HEADWAY MADE IN COMBATING DISCRIMINATION

Headway made in combating discrimination

1. European Union

Following a long and difficult ratification process by Member States, the Treaty of Lisbon finally entered into force on 1 December 2009. The Treaty modified the structure of European institutions and its work methods and pursues a more democratic, transparent and efficient Europe through greater participation of the European Parliament and the implementation of work methods and a simplified voting system. It also pursues a Europe which strengthens Union values and awards the rank of primary legislation to the Charter of Fundamental Rights. The Treaty of Lisbon preserves already existing rights but now guarantees the freedoms and principles laid down in the Charter of Fundamental Rights whose provisions have become legally binding[1]. The Charter lays down civil, political, economic and social rights and equality is now not only one of the values[2] on which the European Union is based, but Member States and European Union institutions are now also going to have to respect Title III "Equality", specifically Article 21[3] ("Non-discrimination") of the Charter of Fundamental Rights given that it has been upgraded from being a mere commitment to having full legal force.

Report on the effective enforcement of Directive 2000/43/EC in the area of labour (FRA)

Article 17 of Directive 2000/43/EC obliges the European Union Agency for Fundamental Rights[4] (FRA) to contribute to the European Commission's reviews of the implementation of the Directive contributing evidence of its impact in the field. In 2010 the FRA published a report entitled *"The Impact of the Racial Equality Directive"* (views of trade unions and employers in the European Union) as part of this mission and presented an assessment of the implementation of the Directive exclusively in the field of employment from the point of view of the trade unions and business organisations. In the case of Spain's business community, interviews were held with Foment del Treball, CECOT (Catalonian employer's associations) and CNC (National Confederation of Builders), Promsa, Escorxadors de Girona, GAG (Guissona Food Group), Rotecna, Bodegas Torres and Telefónica. The following trade unions were also interviewed: UGT, CCOO, CCOO Catalonia, USO Catalonia, CCOO Andalusia, CGT Barcelona and UGT Murcia.

The views gathered from the employers interviewed were divided into four large groups: those who believe that the Directive has had a positive impact; those who believe that the Directive has had very little or no impact; those who

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1 OJEU C83/17 of 30.03.2010. Treaty on European Union. Article 6: *"1. The Union recognises the rights, freedoms and principles set out in the Charter of Fundamental Rights of the European Union of 7 December 2000, as adapted at Strasbourg, on 12 December 2007, which shall have the same legal value as the Treaties."*

2 OJEU C83/17 of 30.03.2010. Treaty on European Union. Article 2: *"The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail."*

3 OJEU C303/7 of 14.12.2007. Charter of Fundamental Rights. Article 21: *"1. Any discrimination based on any ground such as sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age or sexual orientation shall be prohibited. 2. Within the scope of application of the Treaties and without prejudice to the special provisions of those Treaties, any discrimination on grounds of nationality shall be prohibited."*

4 For further information see: http://fra.europa.eu/fraWebsite/home/home_en.htm

have a negative view of the Directive; and those who were unaware or knew very little of the Directive. The latter group is mostly comprised of entrepreneurs from the 12 new Member States who consider this regulation as an "exotic tool" imposed on them from outside. In fact, some simply deny the existence of ethnic discrimination in their countries, particularly when it comes to the Roma population. In their view, if there are few Roma in the labour market it is due to their individual characteristics.

In general, trade unions are more aware of the existence of the Directive and the national law transposing it but their views also vary and, once again, may be divided into four groups: those who believe that the Directive has had a positive impact, those who believe that it has had very little or no impact; those who believe it has had a negative impact; and those who were unaware or knew very little about the Directive. Some of the trade unions interviewed denied the existence of discrimination when asked to comment specifically on discrimination suffered by the Roma community.

When entrepreneurs and trade unions were asked about measures to raise awareness regarding anti-discrimination policies, both agreed that more awareness-raising regarding rights was needed, especially among those groups the Directive was designed to protect. The trade unions were also in favour of the Directive allowing them to file class action suits on behalf of whole groups of workers instead of having to file individual suits.

Key findings include the different degrees of awareness depending on geographical area. In general, EU-15 Member States tend to be more aware. In fact, many of those interviewed were involved in one way or another with the drafting of the Directive.

Also, trade unions are generally more aware of the regulation and hold it in higher esteem. In this connection, while the trade unions prefer compulsory regulations, business organisations tend to prefer voluntary solutions.

Surprisingly, both trade unions and entrepreneurs fail to understand that the Roma community is affected by racial discrimination. In some countries the Roma community is associated with discrimination but this is not viewed within the context of racial discrimination. On very few occasions is the Roma community recognised as being protected by the Directive.

Another finding was that in the majority of Member States, equality organisations are not yet perceived as the proper channel through which to file ethnic or racial discrimination suits in the area of employment or as being able to obtain satisfactory results. The social spokes-persons interviewed expressed their concern for the lack of independence and authority.

Both groups also noted the scant number of complaints or discrimination suits. In some countries, these types of suits do not even exist. The business associations interviewed suggest three explanations accounting for this situation:

- fear on the part of workers that they might lose their jobs;
- workers do not believe that fines imposed will make any difference;
- some workers are so grateful for just having a job that they do not even recognise that they are victims of discrimination.

The following explanations were given by the trade unions for this low number of complaints:

- procedural barriers making it difficult to lodge a complaint;
- limited geographical access to equality bodies;
- the political situation of equality bodies;
- unawareness of equality bodies;
- workers are unaware of their right to not be subjected to discrimination;
- fear of being victimised.

In conclusion, the two groups made a series of proposals to enhance the Directive's practical impact. The following were made by the trade unions:

- Better transposition of Directives because many times the problem is not so much a lack of awareness but rather their transposition;
- The private and public sectors must be covered;
- Improve access to the justice system, not only by ensuring access to justice free of charge but also by permitting trade unions, at least, to file class action suits;
- Independence of equality bodies;
- Stiffer fines - some trade unions even believe that equality bodies should be able to give fines - and redress must be brought into line with what is laid down in the Directive. This would be more effective in getting employers to change their behaviour;
- Improve access to equality bodies.
- The following proposals were made by the business organisations:
- Make the Regulation clearer;
- Earmark more resources for the implementation of the Directive.

II European Summit on Actions and Policies in Favour of the Roma Population

On 8 and 9 April 2010 the "II European Summit on Actions and Policies in Favour of the Roma population" was held in Cordoba (2nd European Roma Summit)[5], organised by the European Commission and the Spanish Ministry of Health and Social Policy within the framework of the activities of the Spanish Presidency of the EU in the first half of 2010.

This high-level conference was the result of a decision taken by the European Parliament urging the Commission to draft a European Strategy and Plan targeting the Roma population. Debates focused on the most recent advances made at European level and specifically on the results of the meetings of the EU Platform for Roma Inclusion and the 10 Common Basic Principles for Roma Inclusion.

As a result of this summit three countries, namely Spain, Belgium and Hungary, signed a Joint Declaration[6] as they believed that the time had come to boost the Roma agenda with a view to achieving substantial improvements in the social and economic integration of Roma in Europe within the framework of the Decisions and Recommendations adopted by European institutions over the last several years. In this Declaration, the trio committed to:

- Advance the mainstreaming of Roma issues in European and national policies so that European strategies and instruments include specific actions favouring the socio-economic inclusion of the Roma. This mainstreaming should be guaranteed in areas such as fundamental rights, gender approach, personal safety and protection against discrimination, etc.
- Improve the design of a road map of the Integrated Platform on Roma Inclusion which establishes a framework for medium-term action, as well as for objectives and results to be achieved; prioritising the key issues to be addressed; and strengthening horizontal cooperation among Member States and civil society.
- Ensure that the existing financial instruments of the European Union, in particular the Structural Funds, are made available to the Roma, and that they address their needs and have an effective impact on the improvement of their living conditions.

However, judging from the rank of the leaders attending the Summit, the general feeling was that Member State governments did not view inclusion policies as a priority: two Spanish Ministers, one French Secretary of State and one Finnish Minister.

[5] The European Commission decided to organise European Summits on the Roma community every two years to bring together high-level representatives of the EU institutions, national governments and civil society organisations from all over Europe. The first Summit on the Roma community was held at Brussels on 16 September 2008.

[6] Available at: http://www.eu2010.es/export/sites/presidencia/comun/descargas/Ministerios/declaracion_de_cordoba_ES_acc.pdf

2. Council of Europe

In May 2010, the Human Rights Commissioner[7] published a report entitled *"Segregated schools marginalise Roma children – the decisions of the European Court of Human Rights must be implemented-."*[8] The Commissioner stated that school segregation and education standards falling below the established curriculum is still a reality for many Roma children in many European countries and this situation leaves them with practically no way to escape from the vicious circle of poverty and marginalisation affecting them for the rest of their lives. The Commissioner insisted that there are important recent judgements from the ECHR reaffirming Roma children's right to non-discriminatory school enrolment. Examples include cases in the Czech Republic (*D.H. and Others*), Greece (*Sampanis and Others*) and Croatia (*Orsus and Others*) and points out that these judgements must be fully and effectively executed in practical terms.

In June the Commissioner took part in a Regional Conference entitled *"Providing the Roma Community with access to personal identification documentation, a regional challenge"*, organised in Skopje by the then President of the Committee of Ministers. The Commissioner stressed that it was unacceptable for several thousand Roma to still be without a personal identification document, without nationality and in risk of being stateless in Europe, especially in the countries of the ex-Yugoslavia. It called for a political resolution to solve this serious problem which is a prerequisite to gaining access to basic human rights. In order to achieve this, the Commissioner pointed out that the governments must adopt clear and feasible actions plans which include a map of the situation, simplification of legislation and civil registry procedures, free legal advice and, where applicable, lowering of the fees charged to register.

The Commissioner made special reference to Kosovo and reiterated its call on Western European countries to stop the forced return of Roma population to the region. This request was particularly relevant in the context of the lack of personal identification documentation because a large number of Roma who were forced to return to Kosovo were faced with this problem which caused major difficulties in being able to benefit from even the most basic human rights such as education and health-care.

[7] For further information see: http://www.coe.int/t/commissioner/default_en.asp

[8] For further information see: http://www.coe.int/Default-EN.asp

3. National. Antenna Network

We would note that one of the major accomplishments of the Council for the Advancement of Equal Treatment Irrespective of Racial or Ethnic Origin (attached to the current Ministry of Health, Social Policy and Equality) was the constitution of a Network of Services designed to Aid Victims of Discrimination based on Racial or Ethnic Origin.

This Network is composed of 8 social organisations[9] which have begun to provide information and services to victims of discrimination through offices open to the public throughout Spain.

It is extremely important for social organisations which have direct contact with groups suffering discrimination, and which are familiar with the sort of social rejection they face, to be able to provide this service in defence of the right to Equality because up until July of 2010, people suffering from discrimination had very few information services, counselling or accompaniment available to them when suffering rejection on the grounds of their racial or ethnic background.

This service is now being offered throughout practically all of Spain and is meeting with success; from July until the end of October 2010, 160 complaints of discrimination in different areas were registered: education, health-care, social

[9] Network composed of: The Spanish Red Cross, the Fundación Secretariado Gitano, CEPAIM, Movimiento Contra la Intolerancia, Movimiento por la Paz, el Desarme y la Libertad, Red Acoge, Unión General de Trabajadores and Unión Romaní.

services, housing, access to goods and services, employment and working conditions.

We are entering a new stage where victims of racial or ethnic discrimination have an information and counselling service available to them thus preventing situations of defencelessness in cases of discrimination. Social organisations will continue to work actively, with the support of the government, to raise the awareness of the entire Spanish society and achieve real equality for all.

Social organisations have reason to celebrate since they have been demanding a service to assist and inform victims of discrimination ever since the transposition of Directive 2000/43/EC[10] and we will continue to work to make the service as comprehensive as possible and to accompany victims of discrimination throughout the whole process of defending their right to equal treatment.

[10] Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin, transposed into Spanish legislation by Law 62/2003 of 30 December 2003.

4. Case Law

European Court of Human Rights (ECHR)

Orsus and others v. Croatia

The applicants in this case[11] were 15 Croatian nationals of Roma ethnic origin born between 1988 and 1994. Between 1996 and 2000 the applicants attended primary school exclusively for Roma children and dropped out at the age of 15. In April 2002 they filed a domestic legal complaint against their schools claiming that the curricula for Roma students contained 30% less content than the official curriculum. They further claimed that this constituted a situation of racial discrimination and violated their right to education and their right to not have to endure degrading treatment. They also filed a psychological study of minors who attended classes only for Roma which concluded that segregated education scarred these children both emotionally and psychologically both in terms of their self-esteem and identity development. In September 2002 the national court dismissed the claim. The court stated that the Roma children were put in separate classes because they needed extra support in Croatian language studies and that the curriculum was identical and therefore the applicants had not proven their claim of racial discrimination. The ensuing national appeals were also dismissed. Despite these setbacks, the applicants decided to file their suit before the European Court of Human Rights (hereafter ECHR) where they claimed, inter alia, that Croatia was in violation of Article 14 (prohibiting discrimination) in conjunction with Article 2 of Protocol No 1 (Right to Education).

The European Court recalled that, as a result of its history, the Roma community had become an especially disadvantaged and vulnerable minority and therefore required special protection, including in the area of education. While there was no general policy of automatically assigning Roma students to separate classes, it was only Roma children who were put in those separate classes in those particular primary schools. As a result, there had been a **clear difference in the treatment** given to Roma students and therefore **the State had to prove that the practice of segregation was objectively justified, appropriate and necessary.**

The Court listened to the argument made by the Government that the reason the applicants were put in classes for Roma students was only because they were lacking in their knowledge of the Croatian language. However, the tests given to students to determine whether or not they would be put in classes for Roma only had not been designed specifically to verify their Croatian language skills but rather to test the general psycho-physical conditions of the children. As for the educational programme, once the children were assigned to these Roma-only classes, the applicants were not given any sort of programme specifically designed to improve their alleged shortcomings in their use of the Croatian language. While they admittedly were

[11] ECHR of 16 March 2010.

given some additional Croatian language classes, these were insufficient; some students received such classes only in grade one and several of the other applicants never received them at all. In any event, even if the additional classes in Croatian had been provided, this would have only partly compensated for the lack of a specifically designed syllabus to meet the needs of students put in separate classes due to their alleged lack of Croatian language skills.

The applicants spent many of their school years (and in some cases all of them) in separate classes for Roma only. However, there was no specific monitoring procedure and the government was unable to furnish any individual report regarding the progress made by any of the applicants in learning Croatian. This complete lack of monitoring procedures left the field wide open to arbitrary decisions taken on the part of the Administration.

Moreover, the statistics furnished by the applicants covering the region in which they lived (which were not contested by the Government) showed an 84% school dropout rate for Roma students before completing primary school studies. All of the applicants had abandoned their studies at the age of 15 without having completed primary school and the reports drawn up by their schools showed poor monitoring. These Roma student school dropout rates in the region should have sparked the implementation of affirmative action to raise the awareness of the Roma population as to the importance of education and to help the applicants with any difficulty they may have faced in their educational programme. However, according to the Government, social services had reported on the very irregular attendance of students only in the case of the five applicants and failed to furnish accurate information on any sort of monitoring.

As to the passiveness of the parents and lack of complaints regarding the fact that their children were placed in separate classes, the Court ruled that the parents, also members of a disadvantaged community and frequently with low levels of education, were not in a position to weigh all of the pros and cons or to foresee the consequences of acquiescing to the school's recommendation. Moreover, **no type of waiver of the right to non-discrimination could be accepted insofar as that would go against the public interest.**

The Court further ruled that, despite the efforts which the Government may have made to ensure the enrolment of Roma children, proper guarantees were not put in place to ensure sufficient attention to the special needs of the applicants as members of a disadvantaged group.

As a result, the Court ruled **that the placement of the applicants in classes exclusively for Roma students was not justified and constituted an infringement of Article 14 (right to non-discrimination) in conjunction with Article 2 of Protocol No 1 (right to education.**

Muñoz Díaz v. Spain (La Nena)

On 8 December 2009 the ECHR delivered its judgement in this case which has been the focus of earlier reports[12]. n this judgement on the enforcement of Article 14 of the Convention in conjunction with Article 1 of Protocol No 1, the Court reiterates that *"Article 14 of the Convention has no independent existence since it has effect solely in relation to the enjoyment of the rights and freedoms safeguarded by the other substantive provisions of the Convention and of the Protocols thereto. The application of Article 14 does not necessarily presuppose the violation of one of the substantive rights guaranteed by the Convention. It is necessary but it is also sufficient for the facts of the case to fall "within the ambit" of one or more of the Convention Articles.* The Court also recalled the doctrine followed in previous case law pointing out that *"in cases, such as the present, concerning a complaint under Article 14 in conjunction with Article 1 of Protocol No. 1 that the applicant has been denied all or part of a particular benefit on a discriminatory ground covered by Article 14, the relevant test is whether, but for the condition of entitlement about which the applicant complains, he or she would have had a right, enforceable under domestic law, to receive the benefit in question (…)". By way of conclusion and in view of the foregoing, the Court held that "since the applicant belongs to the Roma community and was the spouse of M.D., as had been recognised for certain purposes by the Spanish authorities but not for the survivor's pension, the Court finds that the ap-*

[12] See the report "Discrimination and the Roma Community 2009", pages 15 and subsequent. Fundación Secretariado Gitano (FSG) Madrid 2009. Serie Cuadernos Técnicos, Issue No 96.

plicant's proprietary interests fall within the ambit of Article 1 of Protocol No. 1 and the right guaranteed therein to the peaceful enjoyment of possessions, this being sufficient for Article 14 of the Convention to be engaged." As for the application of Article 14, the Court recognises the good faith of the applicant having regard to the validity of the marriage which *"was undeniably strengthened by the attitude of the authorities, who had recognised her as the wife of M.D. and had done so very concretely by issuing her with certain social security documents, in particular a registration document showing her as a wife and the mother of a large family, this situation being regarded as particularly worthy of assistance and requiring, pursuant to the Large Family (protection) Act, recognition of status as spouse."* The Court goes on to say: *"Consequently, the refusal to recognise the applicant as a spouse for the purposes of the survivor's pension was at odds with the authorities' previous recognition of such status. Moreover, the applicant's particular social and cultural situation were not taken into account in order to assess her good faith. In this connection, the Court notes that, under the Framework Convention for the Protection of National Minorities (...), the States Parties to the Convention are required to take due account of the specific conditions of persons belonging to national minorities.* It goes on to say: *"The Court takes the view that the refusal to recognise the applicant's entitlement to a survivor's pension constituted a difference in treatment in relation to the treatment afforded, by statute or case-law, to other situations that must be considered equivalent in terms of the effects of good faith, such as belief in good faith in the existence of a marriage that is null and void. (...) Therefore, the Court finds it established that, in the circumstances of the present case, the applicant's situation reveals a disproportionate difference in treatment in relation to the treatment of marriages that are believed in good faith to exist.* Moreover *"the Court finds that it is disproportionate for the Spanish State, which issued the applicant and her Roma family with a family record book, granted them large-family status, afforded health-care assistance to her and her six children and collected social security contributions from her Roma husband for over nineteen years, now to refuse to recognise the effects of the Roma marriage when it comes to the survivor's pension." Lastly, the Court cannot accept the Government's argument that it would have been sufficient for the applicant to enter into a civil marriage in order to obtain the pension claimed.* The prohibition of discrimination enshrined in Article 14 of the Convention is meaningful only if, in each particular case, the applicant's personal situation in relation to the criteria listed in that provision is taken into account exactly as it stands. *To proceed otherwise in dismissing the victim's claims on the ground that he or she could have avoided the discrimination by altering one of the factors in question – for example, by entering into a civil marriage – would render Article 14 devoid of substance."*

Consequently *"the Court finds that in the present case there has been a violation of Article 14 of the Convention taken together with Article 1 of Protocol No. 1."*

National

Barna Book store

Judgement of the Provincial Court of Barcelona of 26 April 2010.

The owner of a Barcelona book store and the managing director of a cultural association devotes his time to disseminating and regularly selling books and publications which glorify and justify genocide committed by the Third Reich against the Jewish people and other minorities and the apparent inferiority of women and the disabled. The book store itself can accommodate approximately sixty people and is used to hold conferences justifying genocide and racist theories. These activities were going on for an extended period of time between 2005 and 2007.

These events led to the initiation of preliminary investigative proceeding No 1627/06 at local criminal court No 33 of Barcelona. The plaintiff was the Public Prosecutor that classified the acts as an ongoing crime of propagating ideas justifying genocide envisaged and punishable under Article 607(2) of the Criminal Code and an ongoing crime of incitement of hatred and racial discrimination envisaged and punishable under Article 510(1)[13] of the Criminal Code. The

[13] Article 510(1) of the Criminal Code: "Those inciting discrimination hatred or violence against groups or associations on the grounds of race, anti-Semitism or other ideologies, religion or belief, family status, ethnicity or race, national origin, gender, sexual preference, disease or disability shall be punished with a prison term of between one and three years and a fine to be paid over a period of between six and twelve months."

hearing was held at Criminal Court No 11 of Barcelona which, in an unprecedented exemplary judgement, ruled in favour of the Public Prosecution Service and private prosecutor sentencing the defendant for both crimes in this multiple offence procedure. The said judgement was appealed by the defendant's attorney before the Provincial Court of Barcelona which, following a study of the case, partially admitted the remedy of appeal lodged by the defendant because it held the view that the same behaviour could not give rise to two types of crimes but rather one subsumed the other and therefore the perpetrator of the crime would have to be tried for a violation of only Article 607(2) of the Criminal Code. The attorney for the defendant then appealed to the Constitutional Court which ruled that the said Article 607(2) was unconstitutional because it entered into conflict with and clearly violated the constitutional principle of freedom of opinion. The land's highest court ruled that failure to recognise or justification of genocide (607(2) of the Criminal Code) could not be considered a crime because it is interpreted within the immune scope of freedom of expression meaning that genocide is an opinion with no further repercussions. In addition to ruling that the act committed by the defendant was criminally irrelevant, this judgement has become very controversial from the perspective of case law and has very negative consequences for the fight against discrimination because the elimination of the criminal wording of that Article does away with an important anti-discrimination tool and also encourages and contributes to a twisted justification of xenophobic organisations.

As the First-Instance judgement rightly argued, the accused committed two types of criminal acts, i.e. the dissemination of racist ideas through the sale of books justified the application of Article 607(2) prohibiting the dissemination of ideas or doctrine which deny or justify crimes committed for racist and xenophobic reasons and the conferences given by people justifying racism, denying the holocaust and arguing in favour of the inferiority of certain races organised by the defendant for groups of 60 people more than justified the application of Article 510 prohibiting direct incitement to discrimination. Nevertheless, the High Court of Barcelona did not see two different crimes but rather just one: both acts give rise to the same action which is that of disseminating ideas which deny genocide. That is why the defendant is not considered the perpetrator of a crime under Article 510 and Article 607(2) but rather only under the latter. This legal reasoning sets a negative precedent in our fight against discrimination since Article 607(2) will always take precedence over Article 510.

And then, the Constitutional Court's ruling that Article 607(2) is unconstitutional in favour of the right to freedom of opinion in our democratic system leaves us practically defenceless when faced with discriminatory practices because incitement to discrimination through ideas and large-scale meetings will always be protected under the guise of freedom of opinion thus depriving us of a tool within the criminal system with which to prevent discriminatory practices. Incitement to discrimination will have to be extremely direct, i.e. very damaging to victims, to allow for application of Article 510. While Spain has a wide range of anti-discrimination laws on the books, the latter are clearly unfamiliar to a percentage of key law enforcement agents and many are likewise unaware of the importance of their application. Even so, in accordance with procedural practice, when incitement is very direct as required under Article 510 of the Criminal Code and individuals have suffered serious damages, Courts and Tribunals tend to apply the criminal act corresponding to the result produced (damages, injury, etc.) and are satisfied with applying racism as an aggravating circumstance which is not itself a criminal offence but rather only authorises the application of the upper half of the range of the corresponding sentence envisaged for the main offence and which also must be proven in painstaking detail in order to merit consideration in judgements.

The sad reality is that today, at the advent of the 21st century, despite having a whole arsenal of resources at our disposal intended to protect the equality of all persons, when it comes to discrimination everyday life is still awash in situations in which minorities continue to suffer arbitrariness, as in times past, which is very difficult to overcome in reaching full citizenship.

JUDGEMENT 717/2010 OF 28 JUNE 2010 OF THE PROVINCIAL COURT OF MADRID.

The Fundación Secretariado Gitano welcomes the judgement handed down by the Autonomous Community's highest court acknowledg-

ing and condemning a crime resulting in serious and irreversible damages suffered by a person of foreign origin - solely for that fact - which left him quadriplegic.

The event occurred on 10 February 2007 when a Spanish man, exiting a bar, asked a man from Congo for a light. The latter said that he did not have a light and that is when the Spanish man called him a son of a bitch for failing to accommodate him and his desire to smoke. The victim then said: "*I guess that means we're both sons of bitches because neither one of us has a light*". The aggressor immediately called attention to the colour of the victim's skin while making fascist comments. He then violently hit the victim on the neck and face with an open hand leaving him lying unconscious on the ground. When the policed arrived on the scene the aggressor, surprised that the Spanish police acted so swiftly in response to an injury suffered by a non-white man, proclaimed the famous statement which would later come back to haunt him in the judgement: "*I don't understand why the police are so concerned just because a fucking black monkey gets slapped around*".

The Foundation expressed its satisfaction because in practice, this description of crimes in judgements and in case law is very rare. The criminal was convicted for the crime under Article 149[14] of the Criminal Code for serious bodily injury and criminal aggravation. However, the source of our satisfaction is not the application of Article 149 since the seriousness of the crime required the application of that Article in any case (bodily injury resulting in serious consequences for the victim) but rather because the aggravating circumstance of racism and premeditation were included which the Court could have ignored as it had so many times in the past, or it could have subsumed the aggravating circumstance of racism[15] to that of premeditation[16]. Given the everything happened so fast, the Court could have decided not to admit the aggravating circumstance of premeditation. However, the aggravating circumstance of xenophobia described in Article 22 was taken fully into consideration, something quite unusual in procedural practice. The University of Valencia did a search of cases between 1996 and 2005 and found only fourteen cases where racial discrimination was cited and even fewer, six, where the judge admitted it[17]. We therefore reiterate the positive importance of this judgement.

If the aggressor had not said "so much concern for slapping around a nigger" in front of the police, it would have been very difficult for the court to have invoked the Article. But it did in this case, and why? Simply because on this occasion the whole democratic system agreed on carrying out justice. If any of the witnesses, passers-by or the police, had denied what the aggressor said, this sad story would never have given the victim the sense that justice was carried out to the degree possible because a doubt would have been cast over the real underlying cause of the crime and then the whole incident would have been forgotten and these reproachable and violent acts would just keep on occurring. This judgement is a lesson for society and sends an extremely important message: laws are not enough to combat crime if they do not go hand-in-hand with cooperation and collaboration from all social sectors.

[14] Article 149 of the Criminal Code: "Anyone doing bodily harm to another, by any means or procedure, resulting in the loss or uselessness of an organ, main body member or a sense, causing impotence, sterility, serious deformity or serious somatic or psychological disease, shall be punished with a prison sentence of between six and twelve years."

[15] Article 22(4) of the Criminal Code: "To commit a crime with a racist or anti-Semitic motive or another type of discrimination related to the ideology, religion or belief of the victim, ethnic, racial or national origin, sex or sexual orientation or disease or disability he or she may suffer."

[16] Article 22(1). Criminal Code: "Premeditation exists when the guilty party commits any crime against a person using means, modes of action or forms which especially ensure the efficacy of the act without any risk that the person could defend him or herself."

[17] http://www.elpais.com/articulo/espana/Amnistia/afirma/jueces/aplican/agravante/racismo/elpepiesp/20080411elpepinac_11/Tes