



# Progress made in combating discrimination





## 3. Analysis of the headway made in combating discrimination

### 3.1 Studies conducted by the Sociological Research Centre (CIS) and the Eurobarometer

In December 2007 the **Sociological Research Centre** conducted study No 2745 entitled "Discrimination and its perception. Preliminary report" as one of the specific actions envisaged for 2007 within the framework of the European Year of Equal Opportunity for All.

Based on the premise that, as the report shows, social problems are not among the Spanish society's main concerns, a study was conducted on preference for a heterogeneous or homogeneous society. In this connection, 45% stated that that they would like to live in a society with people of different origin (heterogeneous model) while 44% preferred a society of people of the same origin and culture (homogeneous model). The following data lead one to believe that the homogeneous model denotes a certain tendency towards the social rejection of certain groups.

When asked about specific ethnic groups, 52% stated that they had little or no positive feelings towards the Roma community. However, these percentages vary depending on the preferred social model. For example, of those that prefer a heterogeneous society, 47% said that they have little or no positive feelings towards Roma while of the group preferring a homogeneous society, 72% shared those same views of the Roma community.

As for discrimination at institutional level, 84% believed that laws were not enforced equally in Spain and that such enforcement depended on who you are. Moreover, 68% believe that civil servants typically treat citizens unequally.

The study also shows that some people believe that the effort being made by the government to combat discrimination is sufficient (38%) or even excessive in the case of protection offered to immigrants and Roma (20%). It is precisely those groups which do not engender positive feelings which people feel should not be given much protection.

The following conclusions may be drawn from this data:

- The Spanish society is evenly divided in what it believes is the ideal social model in terms of homogeneity or heterogeneity.
- Roma are especially affected by social rejection in Spain.
- In general terms, public action to combat discrimination is considered insufficient. The foregoing does not apply to Muslims, immigrants, Roma and homosexuals; these groups are considered to be sufficiently protected.



The special **Eurobarometer** on discrimination in the European Union was published in January 2007<sup>3</sup>. This report analyses the interaction of community citizens with different groups, opinions on equal opportunity and knowledge of legislation and anti-discrimination rights and opinions on the six forms of discrimination<sup>4</sup>.

As regards interaction, on average it is relatively common for Community citizens to have acquaintances or friends who profess a different religion but only 12% of those surveyed had a relationship with members of the Roma ethnic group. These data vary depending on socio-demographic characteristics. For example, those under the age of 55 have more relations with Roma and this contact is more common for men than for women.

Having regard to the perception of how widespread discrimination is in Europe, 40% of those surveyed said they believed it to be very widespread and that belonging to a different ethnic group was the number one reason for discrimination.

When asked whether belonging to one of these groups could result in social disadvantage, the majority answered in the affirmative. Moreover, 77% answered that they believe that being Roma implies social disadvantage.

As for employment, the majority of the Europeans surveyed responded that being Roma is a disadvantage when seeking work, being accepted as an intern or being promoted.

Having regard to combating discrimination, 51% of those surveyed feel that insufficient effort has been made compared to 45% who believe that enough has been done.

When asked about what steps they would take in the event of being discriminated against, the majority said they would hire a lawyer (41%) and only 25% stated they would contact a national equal treatment organisation as provided for in Directive 2000/43/EC.

This study has dedicated a special section to the analysis of the situation of Roma as the largest minority group in the enlarged European Union. Previous EU studies have shown that the Roma population faces special barriers in gaining access to employment and education. This perception varies considerably from country to country and it is precisely the two most recent additions to the EU, Romania and Bulgaria, that feel least strongly that being Roma poses a social disadvantage. There are other socio-demographic data which cause variations in these percentages. One example is that those with higher levels of education tend to more readily identify belonging to the Roma ethnic group with social disadvantage.

<sup>3</sup> Special Eurobarometer 263/Wave 65.4 – TNS Opinion & Social.

<sup>4</sup> Discrimination on the grounds of gender, ethnic origin, religion or belief, age, disability and sexual orientation. (See Article 13 of the Treaty of Amsterdam, D 2000/43/EC of 29 June on the enforcement of the equal treatment principle regardless of racial or ethnic origin and D 2000/78/EC of 27 November establishing a general framework for equal treatment in employment and occupation.)



### **3.2 The Council for the advancement of equal treatment and non-discrimination of persons on the grounds of racial or ethnic origin**

Article 13 of Council Directive 2000/43/EC of 29 June implementing the principle of equal treatment between persons irrespective of racial or ethnic origin establishes the obligation for each Member State to set up one or more bodies responsible for the promotion of equal treatment for all persons free of discrimination on the grounds of racial or ethnic origin.

The Fiscal, Administrative and Social Order Act, Law 62/2003 of 30 December 2003 addresses the transposition of Directive 2000/43/EC and specifically, having regard to the provision contained in Article 13 of the Directive, provides for the creation of the Council for the advancement of equal treatment and non-discrimination of persons on the grounds of racial or ethnic origin in its Article 33.

This Council is to be a collegiate body and be composed of representatives of the national, regional and local governments, of the most representative business and trade union organisations and of other organisations representing interests having to do with racial or ethnic origin.

Its responsibilities include:

- Providing independent assistance to victims in the processing of complaints of direct or indirect discrimination on the grounds of their racial or ethnic origin.
- Conducting autonomous and independent analyses and studies and the publishing of independent reports on discrimination on the grounds of racial or ethnic origin and on respect for the equality principle meaning the absence of all discrimination.
- Promoting measures which contribute to equal treatment and the elimination of discrimination on the grounds of racial or ethnic origin and formulating recommendations and proposals.

The council will be composed of a chairperson, two vice-chairpersons, eight members representing the General State Administration, four members representing the Autonomous Communities, three members representing Local Governments, two members representing the most representative business organisations, two members representing the most representative trade unions and ten members representing organisations whose activity is related with the promotion of equal treatment and non-discrimination on the grounds of racial or ethnic origin. The Council also has a Secretary who will be the head of the Directorate of the Spanish Observatory against Racism and Xenophobia.



Order TAS/113/2008 of 23 January called for the commencement of the selection process for the appointment of Council members representing organisations and associations. The following requirements, inter alia, must be met to participate in the selection process:

- Only organisations which undertake activities in the field of equal treatment and non-discrimination on the grounds of racial or ethnic origin are eligible. The number of projects targeting the promotion of equal treatment and non-discrimination and the number of beneficiaries and years of experience in the said field will be assessed.
- State-wide presence or at least have a solid position in several different regions. The number of Autonomous Communities in which the organisation carries out its activity will be assessed.
- The organisation must have sufficient structure and management capacity. The 2007 budget will be assessed as will the number of permanent, temporary and volunteer workers, the number of partners or affiliate members and the number of offices.

The Fundación Secretariado Gitano, meeting all of the requirements, submitted its candidacy on 7 February 2008. Not only did the Foundation meet all of the formal requirements but it is also present in 14 Autonomous Communities and in other countries making its scope international. The application also made mention of the fact that the Foundation's activity in the area of equal treatment and non-discrimination based on racial or ethnic origin dates back to 2001 with the launching of the first anti-racism programme entitled "Under the skin we are all the same".

When this 2008 Annual Report went to press, no decision had been taken with regard to the call for candidates and the Council has not yet begun to operate. We feel compelled to express our concern over the delay in the formation and start-up of this body, especially considering that the Directive set the deadline date of 19 July 2003 for Member States to adopt the necessary legal, regulatory and administrative provisions in compliance with the said Directive.



### 3.3 Combating discrimination at the regional government level

As reported in the *2006 Annual Report. Discrimination and the Roma Community*, a number of regional governments have made headway in the fight against discrimination. Of particular relevance in some Autonomous Communities is the inclusion of the fight on discrimination in the reform of their Statutes of Autonomy. Several have also made expressed mention of the Roma community in their statutes.

The Statute of Autonomy of **Aragon** entered into force on 23 April, coinciding with its regional holiday<sup>5</sup>. Its Statute specifically includes the right to equality and non-discrimination under the article referring to the rights of persons<sup>6</sup> and under the articles referring to specific matters such as culture, health, participation and access to employment. It also notes the responsibility of Aragon's public authorities to promote suitable conditions to achieve real and effective equality among all people and their corresponding groups<sup>7</sup>. Furthermore, the Statute makes specific mention of the Roma community and gives Aragon's public authorities the mandate to promote the conditions required for integration<sup>8</sup>.

**Andalusia's** new Statutes of Autonomy<sup>9</sup>, which also entered into force in 2007, provide that in defence of the general interest this Autonomous Community shall exercise its powers focusing on a series of objectives including promotion of the conditions necessary for the integration of minorities making special mention of the Roma community<sup>10</sup>. Andalusia has also embraced the concept of non-discrimination among its action and management principles<sup>11</sup>.

In the case of the new **Castile-Leon** Statutes of Autonomy<sup>12</sup>, non-discrimination and respect for diversity, with specific mention of the Roma community, are included among the "Guiding principles of public policy"<sup>13</sup>. This article is a mandate for Castile-Leon's public authorities to promote and adopt the measures needed to guarantee that the objectives laid down are fully achieved. In this case, the Statutes of Autonomy also include an article on the right to non-discrimination on the grounds of gender<sup>14</sup>.

<sup>5</sup> Official Gazette of Aragon (BOA), Issue 47, 23 April 2007.

<sup>6</sup> Article 12. "Rights of persons. 1. All persons have the right to live with dignity, security and autonomy and to live free of exploitation, mistreatment and all forms of discrimination and have the right to freely develop their personality and personal capacity (...)."

<sup>7</sup> Article 20. "General principles. It is the duty of Aragon's public authorities, without prejudice to national action within the scope of its powers: a) To promote suitable conditions so that the freedom and equality of individuals and the groups of which they form part are real and effective; to remove obstacles hindering their full development and to facilitate the participation of all (...)."

<sup>8</sup> Article 23. "Well-being and social cohesion. (...) 2. Aragon's public authorities shall promote the conditions necessary for the integration of ethnic minorities, especially the Roma community."

<sup>9</sup> Official Gazette of Andalusia (BOJA), Issue 56, 20.03.07.

<sup>10</sup> Article 10(3)(21) "Promotion of the conditions necessary for the full integration of minors, especially the Roma community to achieve full social incorporation."

<sup>11</sup> Article 133. "Action and management principles. 1. The Andalusian Regional Government shall objectively serve the public interest and act in accordance with the principles of efficiency (...), non-discrimination and proximity to citizens (...)."

<sup>12</sup> Official Gazette of Castile-Leon (BOCYL), supplement No 234 of 3 December 2007.

<sup>13</sup> Article 16. Guiding principles of public policy. (...) 23. Non-discrimination and respect of the diversity of the different ethnic, cultural and religious groups in Castile-Leon with special attention being paid to the Roma community through the fostering of mutual understanding and inter-cultural relations.

<sup>14</sup> Article 14. "The right to non-discrimination for reason of gender."



Another example of the involvement of regional government in the fight against discrimination is the 29 March 2007 **Declaration of the Catalanian Parliament** acknowledging Roma persecution and genocide.

This declaration is based on the classification of the crime of genocide as laid down in the Criminal Code and acknowledges that from the 15th to the 20th century, with the outbreak of the Civil War and the ensuing dictatorship, a series of laws and measures were enacted spelling intolerance towards the Roma people whose purpose was their forced assimilation including the loss of their language and forced settlement. The enactment of the Spanish Constitution, and specifically Article 14 providing that *Spaniards are equal before the law, without any discrimination for reasons of birth, race, sex, religion, opinion, or any other personal or social condition or circumstance*, formally put an end to legal discrimination. The Parliament of Catalonia:

1. *"Affirms and acknowledges that the Roma people residing in Spain and specifically in Catalonia, have been the victims of historic and ongoing genocide.*
2. *Deplores all of the racist anti-Roma laws enacted or accepted by Catalanian institutions and all other circumstances which have given rise to the mistreatment, discrimination and vulnerability of the Roma people throughout their history.*
3. *Commits to work to enforce inclusive, effective and firm policies with a view to pursuing equal opportunity for members of the Roma community in Catalonia and the recognition and upholding of their cultural identity in observance of Resolution 1045/VI and 1046/VI of this Parliament, of the governmental actions undertaken in compliance with the said resolutions, of Article 42(7) of the Statutes of Autonomy and of Council Directive 2000/43/EC implementing the principle of equal treatment between persons irrespective of racial or ethnic origin."*





### 3.4 The European Union Agency for Fundamental Rights (FRA)

Considering that “full and absolute respect for fundamental rights entails greater insight and awareness on the part of the Union regarding fundamental rights issues”, the European Union Agency for Fundamental Rights (hereafter FRA) was created by virtue of Council Regulation (EC) No 168/2007 of 15 February 2007<sup>15</sup>.

The precursor of the FRA was the European Monitoring Centre on Racism and Xenophobia (EUMC) and the FRA must therefore continue to cover the phenomena of racism, xenophobia, protection of minorities and gender equality as the successor of the Monitoring Centre taking on all of the latter’s obligations and commitments.

The aim of the FRA is to provide support and counsel to the Union’s competent institutions, bodies, organisations and agencies and to Member States when enforcing Community law in connection with fundamental rights in order to aid them in fully respecting these rights when they adopt measures or establish lines of action within their respective scope of responsibility.

Its duties, carried out with full independence, include:

- compiling, recording, analysis and dissemination of pertinent and objective data and information;
- development of methods and rules to improve data comparability, objectivity and reliability at European level;
- conducting and fostering research and works;
- drafting and publication of findings and opinions on specific topics for the institutions and Member States;
- publication of an annual report on issues having to do with fundamental rights;
- publication of theme-based reports.

Provisions are also made to set up and maintain relations between the FRA and competent Community bodies, organisations and agencies, Member State and international organisations and with the civil society through what has been called the Fundamental Rights Platform. This Platform is a cooperation network composed of non-governmental organisations working in defence of human rights, trade unions, business organisations, and relevant social and professional organisations. It is an information and knowledge sharing mechanism and is open to all qualified interested stakeholders. Having received an invitation from the FRA to form part of the Platform, the Fundación Secretariado Gitano sent its application form in August 2008 convinced of the importance and usefulness of being part of an initiative such as this.

The first meeting of the Platform took place in Vienna on 7-8 October of this year. The FSG and the Movimiento contra la Intolerancia (Movement against Intolerance) were the two Spanish NGOs present at that meeting. Working groups were formed in order to prioritise the FRA’s objectives as well as its duties and work methodology. This was a preliminary contact where

<sup>15</sup> OJL 53/1 of 22.02.07, p.1.



the FRA acknowledged that it was in the midst of the transformation process from the Monitoring Centre to the Agency and where the NGOs offered both criticism and contributions in an effort to make the Platform collaboration work as constructive as possible.

The founding Regulation likewise establishes the need for collaboration and cooperation of the FRA<sup>16</sup> with the Council of Europe to avoid overlap in the activities carried out by the two organisations.

To date the FRA has published two annual reports (2007 and 2008) focusing on the situation of racism and xenophobia in the EU Member States as well as several specific reports on narrower topics. The annual report published in 2007 analyses the situation of racism and xenophobia in the EU during 2006 and is a “transition” report insofar as it was committed to continuing with the mandate of the Monitoring Centre.

That report<sup>17</sup> states that despite progress made in the implementation of the Racial Equality Directive, in nearly half of the Member States, even in some where the law and procedures are in force, there is no information as to whether any sanctions have been imposed in this connection<sup>18</sup>. The report specifically points out that in Spain the Racial Equality Directive was formally transposed in 2003 without any public debate but there is no information or evidence that the legislation is actually being enforced. It goes on to say that there is no evidence that any effective proportional and deterrent sanctions have been imposed in any of the racial discrimination cases during 2006 which means that the key concepts concerning the fight against discrimination have not been enforced, examined or interpreted by the courts. In fact, there are only five Member States lacking official data concerning the application of criminal justice in cases of racial violence and Spain is among them<sup>19</sup>.

The report also points out that while the specialised body for the promotion of equal treatment (Council for the advancement of equal treatment and non-discrimination of persons for reasons of racial or ethnic origin) has been formally created by virtue of a law, it was still not operational as of 2006. On a more positive note, the report cited the creation of the Spanish Racism and Xenophobia Observatory (Oberaxe)<sup>20</sup> as an example of a best practice.

<sup>16</sup> AGREEMENT between the European Community and the Council of Europe regarding cooperation between the European Union Agency for Fundamental Rights and the Council of Europe. OJL 186/7 of 15.07.08, p.6.

<sup>17</sup> [http://fra.europa.eu/fra/material/pub/racism/report\\_racism\\_0807\\_en.pdf](http://fra.europa.eu/fra/material/pub/racism/report_racism_0807_en.pdf).

<sup>18</sup> The European Union Agency for Fundamental Rights (FRA): “Report on Racism and Xenophobia in the Member States of the EU”. 2007. P. 8.

<sup>19</sup> The European Union Agency for Fundamental Rights (FRA): “Report on Racism and Xenophobia in the Member States of the EU”. 2007. P. 22.

<sup>20</sup> The European Union Agency for Fundamental Rights (FRA): “Report on Racism and Xenophobia in the Member States of the EU”. 2007. P. 39.



### 3.5 European year of equal opportunities for all

Despite an extensive body of anti-discrimination legislation, the European Union is aware that this is not enough to ensure equal opportunity in practice. In this connection, the *2007 European Year of Equal Opportunities for All*<sup>21</sup> has attempted to boost the European anti-discrimination strategy.

The overarching objective of the European Year, inaugurated in Berlin on 30 January 2007 at the first Equality Summit, is to raise citizen's awareness regarding the right to equality and to a life free of discrimination and also to provide information regarding "multiple discrimination". Convinced of the importance of eliminating stereotypes, prejudice and violence, of promoting good relations among different groups, especially amongst young people, and of encouraging the values on which the fight against discrimination is based, efforts were also made to create a more cohesive society.

In this context, the Council of the European Union passed a resolution<sup>22</sup> inviting the Member States, the Commission and the Civil Society to implement a series of measures in support of equal opportunity for all. This resolution is based on the fact that the non-discrimination and equal treatment principles are included in the Treaty Establishing the European Community (TEC) and are therefore fundamental principles which must be considered when regulating all other European Union policies despite its recognition that anti-discrimination law continues today to be the great unknown. The report itself points out that despite the many advances made in fostering equality and fighting discrimination, in the EU we can still find inequality and discrimination on the grounds of sex, race, ethnic origin, age, disability, religion or conviction and sexual orientation with a considerable cost for those affected and for the society at large. Given that poverty and social exclusion are important obstacles blocking the way to equal opportunity, achieving full equality is essential for the growth, cohesion, prosperity and well-being of Europe and of all its citizens.

<sup>21</sup> Decision No 771/2006/EC of the European Parliament and of the Council of 17 May 2006.

<sup>22</sup> European Council. Legislative acts and other instruments. "Council Resolution on the follow-up activities of the European Year of Equal Opportunities for All (2007)". Brussels, 26 November 2007. 15383/07.



In light of the foregoing, the Council took due note of several realities including the fact that:

- in order to achieve equality in practice, knowledge and enforcement of the law must be reinforced and that law must envisage equal opportunity;
- it is essential to eliminate violence, prejudice and stereotypes, to promote best practices amongst all members of society (especially young people) and to foster and disseminate the values which underpin the fight against discrimination;
- the gathering of data on discrimination and equality is a fundamental instrument:
  - to accurately evaluate the seriousness and type of discrimination problems people are facing and
  - to draw up, adapt, supervise and evaluate policies;
- the European Year has drawn attention to the aggravated difficulties arising from **multiple discrimination**;
- discrimination can lead to poverty and social exclusion preventing participation and access to resources;
- many Roma are facing very difficult situations of discrimination owing to their ethnic origin and social exclusion;
- the European Parliament and the civil society have called for the broadening of legal protection against discrimination to spheres outside of employment and occupation.

For all of the foregoing, the Council invites the Member States and the Commission to implement measures guaranteeing the full and effective application and evaluation of existing anti-discrimination laws; to intensify efforts to prevent and combat discrimination both within and outside of the labour market; to guarantee and consolidate the effectiveness and independence of specialised equality bodies; to fully bear in mind specific issues arising from multiple discrimination; to take full advantage of the possibilities of affirmative action to overcome existing inequalities and achieve full equality in practice; to firmly condemn all forms of racism and xenophobia and to strengthen supervision and research on these issues. Moreover, the Council makes specific mention of the Roma community and invites States to help Roma gain access to human rights, speed up their social integration process and combat all types of discrimination against them.

Following the experiences of the European Year, the Commission presented a communication<sup>23</sup> with a broad focus on intensifying action against discrimination and promoting equal opportunity. In this communication, the Commission agrees with the situation described by the Council in its report and acknowledges that, despite the EU having one of the most advanced anti-discrimination legal frameworks, many European still feel that discrimination is widespread. 15% claim to have personally suffered discrimination during the last year and 29% said they had witnessed situations of discrimination<sup>24</sup>. Hence, the Commission believes that enhanced legal protection against discrimination needs to be backed up by an active strategy promoting non-discrimination and equal opportunity and proposes actions to give renewed impetus to the dialogue regarding non-discrimination policies and to make more effective use of available instruments. It also proposes that both types of measures put

<sup>23</sup> COM (2008) 420 final.

<sup>24</sup> COM (2008) 420 final. P. 2.



special emphasis on promoting the social inclusion of the Roma community in light of the particularly serious discrimination they suffer.

The Commission proposes improving the enforcement of the existing legal framework consisting of the three Directives<sup>25</sup> adopted for the effective implementation of the provisions of Article 13 of the TEC. In this connection, the transposition of the Directives into national law is not enough; Member States must ensure that **redress mechanisms** for victims are effective and increasingly well publicised. People must know their rights and be able to exercise them.

The Commission also believes that this legal framework should continue developing because the EU is still lacking a minimum uniform level of protection for people who have suffered discrimination<sup>26</sup>. In this connection, it has announced a proposal for a Directive guaranteeing that in the 27 Member States all forms of discrimination, including harassment on the grounds of age, sexual orientation, disability and religion or belief are prohibited and that the victims are provided with effective means of redress.

The Commission goes on to explain that advances in the fight against discrimination and in favour of equal opportunity cannot depend exclusively on legislation; a whole series of political instruments needs to be enhanced such as awareness-raising campaigns, data collection or affirmative action. Anti-discriminatory mainstreaming<sup>27</sup> is one of the main political instruments which needs to be focused on. This means that the equal opportunity principles should be applied across the board to all of the other areas covered under Article 13 TEC with a view to reducing the inequality and discrimination suffered by all groups. The Commission specifically believes that the promotion of equal treatment should be systematically integrated into the framework of coordination mechanisms for employment, social inclusion, education and training. Data collection<sup>28</sup> is likewise considered essential in order to accurately evaluate the degree and nature of discrimination and to subsequently better design, adapt, monitor and evaluate all of these policies. Another of these political instruments is **affirmative action**. The Commission specifically points out that European law does not prohibit any Member State from adopting specific measures to foresee or compensate for disadvantages caused by discrimination.

In addition to the foregoing, specific mention is made of using the best tools to make headway in the social inclusion of the **Roma community**<sup>29</sup>. Today there is particular concern for this community due to the persistent discrimination both at individual and institutional level and long-term social exclusion. Given that EU anti-discrimination legislation is the basic starting point for the social inclusion of the Roma community, the Commission has said that it will be on guard and intensify its work with national equality organisations in order to improve their capacity to deal with cases of discrimination. It is also clear that the local impact of legislative, financial and political tools depends on the commitment of the Member States and the ability of all involved actors to use them to the fullest degree.

<sup>25</sup> Directive 2000/43/EC of 29 June; Directive 2000/78/EC of 27 November; Directive 2004/113/EC of 13 December.

<sup>26</sup> COM (2008) 420 final. P. 4.

<sup>27</sup> COM (2008) 420 final. P. 6.

<sup>28</sup> COM (2008) 420 final. P. 7.

<sup>29</sup> COM (2008) 420 final. P. 9.



With a view to supporting and promoting a joint commitment on the part of Member States, the EU institutions and the civil society together with the Commission organised a European Summit on the Roma community<sup>30</sup> in September 2008 in the context of the new *European Year of Intercultural Dialogue* proclaimed to contribute to the expression and projection of a sustained process of intercultural dialogue.<sup>31</sup>

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<sup>30</sup> The first European Roma Summit took place on 16 September 2008 under the French presidency of the European Union Council. It was organised by the European Commission's Directorate-General for Employment, Social Affairs and Equal Opportunity. Further information at [www.gitanos.org](http://www.gitanos.org).

<sup>31</sup> Decision No 1983/2006/EC of the European Parliament and of the Council of 18 December 2006 on the European Year of Intercultural Dialogue (2008).



### 3.6 Judgement handed down by the Court of Justice (Chamber two) on 10 July 2008

The Community's anti-discrimination and equality regulatory framework was in need of jurisprudence for the purpose of interpretation and analysis of its effective content and scope. In this connection, on 10 July 2008 the Court of Justice of the European Communities delivered its ruling<sup>32</sup> in case No c-54/07 which was a request for a pre-judicial decision on the interpretation of Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin.

The request was submitted within the context of a lawsuit against a company for statements made by one of its administrators publicly affirming that the company did not want to hire "aliens". In view of the issues raised the Court declared:

***"If an employer publicly declares that s/he will not hire workers of a certain ethnic or racial origin, that would constitute direct discrimination in employment as laid down in Article 2(2) a) of Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin, because statements such as these could serve as a strong deterrent to some job seekers and therefore hinder access to the labour market."***

***"The public declarations used by employers to communicate, as part of their hiring policy, that they are not willing to hire workers of a certain ethnic or racial origin are sufficient to presume the existence of a hiring policy which is directly discriminatory as described under Article 8(1) of Directive 2000/43. In this case it is the responsibility of employers to prove that they have not violated the equal treatment principle. This can be done by demonstrating that the company's actual hiring practices do not correspond to those statements. It is the duty of the referring court to substantiate that the charges against that employer have been demonstrated to be true and to assess whether the elements that the said employer submitted to support his assertion that he did not violate the equal treatment principle are sufficient."***

***"Article 16 of Directive 2000/43 demands that the punitive regime applicable to infringements of national provisions laid down to adapt the law to the said Directive where there is no identifiable victim must also be effective, proportionate and dissuasive."***

<sup>32</sup> See [http://www.gitanos.org/areas/igualdad\\_de\\_trato\\_y\\_no\\_discriminacion/documentos\\_1.html](http://www.gitanos.org/areas/igualdad_de_trato_y_no_discriminacion/documentos_1.html)



### 3.7 Protocol No 12 to the European Convention for the Protection of Human Rights and Fundamental Freedoms

One of the most important advances made in connection with equal treatment was in 2008 within the context of the Council of Europe. Following ratification in March, this Protocol No 12<sup>33</sup>, featuring a blanket prohibition of discrimination, entered into force in Spain on the first of June 2008. In other words, while Article 14 of the Convention forbid discrimination in the enjoyment of the rights and freedoms defined in the Convention itself, the Protocol provides for a blanket prohibition of all discrimination affecting any of the rights conferred by law thus providing much broader protection.

The section on the Protocol's provisions defines the equal treatment principle in the following terms: *"The equal treatment principle means that similar situations must be treated similarly and those that are different must be treated differently. Any infringement in this regard shall be presumed discrimination barring objective and reasonable justification."*<sup>34</sup>

In terms of the list of grounds for discrimination, nothing new has been introduced to supplement Article 14 of the Convention but this was not due to any lack of sensitivity but rather because *"the inclusion of further grounds was considered pointless from a legal standpoint given that the list of grounds for discrimination is virtually endless and the inclusion of any additional grounds could give rise to undesirable interpretations in the case of discrimination based on grounds not mentioned. It should not be forgotten that the European Court of Human Rights has already applied Article 14 with respect to grounds for discrimination not mentioned in that provision."*<sup>35</sup>

<sup>33</sup> Instrument of ratification of Protocol No 12 to the European Convention for the Protection of Human Rights and Fundamental Freedoms (No 177 of the Council of Europe) done at Rome on 4 November 2000. Official State Gazette (BOE) No 64 of 14 March 2008. P.15299. ([http://www.gitanos.org/upload/03/47/Ratificacion\\_espanola\\_Protocolo\\_de\\_Defensa\\_Derechos\\_A15299-15304.pdf](http://www.gitanos.org/upload/03/47/Ratificacion_espanola_Protocolo_de_Defensa_Derechos_A15299-15304.pdf))

<sup>34</sup> Protocol No 12 to the European Convention for the Protection of Human Rights and Fundamental Freedoms, paragraph 15.

<sup>35</sup> Protocol No 12 to the European Convention for the Protection of Human Rights and Fundamental Freedoms, paragraph 15.





## 3.8 Relevant case law of the European Court of Human Rights

### 3.8.1 Judgement of the European Court of Human Rights, Grand Chamber, “D. H. and others v. the Czech Republic” of 13 November 2007

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This Judgement is a milestone in terms of the Strasbourg Court’s protection of racial minorities. For the first time this institution took a serious approach to the prohibition of racial discrimination (Article 14 of the European Convention on Human Rights), overturning the judgement delivered by a chamber of this same Court on 7 February 2006 which has been criticised at a number of different fora<sup>36</sup>. In his dissenting vote the Spanish Judge J. Borrego compared this Judgement to a Formula 1 race car moving very swiftly away from previous case law of the Court. He judges this discrepancy with previous case law as negative but I personally believe just the opposite: for the first time the European Court of Human Rights incorporates into the realm of racial discrimination (already done in the case of sexual discrimination) the categories of anti-discrimination law typically used in European Union Law (which he specifically cites in the text) and North American law, the latter giving rise, for example, to the notion of “indirect discrimination” which is key to this case. This Judgement updates and modernises the obsolete categorisation of equality and the prohibition of discrimination that the Strasbourg court had been using up to that point. For the first time it judged indirect racial discrimination; for the first time it applied the probative value of statistics to this field; for the first time it incorporated the notion of strict judicial interpretation (called the *strict scrutiny test* in North American law) as concerns racial discrimination; for the first time it ordered the inversion of the burden of proof in cases of indirect racial discrimination or impact. That is what makes this decision so important; not only for the solution to the specific conflict addressed but especially because of the doctrine it established in respect of racial discrimination applicable to all future cases. What we have then is truly a leading case, a Judgement laying down doctrine for future application.

We must first of all bear in mind that this Judgement was delivered by the Court’s Grand Chamber and reverses a judgement issued by a lower chamber of the same Court. Article 43 of the European Convention on Human Rights envisages, in “exceptional cases” (in this case, due to its social importance recognised by a board of five judges) the “re-examination” of Chamber Judgements. This Judgement is, therefore, the final word from Strasbourg on this conflict.

Also of a propaedeutic nature, we would draw attention to the fact that the Court duly notes the situation of social disadvantage facing the Roma community as a criterion for the interpretation of the case. The Judgement literally states as follows (paragraph 181): “The vulnerable position in which the Roma community finds itself calls for careful consideration of its different needs and lifestyle within general regulatory frameworks and in decisions concerning specific cases”. The Judgement goes on to say that “we must safeguard the interests of minorities” while also “preserving cultural diversity which has value for society”.

<sup>36</sup> See: “*La discriminación racial en la jurisprudencia del Tribunal Europeo de Derechos Humanos*”, Revista Española de Derecho Constitucional, issue No 79, January-April (2007), pp. 279-307.



As the reader will recall, the case focuses on the differential treatment received by Roma children during a period of time in the Czech Republic in terms of school enrolment, a very high number of Roma children being placed in special schools for children with intellectual disabilities. The Chamber Judgement had refused to give probative value to the overwhelming statistical data on discrimination and hence arrived at the conclusion that indirect discrimination was not an issue in this case. In that sense, the Grand Chamber's judgement represented a Copernican shift noting that although Court case law "in the past" had refused to acknowledge statistics as evidence in defining a certain practice as discriminatory, in more recent discrimination cases (on the grounds of gender) the Court actually resorted to statistical data in identifying differential treatment between groups (women and men) in similar situations. Indeed, in its judgement in the *Hoogendijk v. Holland* case of 6 January 2005 the Court asserted that: "When a complainant is able to prove, based on irrefutable official statistics, the existence of a *prima facie* indication that a specific rule (even when formulated in a neutral manner), in practice, affects a clearly higher percentage of women than men, the burden of proof lies with the defendant Government to show that this is the result of objective factors totally unrelated to discrimination on the grounds of gender. If the burden of proving that the difference in impact on men and women is not a discriminatory practice did not lie with the defendant Government, it would be extremely difficult for the complainants to prove indirect discrimination".

The Court transferred this same methodology, point by point, from the sphere of sexual discrimination to racial discrimination: First of all, the alleged victim of discrimination must submit preliminary evidence, with the aid of statistics, that impact-based (or indirect) discrimination has taken place, i.e. differential treatment between two similarly situated groups even if the differentiating criterion is not racial, in other words, even if it is "neutral" (in this case children's academic capacity and educational needs). It is not necessary to prove discriminatory intent on the part of the authority in question. Secondly, this allegation gives rise to a reversal of the burden of proof meaning that the defendant Government and not the complainant must try to show that the differential treatment (in light of the different impact caused and not because different rules have been set up for each group – for that would constitute direct discrimination) is objective and has absolutely nothing to do with racial discrimination. Thirdly, the judicial body bases its decision in view of the arguments raised.

### **1. Can differential treatment be deduced based upon the different impact of the measure being challenged?**

The Judgement first of all points out that as the result of "a turbulent history" Roma have become what can be specifically described as a "disadvantaged and vulnerable minority" requiring "special protection" especially when it comes to the right to education (specified in Article 2 of Protocol No. 1 to the Convention). This case therefore merits "special attention".

Hence, the Court gave credence to the statistical data showing that 56% of all of the children in special schools in Ostrava were Roma despite the fact that this group only accounted for 2.26% of the total number of primary school students in that town. Moreover, only 1.8% of non-Roma children were placed in these special schools while the proportion of Roma children placed there totalled 50.3%. The Court took due note of the fact that the Czech Government did not question these data and failed to furnish any alternative figures. Furthermore, the general statistics for the entire country showed that Ostrava was no exception: of the total number of students placed in spe-



cial schools, between 80% and 90% were Roma. In the view of the Court, this provides a more general view allowing one to conclude that, even if the figures are not 100% accurate, the number of Roma children placed in special school is disproportionately high. Consequently, these statistical data can be considered reliable and significant in proving a strong presumption of the existence of indirect discrimination.

## **2. Reversal of the burden of proof. The Government mounts its defence.**

In light of this presumption of indirect discrimination, it was up to the Czech Government to prove that the different impact that its school system had on Roma and non-Roma children had nothing to do with ethnic origin. Or, to put it in more technical terms, it had to prove an “objective and reasonable justification”, i.e. that it was pursuing a legitimate aim and that there is a reasonable degree of proportionality between the means used and the aim pursued. The Court significantly added that when differential treatment is based on race (incorporating the criterion of strict judicial interpretation), “the notion of objective and reasonable justification must be interpreted as strictly as possible”.

The Czech Government justified the differential treatment afforded to Roma and non-Roma children by pointing to the need to adapt the educational system to the abilities of children with special educational needs. This justification of its academic policy is specifically based on two bodies of data (which it deems neutral and non-discriminatory on the grounds of race): (1) The children were placed in special schools as a result of their low intellectual capacity measured with the help of psychological tests at centres for scholastic psychology. (2) The final decision to refer the children to special schools depended on parental consent.

## **3. Arguments and conclusions of the Court.**

The Judgement did not consider either of the two reasons forwarded by the Government (psychological test, parental consent) as objective and reasonable justification.

### **Psychological tests**

The Court accepted that the system of special schools (which, by the way, was later abolished in the Czech Republic, all children today being placed in ordinary schools) was designed to provide a solution for children with special educational needs. However, it shared the concern expressed in the process by other institutions of the Council of Europe concerning the poor curriculum followed in these schools and the segregation engendered by the system. Moreover, the tests were immersed in scientific controversy and failed to take account of the specific circumstances of the Roma children. The Court concluded that at the very least there was a danger that the psychological tests and their results were not analysed in the light of the special circumstances of Roma children and therefore cannot serve as justification for the differential treatment under challenge.

### **Parental consent**

In the circumstance of this case the Court did not believe that the parents of the Roma children, members of a disadvantaged community with a low level of education, were in a position to properly assess all of the aspects of the situation or the consequences of their consent. The Government conceded that this consent was given in the form of a signature on an official form which did not furnish information on alternatives or on the curricular differences between ordinary and special schools. The dissenting vote of



the Spanish Judge J. Borrego, considers this opinion held by the majority of the Court “insulting” because “it judges parents as incapable of educating their children”. I cannot agree with this objection because it appears obvious that the parents lacked the information needed to take an informed decision and especially because, as the Judgement very correctly points out, Roma parents were faced with the dilemma of sending their children to the ordinary schools, which were not prepared to make provisions for the cultural and social differences of their children (a situation which very likely would condemn them to isolation), or sending them to special schools where they would be with many other Roma children.

The Court therefore concluded that this case involved indirect discrimination or discrimination in terms of impact causing segregation and fewer opportunities for Roma children. The system, as it was applied in practice, had a disproportionate and damaging impact on the Roma community and therefore violated the prohibition against racial discrimination provided for in the Convention (Article 14) having regard to the right to receive an education (Article 2 P.A. No 1).

In short, I believe this to be a magnificent Judgement but not so much for its application to this specific dispute (the damage done in this case is irreparable although the sentence did include economic redress and the school system in the Czech Republic was subsequently reformed) but more for the general doctrine established regarding racial discrimination finally incorporated by the Strasbourg Court and which will most certainly be applied to future cases. From this date forward it will be a little bit more difficult to discriminate against Roma in Europe and for that I believe that congratulations are in order.

### 3.8.2 Judgement of the European Court of Human Rights in the case *Sampanis and others v. Greece* of 5 June 2008

Continuing with the same topic analysed in Chapter 3.4<sup>37</sup> of this report, the European Court of Human Rights (ECHR) heard another case<sup>38</sup>, this time involving Greece, on discrimination in education and segregation against Roma children. In this Judgement, the Court once again turns to Article 14 of the Convention<sup>39</sup>, establishing the notion of direct and indirect discrimination, the possibility of taking affirmative action and highlighting the importance of special care and reaction on the part of the authorities in cases of racial discrimination.

In this case, the children of a group of Roma residents were enrolled in “special preparatory classes” set up in classrooms built on the grounds of a local school. According to the Government (the defendant in this case), the only purpose of these classes was to teach these children to read and write so that they could subsequently be placed in normal classes. The Government also drew attention to the consent given by the families to enrol these children in these circumstances.

The ECHR reminds us that States have the obligation to implement an educational system in public schools and highlights the importance of enrolling children in mainstream primary schools not only for learning purposes but also because this helps to ensure the integration

<sup>37</sup> ECHR. *D.H. and others v. The Czech Republic*.

<sup>38</sup> ECHR. *Affaire Sampanis et Autres c. Grèce*. 5 juin 2008.

<sup>39</sup> **Article 14 – Prohibition of discrimination.** *The enjoyment of rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or sother status.”*



of the children in society, even more important in the case of children belonging to a minority<sup>40</sup>. In this judgement the Court once again recognises that the special vulnerability of the Roma community implies the need to pay special attention to their needs and lifestyle<sup>41</sup> and to their training; special protection in the case of minors where the right to an education is of vital interest.

One of the key elements of this judgement, along the same lines as the *D.H. and others v. the Czech Republic* case, is its analysis of the **burden of proof**<sup>42</sup> in discrimination cases. Normally, one of the most difficult tasks for victims of discrimination, especially indirect discrimination, is to prove it in Court because there are rarely any evidentiary documents or direct testimony. Victims must, therefore, submit to the Court all documents, testimony or any other form of evidence which, considered jointly, allow the Court to conclude that there are indeed indications of discrimination. In this specific case the complainants submitted, *inter alia*, documents demonstrating that, as of the date of the hearing, no Roma child had yet to be mainstreamed into normal classes; documents on racist incidents which had occurred previously in the school involving the parents of non-Roma students and which may have influenced the authorities to take this segregationist decision; and the absence of testing to check academic level prior to enrolling children in these special classes. In light of the foregoing, the Court allowed the reversal of the burden of proof given that the dossier of facts and their historic context considered jointly convinced the Court that there were indications of discrimination and therefore the Government had the task of proving that this differential treatment was not linked to the ethnic origin of the students.

When differential treatment on the grounds of ethnic origin is claimed, the objective justification must be strictly interpreted. In this case the Government claimed that it used the age criterion to determine which children should be placed in special classes but the Court held that a criterion such as age was not enough to eliminate the discriminatory nature of the treatment which was reserved only for these children. In fact, the Court made specific mention of the lack of tests to determine which of the children were encountering these difficulties. As for the claim made by the Greek Government regarding parental consent, the Court held that such consent is tantamount to waiving a right guaranteed under the Convention but, owing to the importance of prohibiting racial discrimination, it would be inadmissible to allow someone to waive this right because that would clash with a more important public interest<sup>43</sup>.

And finally, the Government was unable to prove that this differential treatment was reasonably justifiable, that it pursued legitimate aims or that there was proportionality between the means employed and the aim pursued and the Court thus determined that **discrimination did indeed exist** and Greece was convicted for violation of Article 14 of the Convention (prohibition of discrimination) along with Article 2 of Protocol No 1 to the Convention (Right to Education).

<sup>40</sup> STEDH. *Affaire Sampanis et Autres c. Grèce*. 5 juin 2008. P. 66

<sup>41</sup> ECHR. *Affaire Sampanis et Autres c. Grèce*. 5 juin 2008. P. 72

<sup>42</sup> ECHR. *Affaire Sampanis et Autres c. Grèce*. 5 juin 2008. P. 70 *et. seq.*

<sup>43</sup> ECHR. *Affaire Sampanis et Autres c. Grèce*. 5 juin 2008. P. 95