimination as occurs in the articles 137c ff of the Dutch Criminal Code is impossible, due to the overriding values of free speech embodied in the U.S. Constitution.[8]

In fulfillment of their obligations under the International Convention on the Elimination of all Forms of Racial Discrimination and the first article of the Dutch Constitution, the Netherlands has introduced the following anti-discrimination provisions in the Criminal Code:[9]

> *Article 137 c (racist insults)*
> 1. Any person who verbally or by means of written or pictorial material gives intentional public expression to views insulting to a group of persons on account of their race, religion or convictions, their heterosexual or homosexual preferences or a physical, visual or mental handicap, shall be liable to a term of imprisonment not exceeding one year or to a third-category fine.
> [2. …]

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[6] Translation *available at* the Web site of the Dutch Equal Treatment Commission, an independent organization that was established in 1994 to promote and monitor compliance with this legislation, http://www.cgb.nl/cgb170.php (last visited Apr. 2, 2008).

[7] B. Sloot, PhD thesis published in 1986, quoted in POLICYMAKING RELATED TO IMMIGRATION AND INTEGRATION. A REVIEW OF THE LITERATURE OF THE DUTCH CASE 16-17 (IMISCOE), http://www.imiscoe.org/publications/workingpapers/documents/country_report_netherlands.pdf (last visited Apr. 2, 2008).

[8] CHRISJE BRANTS et. al., *Summary*, STRAFBARE DISCRIMINATIE [Punishable Discrimination] 246 (BOOM JURIDISCHE UITGEVERS, 2007), *available at* http://www.wodc.nl/images/1472_percent20summary_tcm44-87314.pdf.

[9] Wetboek van Strafrecht, Dutch abbreviation "Sr."; arts. 137c, 137d, 137e, 137f, 137g &429quater Sr., Mar. 10, 2005, Stb. at 111; art. 137g Sr.,, Nov. 20, 2003, Stb. at 480.

Article 137d (incitement to racial discrimination)
1. Any person who verbally or by means of written or pictorial material publicly incites hatred against or discriminating of other persons or violence against the person or the property of others on account of their race, religion, convictions, sex, heterosexual or homosexual preference or a physical, visual or mental handicap, shall be liable to a term of imprisonment not exceeding one year or to a third-category fine.
[2. …]

Article 137e (dissemination of racist material)
1. Any person who for reasons other than the provision of factual information:
(a) makes public an utterance which he knows or can reasonably be expected to know is insulting to a group of persons on account of their race, religion, convictions, heterosexual or homosexual preference or a physical, visual or mental handicap, or which incites hatred against or discrimination of other persons or violence against the person or property of others on account of their race, religion or convictions, sex, heterosexual or homosexual preference or a physical, visual or mental handicap.
(b) […]
shall be liable to a term of imprisonment not exceeding six months or a third-category fine.
[2. …]
[3. …]

Article 137f (participation in racist activities)
Any person who participates in, or provides financial or other material support for, activities aimed at discrimination against persons on account of their race, religion, convictions, sex or their heterosexual or homosexual preference or a physical, visual or mental handicap, shall be liable to a term of imprisonment not exceeding three months or to a second-category fine.

Article 137g (intentional racial discrimination in office, profession or business)
1. Any person who in the exercise of his office, profession or business, intentionally discriminates against persons on account of their race shall be liable to a term of imprisonment not exceeding six months or a third-category fine.
[2. …]

Article 429quater (non-intentional racial discrimination in office, profession or business)
1. Any person who in the exercise of his office, profession or business discriminates against persons on account of their race, religion, convictions, sex or heterosexual or homosexual preference shall be liable to a term of detention not exceeding two months or a third-category fine.
[2. …][10]

According to article 23, paragraph 4 of the Criminal Code, a third-category fine is at a maximum €7400 (about US$11,600); the second-category fine mentioned in article 137f is a maximum of €3700 (about US$5,800). In this context, it is worth noting that the Ministry of Justice, more specifically the Board of Procurators General (heads of the Prosecution Service), has issued a Discrimination Directive, dated October 29, 2007.[11] These instructions on article 137c through article 137g and on article 429quater of the Criminal Code require prosecution of discrimination as a matter of principle and permit divergence from prosecution only in very minor or exceptional cases. In spite of all this, relatively few cases based upon these articles have been brought to a judge. For example, the District Court of Zwolle[12] held expressions like "Go home to your own country, dirty Portuguese" and "Dirty black bastard" to be a form of discrimination on account of race in the sense of article 137c of the Code.

[10] Translation based on the Web site of the Council of Europe, http://www.coe.int/t/e/human_rights/ecri/1-ecri/3-general_themes/3-legal_research/1-national_legal_measures/netherlands/Netherlandspercent20SR.asp#TopOfPage (last visited Apr. 2, 2008).

[11] STAATSCOURANT [Netherlands Government Gazette], Nov. 30, 2007, no. 233, at 10.

[12] Rechtbank Zwolle, Case-no. 07/400643-05, Jan. 3, 2006, *available at* http://www.rechtspraak.nl.

National data for the years 2000-2005 may illustrate the extent of criminal law enforcement: in the period between 2000 and 2005, the Public Prosecution Service issued 803 summonses – on average fifty-eight percent of the 1453 specific discrimination offences that came to the attention of the prosecutors. The prosecution was dropped in about twenty percent of cases, and sixteen percent were settled out of court by means of a prosecutor's fine (so-called "transaction"). Overall, the number of transactions rose considerably (though inconsistently) over the years, from nine percent in 2000 to fifteen percent in 2005. The reverse is true for the number of prosecutions, which dropped (in a great majority of cases for lack of proof) thirty percent in 2000 and twenty percent in 2005. Each year, the courts convicted in between 93 and 118 cases of specific discrimination, with on average about nine percent overall acquittals. Community service orders seem to be gaining in popularity as punishment, instead of fines and custodial sentences.[13]

III. Reference Index Antilleans

According to the European Commission against Racism and Intolerance: [14]

> Approximately 100,000 Dutch citizens from the Caribbean part of the Kingdom of the Netherlands (i.e. the Netherlands Antilles and Aruba) live in the Netherlands, the European part of the Kingdom. … The Dutch authorities have reported that many Antilleans who live in the Netherlands experience various inter-connected problems, including low levels of education, high levels of unemployment, broken families, teenage pregnancy, and involvement in criminal activities. … The Dutch authorities have also stressed that many young Antilleans do not register their residence in the Netherlands and frequently change the place where they stay. This, the Dutch authorities explain, renders the adoption of measures targeted at individual members of this community who are at risk and in need of support more difficult. The Dutch authorities have stressed that it is in order to address this situation that they have proposed, with the special authorization of the Dutch Data Protection Authority, a temporary reference system exclusively for Antilleans (Reference Index Antilleans, Verwijsindex Antillianen, VIA), which enables the educational, care, and support services; the courts; and the police to reach Antillean youths at risk more effectively and provide them with targeted support. A number of civil society organizations claim that the VIA discriminates directly on the basis of race and ethnic origin. …

The Dutch authorities underline that the VIA is a temporary measure that addresses a specific situation within a particular group through an effective and personalized approach. According to the government of the Netherlands, the VIA has not yet been implemented as the government is awaiting a Council of State (Raad van State) decision on the VIA's compatibility with privacy legislation.[15]

Irrespective of the situation that the VIA is designed to address, the establishment of a registration system with clear links to the criminal justice system that is based on race and ethnic origin and limited to one specific group can hardly comply, in the opinion of the European Commission against Racism and Intolerance, with the prohibition of racial discrimination.[16] In addition, the organization Open Society Justice Initiative[17] states that it is undisputed that the starting point for registration in the Reference Index of Antilleans is the requirement that an individual be an under-twenty-five youth of Antillean origin. Accordingly, actions taken by participating agencies in reliance on the Reference Index would also be linked to the included individuals' race and ethnicity. This inevitably constitutes differential treatment of

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[13] Chrisje Brants et. al., *supra* note 6, at 247.

[14] ECRI, *supra* note 2, at 24-25.

[15] *Id.*, at 48.

[16] ECRI, *supra* note 2, at 25.

[17] Open Society Justice Initiative, LEGAL OPINION IN THE CASE OF REFERENCE INDEX OF ANTILLEANS 'VERWIJSINDEX ANTILLEANEN' 12-13 (Washington DC, Mar. 2008), *available at* http://www.yudikorsou.com/download/OSJIpercent20VIApercent20Legalpercent20Opinion.pdf.

Antilleans based upon their race. The difference in treatment lies in the fact that the native Dutch population and other racial/ethnic groups in the Netherlands are not subject to comparable scrutiny. The Reference Index of Antilleans is intended to monitor and address crime and social disadvantage, problems that not surprisingly pertain to many segments of Dutch society across racial and ethnic categories. Yet individuals of Netherlands Antillean origin are the only ones that would be subjected to database registration as "at-risk" youths and to subsequent State intervention in the form of intensified monitoring.

IV. Blacks in the Netherlands

In assessing the impact of post-colonial immigration on Dutch society, it is important to keep in mind that the Dutch did not regard their country as a destination for immigration. On the contrary, the government considered the Netherlands to be overpopulated and actively promoted emigration, for instance, to Canada. Up until 1983, the Dutch government explicitly denied that there were immigrants in the Netherlands. The Dutch reluctance to admit that the Netherlands was (and is) a country of immigration has led to all kinds of symbolic measures, for instance the avoidance of the word "immigrant" in describing migrants to the Netherlands. Immigrants from former colonies were, certainly in the first period after World War II, given other names (for example repatriates), but they do nevertheless form part of the immigration history of the Netherlands.[18]

Dutch immigration law is based on the Aliens Act,[19] which has been changed several times. The Act defines the right of admission to the Netherlands and the different types of permits and procedures for decision making. It, however, is not the only source of immigration law in the Netherlands. A lot of important rules are laid down in secondary legislation, based on the Aliens Act. It is to be assumed that Dutch immigration law dealing with the conditions upon which entry is allowed and the criteria upon which permits can be revoked, is not discriminatory on account of race.

Antillean Immigration: A Recent Problem

To a great extent, Antillean society reflects its colonial history. The population largely consists of the descendents of white Protestant and Jewish colonial elites, the black lower classes who are descendants of African slaves, and a middle class of colored people of mixed ancestry.[20]

From the 1960s on, more and more black, lower-class Antilleans, many of them poorly educated and unskilled, opted for migration to the Netherlands. This group of young, unemployed male Antilleans has a particularly negative public image in the Netherlands. Whereas the Antillean elite and middle-class immigrants are hardly recognized as immigrants by the general public, the young, lower-class, black males are the center of attention and hold the political spotlight.[21]

Comparison: Diversity in Experiences

The most obvious fact about the migration flows from the former colonies is that they have so little in common, except that they are genetically linked to the colonial past. They differ in volume, composition of the immigrant population, span of the migration period, expectations towards the host society among the immigrants, and acceptance and support from Dutch society for the newcomers.

Two flows of immigrants from Indonesia spanned a short period of time, making it relatively easy to summarize the outcome of those flows. The course of the integration process of immigrants is always

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[18] van Amersfoort, Hans & Mies van Niekerk, *Immigration as a Colonial Inheritance: Post-Colonial Immigrants in the Netherlands, 1945-2002*, 32 JOURNAL OF ETHNIC AND MIGRATION STUDIES 323, 324 (2006).

[19] Vreemdelingenwet 23-11-2000, Stb. at 495.

[20] van Amersfoort, Hans & Mies van Niekerk, *supra* note 18, at 337.

[21] *Id.*, at 338, 340.

the outcome of interaction between two sets of factors, the characteristics of the migrants and the reaction of the receiving society. These factors in the case of the repatriates were quite different from the factors for immigrating Moluccan soldiers, who had been recruited in the Dutch East Indies to join the Royal Dutch Indian Army. The repatriates were a substantial group of about 300,000, including about 180,000 Eurasians, who had little experience and few contacts to help them through the first period of settlement and adaptation. On the other hand, they considered themselves Dutch and were determined to ensure for themselves, and certainly for their children, a place in Dutch society. The government embarked, after a period of hesitation, on a policy of straightforward integration of these "fellow-citizens." In an amazingly short period, this integration indeed took place, stimulated in part by favorable economic development at the time. After 1955, recovery from the war gained momentum and the labor market was able to absorb practically anybody willing to take a job. However, the same favorable economic context did not help the integration of the small group of Moluccans. Here both the characteristics of the immigrants and the reaction of the receiving society were impediments to integration. Only after a period of violent conflict did a process of integration get slowly underway.[22]

The two flows from the Caribbean have a different character. They developed over a long period and had different characteristics at the various stages of their development. Even disregarding the very early migration of slaves and concubines, the migration of middle-class people had already started by the middle of the nineteenth century. This migration only became important quantitatively after 1954, when the Surinamese and Antilleans became Dutch citizens. The integration of the Surinamese population as a whole is the most difficult to assess. It is a highly heterogeneous population, looking at such variables as duration of stay, class status, and ethnic identity. Migrants who came before the great exodus of the 1970s generally had more educational attainments and were better prepared for life in the Netherlands. This heterogeneity is still visible in the second generation. The older age-cohort of the second generation has a better socio-economic position than later age-cohorts, and this difference within the second generation reflects the parents' social class position. Whereas the "early" second generation consists of the children of the Surinamese who came to the Netherlands before the mass exodus, the "later" second generation includes children of those Surinamese parents who arrived in the 1970s. For immigrants who came in the rush to beat the date of Surinam's 1975 independence, rising unemployment following the oil crisis was also a negative factor in their integration. Participation in the labor market developed positively, however, when the boom of the 1990s improved the general employment situation in the Netherlands.

Unlike migration flows from the East Indies, the Caribbean migrations did not come to an abrupt end and continue today. Antillean migration to the Netherlands gained momentum later than the Surinamese. It became numerically important only when labor market conditions went into continuous recession due to rationalization in the oil industry. The lower classes of Curaçao in particular have not much to expect from a future on the island, and many try their luck in the Netherlands. At present, the integration of poorly-educated Antillean youngsters is the biggest problem facing the immigrant groups discussed in this paper.[23]

Prepared by Conrad van Laer
Contract Foreign Law Specialist
April 2008

[22] *Id.*, at 340.

[23] *Id.*, at 341.

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IMMIGRATION AND DISCRIMINATION LAWS

PORTUGAL

Executive Summary

Portugal is participating in a communication campaign being sponsored by the European Union to implement a better dialogue with different cultures, which has triggered many government initiatives affecting all races and cultures living in the country.

In 2007, a new immigration law was enacted establishing a new legal regime for entry, permanent stay, exit, and removal of foreigners and displaced persons. A resolution was also passed by the Portuguese government detailing a plan for the integration of immigrants.

I. Overview

Comprehensive research of legal, parliamentary, governmental, and other sources could not identify government initiatives, policies, or pieces of legislation specifically designed to have an impact or effect on black populations in Portugal. Accordingly, this report will cover relevant government initiatives and policies affecting all the different races and cultures living in Portugal; constitutional principles regarding discrimination, racism, and human rights; immigration law and integration policies; legislation regarding anti-discrimination, including provisions of the asylum and refugee law, as well as judicial cooperation in criminal matters involving discrimination; Portugal's adhesion to the International Convention on the Elimination of all Forms of Racial Discrimination; and hate crimes.

II. Government Initiatives

On December 4, 2007, the European Commission, the executive body of the European Union (EU), launched a communication campaign, The European Year for Intercultural Dialogue 2008 (The European Year 2008), with the purpose of promoting mutual understanding and better living practices among different cultures by exploring the benefits of cultural diversity, active civic participation in European Affairs, and fostering a sense of European belonging. The campaign is a joint initiative of the EU, its Member States, and European civil society.[1]

In Portugal, The European Year 2008 is being coordinated by the High Commission for Immigration and Intercultural Dialogue, and it will feature a small number of flagship projects on a European level, as well as European Union support for a national project in each Member State and a Partner program aimed at mobilizing civil society.[2]

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[1] Press Release, Unidos na Diversidade: Um Objetivo para os Povos da Europa (Dec. 4, 2007), *available at* the government Web site for the European Year for Intercultural Dialogue 2008 (*Ano Europeu do Diálogo Intercultural 2008*), http://www.aedi2008.pt/Files.aspx?tabId=28.

[2] Press Release, EYID 2008 Official Opening in Portugal (Feb. 25, 2008), *available at* the Web site of the High Commission for Immigration and Intercultural Dialogue (*Alto Commisariado para a Imigração e Minorias*

All Member States have been asked to prepare national strategies for The European Year 2008 outlining national priorities and setting out planned activities that involve civil society organizations and individual European citizens.[3]

Portuguese Strategy

Traditionally, Portugal has always been an emigration country. However, in the last few decades, Portugal also became a hosting country for immigrants. Today, 9% of Portugal's working population (4.2% of its total) is composed of different nationalities with a diverse number of cultural backgrounds.[4] This new scenario required changes in the way Portugal hosts its immigrants with the implementation of new supporting public policies, which also demanded the enactment of new laws.[5]

In 2004, as part of the projects of the High Commission for Immigration and Intercultural Dialogue to support immigrants, two National Immigrant Support Centers[6] were opened. The centers operate as one-stop shops for immigrants living in Portugal and bring several government and non-government offices together in the same space.[7] In these centers, an immigrant can find information and resolve problems in areas including health, education, employment, and social security.[8]

As part of its national priorities, Portugal plans to integrate already existing events and activities in the areas of cinema, theatre, music, sports, dance festivals, arts contests and prizes, and many others with the objectives of The European Year 2008.[9] The idea is to make the government act as a coordinator of the development of projects dealing with intercultural dialogue and to assist eventual partners in finding financial and logistic support to implement the activities.[10]

Portugal intends, *inter alia*, to promote a Conference on Intercultural Dialogue and publish its records; establish co-partnerships to publish and disseminate works that, within the framework of the departments of the Ministry of Culture, give visibility and significance to intercultural dialogue; help equip the educational teams of museums and other cultural institutions with materials giving visibility to intercultural dialogue; collaborate on the support of multilingual publications; and motivate the scientific community to approach the theme of intercultural dialogue in research projects, spreading knowledge on the subject.[11] Additionally,

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Étnicas), http://www.acidi.gov.pt/modules.php?name=News&file=article&sid=2207.

[3] National Strategies for The European Year of Intercultural Dialogue (EYID) 2008, *available at* http://www.interculturaldialogue2008.eu/478.0.html?&L=0&redirect_url=my-startpage-eyid.html.

[4] European Year of Intercultural Dialogue 2008, National Strategy, *available at* http://ec.europa.eu/culture/archive/dialogue/pdf_word/strategy_portugal.doc.

[5] *Id.*

[6] High Commission for Immigration and Intercultural Dialogue, http://www.acidi.gov.pt/modules.php?name=Content&pa=showpage&pid=977 (last visited Mar. 31, 20008).

[7] High Commission for Immigration and Intercultural Dialogue, http://www.acidi.gov.pt/modules.php?name=News&file=article&sid=2216 (last visited Mar. 31, 2008).

[8] *Id.*

[9] European Year of Intercultural Dialogue (2008), National Strategies, *available at* http://ec.europa.eu/culture/archive/dialogue/pdf_word/strategy_portugal.doc.

[10] *Id.*

[11] *Id.*

the Portuguese strategy also includes projects in the areas of education, European identity, and communications.[12]

III. Constitutional Principles

The Portuguese Constitution[13] determines that all citizens enjoy the rights and are subject to the duties established in it[14] and that all citizens have the same social dignity and are equal before the law.[15] Additionally, no one will be privileged or favored, discriminated against, or deprived of any right or exempted from any duty by reason of ancestry, sex, race, language, territory of origin, religion, political or ideological convictions, education, economic situation, social condition, or sexual orientation.[16]

Article 24 of the Constitution provides that human life is inviolable[17] and prohibits the application of the death penalty.[18] It also holds the moral and physical integrity of a person inviolable,[19] and no one may be subjected to torture or to cruel, degrading, or inhuman treatment or punishment.[20]

Under the Constitution, all persons are recognized as having the right to personal identity, personal development, civil capacity, citizenship, good name and reputation, image, free speech, the protection of the privacy of their personal family life, and legal protection against any form of discrimination.[21]

All workers, regardless of age, gender, race, nationality, place of origin, religion, or political or ideological convictions, have the right[22] to remuneration for their work, according to its quantity, nature, and quality, on the principle of equal pay for equal work, so as to guarantee to them a respectable livelihood.[23]

The Constitution does not allow the existence of armed, quasi-military, militarized, or paramilitary associations, other than those of the State or the Armed Forces, and also does not allow the existence of racist organizations or organizations that adopt fascist ideologies.[24]

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[12] *Id.*

[13] Constituição da República Portuguesa, de acordo com a Lei Constitucional No. 1/2005, de 12 de Agosto (Lisboa: Quid Juris, 2006).

[14] *Id.*, art. 12(1).

[15] *Id.*, art. 13(1).

[16] *Id.*, art. 13(2).

[17] *Id.*, art. 24(1).

[18] *Id.*, art. 24(2).

[19] *Id.*, art. 25(1).

[20] *Id.*, art. 25(2).

[21] *Id.*, art. 26(1).

[22] *Id.*, art. 59(1).

[23] *Id.*, art. 59(1)(a).

[24] *Id.*, art. 46(4).

IV. Immigration and Integration

Immigration Law

On May 10, 2007, the Portuguese Parliament passed a new Immigration Law (Lei No. 23/2007, de 4 de Julho) that, according to a Press Release issued on May 11, 2007, by the Ministry of Internal Administration (*Ministério da Administração Interna*),[25] will allow for a more balanced and realistic regulation of immigration. The release states that the new law will benefit legal immigration, oppose illegal immigration, reduce bureaucracy, make use of new technologies to expedite procedures, and create innovative solutions.

The new law establishes a legal regime for the entry, permanent stay, exit, and removal from the Portuguese territory of foreigners and stateless persons (*apátridas*) not covered by special legislation dealing with nationals of the European Union, refugees, asylees, or Portuguese family members living abroad.[26] It does not, however, focus on or benefit any specific race or ethnic group. It only makes reference to immigrants in general. For example, an immigrant that plans to invest in Portugal can obtain a resident visa if an investment has been made in the country[27] or if he can show evidence of enough funds available in Portugal, including those obtained from Portuguese financial institutions, and can demonstrate, by any means, his intention to invest in Portuguese territory.[28]

It also integrates many communitarian directives (*directivas comunitárias*) issued in the last few years by the European Commission concerning immigration;[29] changes the rules regarding refusal of admission and admission of resident aliens;[30] substitutes for work visas, student visas, permanency extensions, and temporary visas a newly created type of visa called a residency authorization;[31] re-establishes the family reunion regime that was in force until 2003 that allowed the reunion of family members with no restrictions to their legal permanency;[32] allows for the reunion of partners in fact;[33] treats requests for family reunion as a whole; and applies granted concessions to all family members living abroad.[34]

The law creates a long-term resident statute applicable to all legal immigrants that live for five years in the country, which grants them the right to circulate and live anywhere in European territory.[35] It enlarges the regime of concession of permanent residency without the need of a visa to include children born in Portugal that have stayed in the country illegally and are attending

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[25] Press Release, Ministério da Administração Interna, Aprovação da Nova Lei de Imigração (May 11, 2007), *available at* http://www.portugal.gov.pt/Portal/PT/Governos/Governos_Constitucionais/GC17/Ministerios/MAI/Comunicacao/Outros_Documentos/20070511_MAI_Doc_Lei_Imigracao.htm.

[26] *Id.*

[27] Lei No. 23/2007, de 4 de Julho, art. 60(2)(a), DIÁRIO DA REPÚBLICA, 1ª Série, No. 127, July 4, 2007, at 4301.

[28] *Id.*, art. 60(2)(b).

[29] Press Release, Ministério da Administração Interna, Aprovação da Nova Lei de Imigração (May 11, 2007,) *available at* http://www.portugal.gov.pt/Portal/PT/Governos/Governos_Constitucionais/GC17/Ministerios/MAI/Comunicacao/Outros_Documentos/20070511_MAI_Doc_Lei_Imigracao.htm.

[30] *Id.*

[31] *Id.*

[32] *Id.*

[33] *Id.*

[34] *Id.*

[35] *Id.*

school, as well as to the grandparents of these children that have guardianship powers over them;[36] to aliens that are the children of legal immigrants that have reached the age of majority (*maioridade*) and have been living in the country since they were ten years old;[37] to aliens who have lost their Portuguese citizenship and have lived in the country illegally for the past fifteen years;[38] to victims of trafficking in persons;[39] to illegal immigrants that are victims of serious labor exploitation confirmed by the General Labor Inspection Office (*Inspecção Geral do Trabalho*) and that cooperate with the authorities;[40] and to scientists and highly qualified professionals who have been temporarily admitted and decide to continue their activities in Portugal.[41]

For extraordinary cases, the law expands the grounds for the exceptional concession of residency authorization for humanitarian reasons and for public interest due to the exercise of relevant activity in the fields of science, culture, sports, economics, or social activities.[42]

In the area of alien removal or expulsion, the new immigration law determines that all aliens that were born and live in Portugal, that have lived in the country since below the age of ten, or that have minor children with Portuguese or foreign citizenship under their custody cannot be removed or expelled.[43]

To fight illegal immigration, the law:

- punishes whoever assists illegal immigration in a manner that puts the life of the immigrant in danger with two to eight years in prison;[44]
- criminalizes arranged marriages for immigration purposes and punishes perpetrators with one to four years in prison;[45]
- increases the fines applied to employers who make use of illegal immigrants;[46] and
- grants residency authorization to the victims of trafficking in persons who cooperate with the legal authorities and are no longer considered illegal immigrants;[47]

Integration of Immigrants

On March 3, 2007, the Portuguese government approved a resolution[48] containing a plan

[36] *Id.*

[37] *Id.*

[38] *Id.*

[39] *Id.*

[40] *Id.*

[41] *Id.*

[42] *Id.*

[43] *Id.*

[44] *Id.*

[45] *Id.*

[46] *Id.*

[47] *Id.*

[48] A resolution is a regulation approved by the Council of Ministers. João Melo Franco, António Herlander Antunes Martins. eds., DICIONÁRIO DE CONCEITOS E PRINCÍPIOS JURÍDICOS: NA DOUTRINA E NA JURISPRUDÊNCIA 758 (Coimbra: Livraria Almedina, 1995).

especially developed to integrate immigrants.[49] According to the reasons provided within the resolution for the adoption of the integration plan, the migration phenomenon is seen as an important contribution to reversing the declining Portuguese demographic situation and a positive factor for the Portuguese economic growth, for the sustainability of the social security system, and for the country's cultural enrichment.[50] This new reality triggered government action to integrate these citizens, with a particular focus on the strengthening of social cohesion and better integration and management of cultural diversity.[51]

The plan calls for orchestrated action by different ministries, resulting in an ambitious political program to highly integrate immigrants into Portuguese society, either through new initiatives or by consolidating existing ones and simplifying bureaucratic procedures.[52]

The integration plan consists of 120 measures, which establish a body of principles organized to guide the integration.[53] The main features of the plan are the provision of good harbor to immigrants and the full and complete integration of immigrant communities into Portuguese society;[54] acknowledgment that harboring immigrants with hospitality and citizenship is one of the fundamental pillars of the immigration policy;[55] assertion of an intercultural principle, which guarantees social cohesion and acceptance of the specificity of different cultural and social communities, supported by mutual respect and obedience to the laws of the harboring country;[56] participation and co-responsibility in all sectors of the society, stimulating immigrants to take part in the immigration policies and not only benefit from them;[57] simultaneous and indivisible assertion of the rights and duties of the immigrants;[58] equal opportunities for all, with a reduction in the disadvantages of access to education, work, health, dwellings, and social rights; rejection of any discrimination by reason of ethnic origin, nationality, language, religion, or sex and opposition to any legal or administrative dysfunction;[59] and the right to live in a family, recognizing the structuring role it plays in the integration of immigrants into the harboring society.[60]

V. Anti-Discrimination Laws

The Portuguese Code of Publicity (*Código da Publicidade*)[61] forbids publicity that, by its form, objective, or purpose, offends values, principles, and fundamental institutions that have

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[49] Resolução do Conselho de Ministros No. 63-A/2007, DIÁRIO DA REPÚBLICA, 1ª Série, No. 85, May 3, 2007, at 2964-(2).

[50] *Id.*

[51] *Id.*

[52] *Id.*

[53] *Id.*

[54] *Id.*

[55] *Id.*

[56] *Id.*

[57] *Id.*

[58] *Id.*

[59] *Id.*

[60] *Id.*

[61] Código da Publicidade, Decreto-Lei No. 330/90, de 23 de Outubro, *available at* the Web site of the Portuguse Public Ministry (Ministério Público, Procuradoria-Geral Distrital de Lisboa), http://www.pgdlisboa.pt/pgdl/leis/lei_mostra_articulado.php?nid=390&tabela=leis&ficha=1&pagina=1.

been constitutionally enshrined.[62] It specifically prohibits publicity that contains any discrimination related to race, language, territory of origin, religion, or sex.[63]

Article 5 of the Portuguese Code of Administrative Procedure[64] establishes that the public administration must be governed by the principle of equality and must not privilege, benefit, damage, deprive of any right, or exempt of any duty any person by reason of ancestry, sex, race, language, territory of origin, religion, political or ideological convictions, education, economic situation, or social condition.

On October 26, 1998, the Portuguese Government passed a law that protects personal data.[65] Its general principle determines that personal data[66] must be processed in a transparent way and with strict respect for private life, as well as for rights, liberties, and other fundamental guarantees.[67] Article 7 prohibits the handling of personal data related to philosophical or political convictions, political or union affiliation, religious faith, private life, and racial and ethnical origin, as well as the handling of data related to health and sexual life, including genetic data.[68] The same article lists the exceptions to this prohibition.[69]

In 1999, Portugal enacted a law forbidding discrimination in the exercise of rights by reason of race, color, nationality, or ethnic origin.[70] The law is applicable to all persons, including private and public institutions.[71] Article 3 of the law defines racial discrimination as any distinction, exclusion, restriction, or preference by reason of race, color, ancestry, national origin, or ethnic identity that has as its objective or that produces as a result the annulment or restriction of the enjoyment or exercise, in equal conditions, of rights, liberties, and guarantees or economic, social, and cultural rights. The law further defined what is considered discriminatory practice,[72] created a Commission for Equality and Against Racial Discrimination (*Comissão para a Igualdade e Contra a Discriminação Racial*) to accompany the enforcement of the law, and defined the Commission's competency,[73] composition[74] and working methods.[75] According to the law, discriminatory acts are classified as misdemeanors (*contra-ordenação*), and a regime of

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[62] *Id.*, art. 7(1).

[63] *Id.*, art. 7(2)(d).

[64] Código do Procedimento Administrativo, Decreto-Lei No. 42/91, de 15 de Novembro, *available at* the Web site of the Portuguse Public Ministry (Ministério Público, Procuradoria-Geral Distrital de Lisboa), http://www.pgdlisboa.pt/pgdl/leis/lei_mostra_articulado.php?nid=480&tabela=leis&ficha=1&pagina=1.

[65] Lei da Protecção de Dados Pessoais, Lei No. 67/98, de 26 de Outubro, DIÁRIO DA REPÚBLICA, 1ª Série-A, No. 247, Oct.26, 1998, at 5536.

[66] Article 3(b) of Law No. 67/98, Oct. 26, 1998, defines handling of personal data as any action or body of actions concerning personal data, performed with or without automated means, such as the collection, registry, preservation, adaptation or alteration, retrieval, consultation, communication by transmission, or diffusion or by any other form of making it available, with comparison or interconnection, as well as its isolation, erasure or destruction.

[67] *Id.*, art. 2.

[68] *Id.*, art. 7(1).

[69] *Id.*, arts. 7(2), 7(3) and 7(4).

[70] Lei No. 134/99, de 28 de Agosto, *available at* the Web site of the Portuguse Public Ministry (Ministério Público, Procuradoria-Geral Distrital de Lisboa), http://www.pgdlisboa.pt/pgdl/leis/lei_mostra_articulado.php?nid=230&tabela=leis&ficha=1&pagina=1.

[71] *Id.*, art. 2.

[72] *Id.*, art. 4.

[73] *Id.*, art. 5.

[74] *Id.*, art. 6.

[75] *Id.*, art. 7.

fines was established to punish whoever practices any discriminatory act as prescribed in article 4 of the law.[76]

In 2004, the government issued a law that approved preventive and punitive measures to be adopted in case of manifestation of violence associated with sports.[77] Article 11 establishes the conditions for a person to be exclude from the premises where sports are being played. The conditions concerning racism and xenophobia are:

- do not display placards, flags, symbols, or other signs with offensive messages of racist or xenophobic nature;[78]
- do not practice acts of violence which encourage additional violence, racism, or xenophobia;[79] and
- do not sing racist or xenophobic songs.[80]

The infringement of these and other conditions foreseen in the law subject the person to the immediate removal from the premises by the security forces of the place, without prejudice of any other applicable sanctions.[81] The encouragement of violence, racism, and xenophobia and any other forms of discrimination are considered misdemeanors (*contra-ordenação*) punishable with a fine and other applicable sanctions.[82] Article 32 lists the types of fines and their classification.

Law No. 18 of May 11, 2004, partially incorporated into Portuguese domestic law the directive issued by the Council of the European Commission (*Directiva No. 2000/43/CE, do Conselho, de 29 de Junho*) that applies the principle of equal treatment between people, without distinction of racial or ethnic origin, and has as its objective the establishment of a legal basis to fight discrimination by reason of racial or ethnic origin.[83] The law is applicable to both public and private sectors.[84] The principle of equality is defined in the law as the absence of any restriction, direct or indirect, by reason of racial or ethnic origin.[85] Article 3(2) lists a series of situations that violate the principle of equality by either an action or an omission and that are considered discriminatory practices by reason of race, color, nationality, or ethnic origin.

Asylum

The Portuguese Asylum and Refugee Law (Lei No. 15/98, de 26 de Março) grants to foreigners and displaced persons the right to obtain a concession of asylum. Those who qualify for the concession are aliens who fear persecution by virtue of their race, religion, nationality, political opinions, or participation in certain social groups and therefore cannot or, due to this

[76] *Id.*, art. 9.

[77] Lei No. 16/2004, de 11 de Maio, art. 1, DIÁRIO DA REPÚBLICA, 1ª Série-A, No. 110, May 11, 2004, at 2962.

[78] *Id.*, art. 11(1)(a).

[79] *Id.*, art. 11(1)(c).

[80] *Id.*, art. 11(1)(d).

[81] *Id.*, art. 11(2).

[82] *Id.*, art. 31(d).

[83] Lei No. 18/2004, de 11 de Maio, art. 1, DIÁRIO DA REPÚBLICA, 1ª Série-A, No. 110, May 11, 2004, at 2971.

[84] *Id.*, art. 2(1).

[85] *Id.*, art. 3(1).

fear, do not want to return to the country of their nationality or usual residency.[86]

International Judicial Cooperation

On August 31, 1999, Portugal approved a law on international judicial cooperation in criminal matters.[87] The law is applicable in cases of extradition; transfer of proceedings in criminal matters; enforcement of criminal judgments; transfer of persons sentenced to any punishment or measure involving deprivation of liberty; supervision of conditionally sentenced or conditionally released persons; and mutual legal assistance in criminal matters.[88] However, a request for cooperation must be refused in cases where the proceedings do not comply with the requirements laid down in the European Convention for the Protection of Human Rights and Fundamental Freedoms of November 4, 1950, or other relevant international instruments ratified by Portugal[89] or where there are well-founded reasons for believing that co-operation is sought for the purpose of persecuting or punishing a person on account of that person's race, religion, sex, nationality, language, political or ideological beliefs, or belonging to a given social group.[90]

International Convention on the Elimination of all Forms of Racial Discrimination

In 1982, Portugal acceded to the International Convention on the Elimination of all Forms of Racial Discrimination.[91] Under the Convention, Portugal must condemn racial discrimination, undertake to pursue by all appropriate means a policy of eliminating racial discrimination in all its forms and promoting understanding among all races,[92] and condemn all propaganda by individuals and organizations which is based on ideas or theories of the superiority of one race, persons of one color, or persons of one ethnic origin, or those that attempt to justify or promote racial hatred and discrimination in any form.[93] Portugal promises to undertake immediate and positive measures to eradicate all incitements to, or acts of, such discrimination.[94]

VI. Hate Crimes Laws

The Portuguese Penal Code[95] punishes murderers with eight to sixteen years in prison. The punishment is increased to twelve to twenty-five years in prison if the crime is motivated by racial, political, or religious hatred.[96] Similarly, if hatred is a motive, a person who offends the

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[86] Lei No. 15/98, de 26 de Março, art. 1(2), *available at* the Web site of the National and Borders Service (*Serviço de Estrangeiros e Fronteiras*), http://www.sef.pt/portal/V10/PT/aspx/legislacao/legislacao_detalhe.aspx?id_linha=4219#0.

[87] Lei No. 144/99, de 31 de Agosto, *available at* the Web site of the Portuguse Public Ministry (Ministério Público, Procuradoria-Geral Distrital de Lisboa), http://195.23.47.120/pgdl/leis/lei_mostra_articulado.php?nid=295&tabela=leis&ficha=1&pagina=1.

[88] *Id.*, art. 1.

[89] *Id.*, art. 6(1)(a).

[90] *Id.*, art. 6(1)(b).

[91] International Convention on the Elimination of all Forms of Racial Discrimination. New York, United States. Accession Sept. 23, 1982. 660 U.N.T.S. 195.

[92] *Id.*, art. 2.

[93] *Id.*, art. 4.

[94] *Id.*

[95] Decreto-Lei No. 48/95, de 15 de Março, Maria João Antunes. ed., CÓDIGO PENAL (13ª ed., Coimbra: Coimbra Editora, 2006).

[96] *Id.*, art. 132(1)(e).

body or the health of another person is punished with up to three years in prison and a fine.[97] If, as a consequence of the offenses, the criminal causes the victim to suffer deprivation of an important organ or limb, or serious and permanent disfigurement;[98] a decrease in work, intellectual, or reproduction capacities or the possibility of using the body, the senses, or the ability to speak;[99] causes particularly painful and permanent illness or serious or incurable psychological anomaly;[100] or puts the victim's life in danger, the punishment increases to two to ten years in prison.[101] If the consequence is death, the punishment may reach up to twelve years in prison. [102]

In 2004, Portugal published Law No. 31 of July 22, 2004, revoking article 239 of the Portuguese Penal Code, which had criminalized genocide.[103] The new legislation defines the crimes that violate international humanitarian law and lists genocide as a crime punished with twelve to twenty-five years in prison.[104] Furthermore, whoever instigates, publicly and directly, the practice of genocide is punished with two to eight years in prison.[105] Conspiracy to practice genocide is punished with one to five years in prison.[106]

According to the Penal Code, the founding or establishment of an organization or the development of activities of organized propaganda that instigates or encourages discrimination, hatred, or racial or religious violence is punished with one to eight years in prison.[107] The same punishment is applied to whoever organizes or takes part in any of these activities, or supports, such organization, including financial support.[108]

The publication, in any means of social communication or during a public meeting, of a written document designed[109] to provoke acts of violence against a person or group of people by reason of their race, color, ethnic origin, nationality, or religion[110] or to defame or insult a person or group of people for the same reasons,[111] with the intent to instigate or to encourage racial or religious discrimination, is punished with six months to five years in prison.[112]

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[97] *Id.*, art. 143(1).

[98] *Id.*, art. 144(a).

[99] *Id.*, art. 144(b).

[100] *Id.*, art. 144(c).

[101] *Id.*, art. 144(d).

[102] *Id.*, art. 145(1).

[103] *Id.*, art. 239(1).

[104] Lei No. 31/2004, de 22 de Julho, art. 8, Maria João Antunes. ed., CÓDIGO PENAL 417 (13ª ed., Coimbra: Coimbra Editora, 2006)

[105] *Id.*, art. 8(2).

[106] *Id.*, art. 8(3).

[107] Decreto-Lei No. 48/95, de 15 de Março, art. 240(1)(a), Código Penal, Maria João Antunes, 13ª Ed. (Coimbra: Coimbra Editora, 2006).

[108] *Id.*, art. 240(1)(b).

[109] *Id.*, art. 240(2).

[110] *Id.*, art. 240(2)(a).

[111] *Id.*, art. 240(2)(b).

[112] *Id.*, art. 240.

VII. Concluding Remarks

Constitutional principles determine that all persons, whether Portuguese citizens or not, should live peacefully in the country. They also dictate that no person is going to be privileged or favored, discriminated against, or deprived of any right or exempted from any duty by reason of ancestry, sex, race, language, territory of origin, religion, political or ideological convictions, education, economic situation, social condition, or sexual orientation.

Although not specifically aimed at impacting black populations, Portugal has been working to improve the quality of life of all different races and cultures living in the country. In 2008, under the auspices of the European Commission, Portugal is taking part in a European effort to improve the dialogue between groups and consequently contribute to a better co-existence and mutual comprehension of the many races with their diverse cultural backgrounds.

Portugal recently enacted a new immigration law, which by itself would only better regulate the flow of immigrants into Portugal. Thereafter, the Portuguese government also passed a resolution detailing a plan to integrate immigrants into the society.

Several pieces of legislation set the framework that prohibits any of the forms of discrimination outlined in the Constitution as applied to any person by reason of ancestry, sex, race, language, territory of origin, religion, political or ideological convictions, education, economic situation, or social condition. Additionally, the Portuguese Penal Code applies severe punishments to crimes that are motivated by racial, political, or religious hatred.

Prepared by Eduardo Soares
Foreign Law Specialist
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IMMIGRATION AND DISCRIMINATION LAWS

ENGLAND AND WALES

Executive Summary

England and Wales have a robust legislative regime to aid the integration of minority communities and to prevent discrimination and crimes against them. The legislative regime has its origins in the 1970s and has been revised and updated to take into account new challenges and situations.

"The challenge of achieving integration is not simply about building cohesion across racial or cultural difference, but about tackling racial inequality, racism, and discrimination; better management of tensions; and establishing a foundation of shared values and common citizenship, which can successfully integrate diverse cultural communities."[1]

I. Immigration Laws

Immigration of minorities into Britain developed in 1950s with the State's policy towards migrants being a:

> laissez-faire assumption of assimilation. It was thought that … immigrants would adapt quickly to the cultural, life style, and attitudinal norms of the host community. However, social tensions soon began to emerge, particularly in relation to housing. Successive Governments failed to meet post-war demands for housing … and the arrival of large numbers of immigrants, particularly in the inner city areas with the most acute housing problems, inevitably exacerbated already serious shortages and supplied ready made scapegoats on whom already extant problems could be blamed.[2]

Rising tensions led the government to link immigration control to good minority relations and the successful integration of migrants, in order to prevent a complete deterioration of relations between minorities and the mainstream British population. This resulted in a restrictive immigration policy that made it difficult for individuals to legally migrate to the UK. The policy did not prove to be successful in improving community relations and reportedly resulted in a large-scale illegal immigration problem and abuse of the asylum system. [3]

The government has recently shifted back to a policy of managed migration "in the interests of the economy,"[4] in which the skills and benefits that migrants bring to the country are emphasized, with

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[1] Equality and Human Rights Commission, ANNUAL REPORT, 2004, *available at* http://www.cre.gov.uk/downloads/AR04main.pdf.

[2] JAMES ATKINSON, THE IMPACT OF IMMIGRATION POLICY ON RACE RELATIONS AND THE NATIONAL IDENTITY CRISIS IN POST-WAR BRITAIN (2003), *available at* http://www.jimmyatkinson.com/papers/british.pdf.

[3] *Id.*

[4] Home Office, *Controlling Our Borders: Making Migration Work in Britain, Five Year Strategy for Asylum and Immigration*, 2005, Cm. 6472.

particular support for skilled workers[5] and quotas for those without skills, where there is a need in the UK.[6]

The large majority of the migration from African nations and the West Indies occurred at the end of World War II, when the government, faced with labor shortages, provided easier routes for migration to fill vacant jobs, and legislation enabled residents of countries of the Empire and the Commonwealth open access to the UK as they had British passports. The 1950s saw a number of riots from several communities concerned with the influx of black migrants, and the government sought to restrict non-white immigrants through legislation that made it more difficult for them to enter the country.[7] The period from the 1950s to the 1970s saw a jump in black residents from the low thousands to 1.4 million.[8]

The present legislative and regulatory framework governing immigration into the United Kingdom of Great Britain and Northern Ireland is contained in the Immigration Act 1971[9] and the Immigration Rules.[10] The Immigration Rules are made by the Secretary of State, under the authority of the Immigration Act 1971, and are the practices that are followed in the administration of the 1971 Act.[11] The Immigration Rules are not legislation or regulations per se, but are published as House of Commons Papers and are considered to be part of the law.[12]

II. Integration Laws and Policies

Former British Home Secretary David Blunkett referred to the British approach to integration as "pragmatic, based on common sense, allowing people to express their identity within a common framework of rights and responsibilities … Integration in Britain does not mean assimilation into a common culture so that original identities are lost."[13] Instead, the multicultural approach:

> does not rest on a recognition of minority group rights but [through the] … management of relations between different ethnic or racial communities … [by] anti-discrimination legislation and equal opportunities policies, with easy access to full civil and political rights, and local

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[5] *Id.*

[6] Home Office, *Secure Borders, Safe Haven: Integration with Diversity*, 2002, Cm. 5387.

[7] *See, for example*, the Immigration Act 1972, c. 77 (as amended) http://www.statutelaw.gov.uk/legResults.aspx?LegType=All+Legislation&title=immigration+act+&Year=1971&searchEnacted=0&extentMatchOnly=0&confersPower=0&blanketAmendment=0&TYPE=QS&NavFrom=0&activeTextDocId=1578007&PageNumber=1&SortAlpha=0 (unofficial source, last visited Apr. 10, 2008).

[8] *Short History of Immigration*, BBC NEWS, http://news.bbc.co.uk/hi/english/static/in_depth/uk/2002/race/short_history_of_immigration.stm (last visited Apr. 10, 2008).

[9] Immigration Act 1971, c. 77 (as amended) http://www.statutelaw.gov.uk/legResults.aspx?LegType=All+Legislation&title=immigration+act+&Year=1971&searchEnacted=0&extentMatchOnly=0&confersPower=0&blanketAmendment=0&TYPE=QS&NavFrom=0&activeTextDocId=1578007&PageNumber=1&SortAlpha=0 (unofficial source).

[10] Statement of Changes in Immigration Rules (1993-4) H.C. 395 (as amended) *at:* http://www.ind.homeoffice.gov.uk/ind/en/home/laws___policy/immigration_rules.html.

[11] Immigration Act 1971, c. 77, §3(2), Ministry of Justice Web Site, *available at* http://www.statutelaw.gov.uk/legResults.aspx?LegType=All+Legislation&title=immigration+act+&Year=1971&searchEnacted=0&extentMatchOnly=0&confersPower=0&blanketAmendment=0&TYPE=QS&NavFrom=0&activeTextDocId=1578007&PageNumber=1&SortAlpha=0 (unofficial source).

[12] R v Chief Immigration Officer, Heathrow Airport, ex. p. Salamat Bibi [1976] 3 All ER 843 (CA) (official source), per Roskill, LJ : "these rules are [not administrative practice and are] just as much delegated legislation as any other form of rule making activity … which is empowered by an Act of Parliament. Furthermore, these rules are subject to a negative resolution and it is unheard of that something which is no more than an administrative circular stating what the Home Office considers to be good administrative practice should be subject to a negative resolution by both Houses of Parliament. These rules, to my mind, are just as much a part of the law of England as the 1971 Act itself."

[13] David Blunkett, M.P., Home Secretary, *Speech to the Institute of Public Policy Research*, July 2004, *available at* https://www.ippr.org/uploadedFiles/events/Blunkettspeech.pdf.

> arrangements to facilitate communication and understanding between ethnic groups. The emphasis is on promoting equality in all spheres, while enabling the exercise of different cultural practices.[14]

The policy of the United Kingdom towards integration is thus based on valuing and promoting cultural diversity with the aim of enabling "members of ethnic minorities to play a full part in national life, with all the rights and responsibilities which that entails, whilst still being able to maintain their own culture, traditions, language and values."[15] The legislative approach taken to achieve this aim has been through providing enforceable rights and protections to individuals affected by discrimination.

III. Anti-Discrimination Legislation

There is an extensive anti-discrimination legislative regime in England and Wales. The main legislation is the Race Relations Act 1976 (as amended),[16] which prohibits harassment[17] and direct or indirect discrimination[18] on racial grounds[19] for the purposes of employment; housing; education; the provision of goods, facilities, services, and premises; and planning functions of planning authorities. Discriminatory practices and advertisements and instructions or pressure to discriminate are also unlawful under this Act.[20] The Act includes a provision on discrimination by way of victimization, which makes it unlawful to discriminate against a person by less favorable treatment if the person has made, is intending to make, or assists in complaints of racial discrimination.[21] The test for determining whether a person has been discriminated against is an objective one; thus there is no requirement of intent from the alleged discriminator.[22] To aid in the prevention of discrimination in the workplace, the Act makes employers vicariously liable for discriminatory acts of their employees, regardless of whether or not they were aware that the actions were occurring.[23] The Act also places a general duty on public authorities to eliminate discrimination and promote equal opportunities and good relations between racial groups.[24]

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[14] ANJA RUDIGER AND SARAH SPENCER, SOCIAL INTEGRATION OF MUSLIMS AND ETHNIC MINORITIES: POLICIES TO COMBAT DISCRIMINATION (2003), *available at* http://www.compas.ox.ac.uk/about/publications/Sarah/OECDpaper03.pdf.

[15] Report Submitted by the United Kingdom Pursuant to art. 25, ¶ 1, of the Framework Convention for the Protection of National Minorities, July 1999, ACFC/SR (1999)013. *See also* Framework Convention for the Protection of National Minorities, opened for signature Feb. 1, 1995, C.E.T.S. 157. The Council of Europe states the "Convention is the first legally binding multilateral instrument concerned with the protection of national minorities in general. Its aim is to protect the existence of national minorities within the respective territories of the Parties. The Convention seeks to promote the full and effective equality of national minorities by creating appropriate conditions enabling them to preserve and develop their culture and to retain their identity." Council of Europe, *Framework Convention for the Protection of National Minorities: Summary*, http://www.eycb.coe.int/compass/en/chapter_6/6_10.html (last visited Apr. 9, 2008).

[16] Race Relations Act 1976, c. 76, *available at* http://www.statutelaw.gov.uk/legResults.aspx?LegType=All+Legislation&title=Race+Relations+Act+&Year=1976&searchEnacted=0&extentMatchOnly=0&confersPower=0&blanketAmendment=0&TYPE=QS&NavFrom=0&activeTextDocId=2059995&PageNumber=1&SortAlpha=0 (unofficial source).

[17] Harassment is unlawful under the Act and occurs where a person engages in unwanted conduct that has "the purpose or effect of violating that other person's dignity, or creating an intimidating, hostile, degrading, humiliating or offensive environment." *Id*, at c. 76, § 71.

[18] Direct discrimination occurs where individuals are treated less favorably than their counterparts due to their race, and indirect discrimination occurs when individuals of a particular race are disadvantaged due to the application of a requirement or condition that is not justifiable or proportionate and is to the detriment of a racial group. *Id.*, at c. 76 § 1.

[19] Racial group is defined in the Act by color, race, nationality, or ethnic or national origins. *Id.*, at c. 76, § 3.

[20] *Id.*, at c. 76, §§ 28-31.

[21] *Id.*, at 76, § 2 , *id.*

[22] *Id.*, at c. 76, § 1.

[23] *Id.*, at c. 76, § 32.

[24] *Id.*, at c. 76, § 71. The bodies this applies to are listed in sch. 1A of the Act.

This legislation is enhanced by an independent public body, the Commission for Equality and Human Rights,[25] which has investigative and litigation powers to put into practice the provisions of the Acts.[26] The Commission has a number of general duties, one being to encourage and support the efforts to the effect that "people's ability to achieve their potential is not limited by prejudice or discrimination,"[27] and it works closely with all sectors to promote good practice to eliminate all forms of discrimination.[28]

IV. The Police and Discrimination

The statutory basis for stops and searches by the police is contained in the Police and Criminal Evidence Act 1984,[29] which provides that the police can stop and search an individual if they have reasonably suspicion that a crime has been, is, or is about to be committed. Statistics show that under the provisions of this Act, the police have stopped black people six times more frequently than white people.[30] The police were provided with broader authority to stop and search people under the Terrorism Act 2000 that permits officers, with authorization from a senior officer, to stop and search anyone to prevent terrorism.[31] Statistically, black people are five times more likely to be stopped than white people under this Act.[32] These statistics, combined with the Code issued under the Police and Criminal Evidence Act and the Home Office Stop and Search Interim Guidelines, provide that while the police must "not discriminate against members of minority ethnic groups when they exercise these powers. There may be circumstances where it is appropriate for officers to take account of a person's ethnic background when they decide who to stop in response to a specific terrorist threat."[33] This Code of Practice has given rise to the claim that the British police use ethnic and religious profiling in their policing, a claim that both the government and the police have actively worked to dismiss.[34]

The government has responded to concerns of racial profiling with measures to provide training to the police, who are taking active steps to engage minority communities and build trust, good relations,

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[25] Equality Act 2006, c. 3, *available at* http://www.opsi.gov.uk/acts/acts2006/pdf/ukpga_20060003_en.pdf (official source). This Commission replaces the Commission for Racial Equality.

[26] *Id.*

[27] *Id.*, at c. 3, § 3.

[28] Commission for Equality and Human Rights, http://www.equalityhumanrights.com/en/aboutus/whatwedo/pages/whatwedo.aspx#Enforcing%20the%20law (last visited Apr. 2, 2008).

[29] Police and Criminal Evidence Act 1984, c. 60, *available at* http://www.statutelaw.gov.uk/legResults.aspx?LegType=All+Legislation&title=Police+and+Criminal+Evidence+Act++&Year=1984&searchEnacted=0&extentMatchOnly=0&confersPower=0&blanketAmendment=0&TYPE=QS&NavFrom=0&activeTextDocId=1871554&PageNumber=1&SortAlpha=0 (official source).

[30] Home Office, *Statistics on Race and the Criminal Justice System 2003*, 2004, *available at* http://www.cre.gov.uk/Default.aspx.LocID-0hgnew04s.RefLocID-0hg00900c002.Lang-EN.htm.

[31] Terrorism Act 2000, c. 11, § 44, *available at* http://www.statutelaw.gov.uk/legResults.aspx?LegType=All+Legislation&title=terrorism+act+&Year=2000&searchEnacted=0&extentMatchOnly=0&confersPower=0&blanketAmendment=0&TYPE=QS&NavFrom=0&activeTextDocId=1851852&PageNumber=1&SortAlpha=0 (unofficial source). *See further*, Arun Kundnani, *Racial Profiling and Anti Terror Stop and Search*, IRR NEWS, Jan. 31, 2006, *available at* http://www.irr.org.uk/2006/january/ha000025.html.

[32] *Id., at* § 44. (unofficial source); Home Office, *Statistics on Race and the Criminal Justice System 2003*, 2004, *available at* http://www.cre.gov.uk/Default.aspx.LocID-0hgnew04s.RefLocID-0hg00900c002.Lang-EN.htm.

[33] Police and Criminal Evidence Act 1984, Code A: Code of Practice for the Exercise by Police Officers of Statutory Powers of Stop and Search, http://www.homeoffice.gov.uk/docs/pacecodea.pdf; Home Office, *Stop and Search Action Team: Interim Guidelines*, http://www.privacyinternational.org/issues/terrorism/library/ukstopsearchguidance2004.pdf (last visited Apr. 7, 2008).

[34] Mark Oliver, *Blears Backs Away from Racial Profling*, GUARDIAN (London), Aug. 2, 2005, *available at* http://www.guardian.co.uk/attackonlondon/story/0,16132,1540937,00.html?gusrc=rss.

and confidence in the criminal justice system.[35] Intelligence-led stops and searches are used, and to help in accurate record keeping, the police now record and monitor the ethnic identity of all individuals stopped and searched to reduce disproportionately between ethnic groups.[36] A Stop and Search Action Team was established in 2004 to consider "how officers use the intelligence they receive to decide who to stop and search; where stop and search is targeted and whether this is fair; and how police officers and police authorities can actively involve local communities in reaching an agreement about using stop and search."[37]

V. Racial Hatred Legislation

There are a number of laws that address criminal instances of racial hatred. Incitement to racial hatred is outlawed under the Public Order Act 1986.[38] It is an offense to use threatening, abusive, or insulting words or behavior, which includes displaying material with the intention or likelihood that racial hatred will be "stirred up."[39] The maximum penalty for this offense is seven years of imprisonment and/or a fine.[40] Due to the sensitive nature of any prosecutions under the Act, the consent of the Attorney General must be obtained prior to any prosecution.[41] This requirement also ensures that the use of the provisions of the Act can be properly recorded for statistical purposes and to gauge the effectiveness of the provisions. Between the years 2001 and 2004, there were eighty-four cases referred to the Crown Prosecution Service and two convictions of the offense of incitement to racial hatred.[42] During the entire lifespan of the legislation, from 1987 to 2004, there have been a total of forty-four convictions.[43]

Publishing or distributing written material, public performances, broadcasts, or possession of materials designed to stir up racial hatred is also an offense under the Public Order Act 1986 and is punishable with up to two years of imprisonment and/or a fine.[44] Chanting racial abuse at football (soccer) matches in England and Wales is also prohibited by the Football Offences Act 1991. An offense is committed if a person chants, either with others or by themselves, threatening, abusive, or insulting words or sounds to another person based on the victim's race.[45] If a person is found guilty under this

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[35] The issue of police sensitivity towards minorities was highlighted in 1993, when a young black male was murdered and a police investigation into his death was "fundamentally flawed." An inquiry into this incident described London's metropolitan police force as "institutionally racist," which was defined as "the collective failure of an organization to provide an appropriate and professional service to people because of their color, culture, or ethnic origin." The findings of this inquiry lead to seventy recommendations that included legislative amendments to extend the Race Relations Act to cover the police, as well as grassroots reforms such as significant training of police officers. Home Office, *Report of an Inquiry by Sir William Macpherson of Cluny, The Stephen Lawrence Inquiry*, Cm. 4262-1, 1999.

[36] Home Office, *Race Relations and the Police*, http://www.homeoffice.gov.uk/police/about/race-relations/ (last visited Apr. 7, 2008).

[37] *Id.*

[38] Public Order Act 1986, c. 64, *available at* http://www.statutelaw.gov.uk/legResults.aspx?LegType=All+Legislation&title=public+order+act+&Year=1986&searchEnacted=0&extentMatchOnly=0&confersPower=0&blanketAmendment=0&TYPE=QS&NavFrom=0&activeTextDocId=2236942&PageNumber=1&SortAlpha=0 (unofficial source).

[39] *Id.*, at c. 64 § 18.

[40] *Id.*, at c. 64 § 27(2).

[41] *Id.*, at c. 64 § 27(3). *See further* Crown Prosecution Service, *Guidance on Prosecuting Cases of Racist and Religious Crime*, http://www.cps.gov.uk/Publications/prosecution/rrpbcrpol.html#23 (last visited Apr. 6, 2008).

[42] Home Affairs Committee, *Terrorism and Community Relations, 2003-4*, H.C. 165-I, ¶ 221.

[43] House of Commons, Joint Committee on Human Rights, *Eighth Report, 2004-5*, H.C. 388, ¶ 2.27.

[44] Public Order Act 1986, c. 64 §§ 19-23, *available at* http://www.statutelaw.gov.uk/legResults.aspx?LegType=All+Legislation&title=public+order+act+&Year=1986&searchEnacted=0&extentMatchOnly=0&confersPower=0&blanketAmendment=0&TYPE=QS&NavFrom=0&activeTextDocId=2236942&PageNumber=1&SortAlpha=0 (unofficial source).

[45] Football Offences Act 1991, c. 19 § 3, available at http://www.statutelaw.gov.uk/legResults.aspx?LegType=All+Legislation&title=+Football+Offences+Act&Year=1991&searchEnacted=0&extentMatchOnly=0&confersPower=0&blanketAmendment=0&TYPE=QS&NavFrom=0&activeTextDocId=1537069&PageNumber=1&SortAlpha=0 (unofficial source).

provision, they can be fined up to £1,000 (about US$2,000) and banned from attending football matches, both in the UK and overseas.

The Crime and Disorder Act 1998 (as amended) provides for a number of specific racially aggravated[46] offenses for criminal damage, assault, harassment, wounding, and threatening or abusive behavior, after monitoring indicated that these were the most common offenses in which race was an element.[47] In order to meet the criteria of a racially aggravated offense, there must be evidence of hostility towards the victim of the offense by the perpetrator during the commitment of the offense or immediately thereafter that is based on the victims' membership, or presumed membership, in a racial group.[48] The substantive difference between a racially aggravated offense and one that does not involve this element is that the penalty is greater for those that are aggravated by the victims' race.

In addition to the specific racially aggravated offenses noted above, when determining the sentence of a defendant convicted of a basic criminal offense, the courts may consider whether the crime has been aggravated by the defendants' hostility towards the victim's race.[49] If it appears that the crime has been aggravated in this manner, it increases the seriousness of the offense, thus paving the way for an increase in the defendants' punishment.[50]

To improve public confidence in the investigation and prosecution of racially motivated crimes and thus increase the reporting of such incidents, the Crown Prosecution Service considers that any incident is racially aggravated if the victim perceives it to be that way, and the Service will not accept pleas to lesser offenses to expedite cases and ensure convictions.[51] The Crown Prosecution Service has reported that in 2005-2006, 7,430 cases that involved a racist incident were brought before it and 6,123 of these were prosecuted, an increase from 5,788 in the period 2004-2005.[52]

Prepared by Clare Feikert
Senior Foreign Law Specialist
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[46] Racially aggravated is defined in the Act as when "at the time of committing the offence, or immediately before or after doing so, the offender demonstrates towards the victim of the offence hostility based on the victim's membership (or presumed membership) of a racial group; or the offence is motivated (wholly or partly) by hostility towards members of a racial group based on their membership of that group." Crime and Disorder Act 1998, c. 37 § 28, *available at* http://www.statutelaw.gov.uk/legResults.aspx?LegType=All+Legislation&title=crime+and+disorder+act&searchEnacted=0&extentMatchOnly=0&confersPower=0&blanketAmendment=0&TYPE=QS&NavFrom=0&activeTextDocId=1570287&PageNumber=1&SortAlpha=0 (unofficial source). *See also* Crown Prosecution Service, *Guidance on Prosecuting Cases of Racist and Religious Crime*, http://www.cps.gov.uk/Publications/prosecution/rrpbcrpol.html#23 (last visited Apr. 6, 2008).

[47] Crime and Disorder Act 1998, c. 37, §§ 28-32, *id.*

[48] *Id.*, at c. 37, § 28.

[49] *See, for example*, Public Order Act 1986, c. 64 § 28, *available at* http://www.statutelaw.gov.uk/legResults.aspx?LegType=All+Legislation&title=public+order+act+&Year=1986&searchEnacted=0&extentMatchOnly=0&confersPower=0&blanketAmendment=0&TYPE=QS&NavFrom=0&activeTextDocId=2236942&PageNumber=1&SortAlpha=0 (unofficial source); Crime and Disorder Act 1998, c. 37, §§ 29-32 , *id.*; and the Criminal Justice Act 2003, c. 44 § 145 , *available at* http://www.statutelaw.gov.uk/legResults.aspx?LegType=All+Legislation&title=criminal+justice+act+&Year=2003&searchEnacted=0&extentMatchOnly=0&confersPower=0&blanketAmendment=0&TYPE=QS&NavFrom=0&activeTextDocId=902928&PageNumber=1&SortAlpha=0 (unofficial source).

[50] Criminal Justice Act 2003, c. 44 § 145 , *id.*

[51] Crown Prosecution Service, *Guidance on Prosecuting Cases of Racist and Religious Crime*, http://www.cps.gov.uk/Publications/prosecution/rrpbcrpol.html#23 (last visited Apr. 6, 2008).

[52] Crown Prosecution Service, *Racist and Religious Incident Monitoring: Annual Report 2005-6*, 2006, *available at* http://www.cps.gov.uk/publications/docs/rims05-06.pdf.