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European Union Anti-Racism Policy Reaches Turning Point

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Human Rights Groups Face New Challenges in South Africa

by Geoff Budlender*

For many years, South African human rights groups battled an apartheid government in a hostile political and legal environment. Now we have a democratic constitution, with a sophisticated bill of rights, as well as a new Constitutional Court, for which a demonstrated commitment to human rights is a prerequisite for appointment.

These changes create new challenges and opportunities for human rights groups. South Africans are not used to a situation in which government not only proclaims its commitment to human rights, but also takes the lead in promoting human rights. We are not used to a situation in which the most powerful court is led by human rights advocates.

Challenges and Opportunities

One of the deep ironies of our political transition is that those who were responsible for the abuse of human rights now are among those who argue most loudly for the entrenchment of human rights in the "final" Constitution currently being drafted. There seem to be two reasons for this. In part, the advocacy reflects a desire that white South Africans should not be treated in

the same manner as they previously treated black South Africans. That is a legitimate desire, although one rightly may be offended by its inherent hypocrisy.

Additionally, the support for human rights reflects a fear of democratic rule. Some people want to regain, through the constitution and the courts, that which they lost through

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political transformation. This is because a bill of rights is not an unambiguous document. In the South African context, it can be used as a means of entrenching power and privilege built up over generations of apartheid, against the legitimate wishes of a democratic majority.

Of course, a bill of rights *does* impose limits on the power of a political majority, and must do so. If the bill of rights comes to be viewed as a legal obstacle to dealing with the inequities created by apartheid, however, then the very notion of human rights and constitutionalism is threatened.

The first challenge created by the new constitutional environment is,

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European Union Anti-Racism Policy Reaches Turning Point

by Johnita P. Due*

European Union policy on racism and xenophobia is reaching a turning point as the Union's legislative bodies struggle to find legal authority to combat racism and consensus among the Member States on how to accomplish this. The 1996 Inter-Governmental Conference, where the Maastricht Treaty on European Union is scheduled to be revised, begins in March in Turin, Italy, and will be the next battleground in the fight against racism.

The 1992 Maastricht Treaty on the European Union, which amended the Treaty of Rome Establishing the European Economic Community, confirms the development of the European

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Community (EC) from a predominantly economic association to a political one. The Treaty even makes explicit reference to human rights as a value to be respected. The right not to be discriminated against on the basis of race, color, descent, or national or ethnic origin is also a right found in principal international human rights instruments, such as the European Conven-

The Maastricht Treaty, however, does not have a specific provision granting the EC legal authority to combat racism.

This omission is egregious in view of the dramatic upsurge in racial intolerance and violence and the rise of openly racist right-wing parties.

tion for the Protection of Human Rights and Fundamental Freedoms (ECHR), the Universal Declaration of Human Rights, the Convention on the Elimination of All Forms of Racial Discrimination, and the International Covenant on Social and Political Rights.

The Maastricht Treaty, however, does not have a specific provision granting the EC legal authority to combat racism. This omission is egregious in view of the dramatic upsurge in racial intolerance and violence and the rise of openly racist right-wing parties oriented towards immigrants, gypsies and religious minorities throughout the Member States. Without specific legal authority, the EC institutions have been reluctant to enact any Community-wide legislation, and until recently have limited their legal activity to adopting non-binding resolutions and declarations against racism. Community-wide legislation would fulfill two objectives: 1) setting Community standards and thereby obliging Member States to improve existing national laws; and 2) addressing inter-state racist activity, such as the distribution of racist material.

Of all the EC institutions, the European Parliament, which has a limited legislative role compared to the Commission and Council, has been at the forefront of the drive to amend the

Maastricht Treaty. In October 1995, the European Parliament adopted a resolution urging the European Commission to make immediate proposals to include provisions within the Treaty which would outlaw all forms of discrimination and condemn racism.

Although the Parliament deemed it essential to amend the Treaty, the Parliament has maintained steadfastly that a sufficient legal basis for action already exists within the EC Treaty. Therefore, the other EC bodies have had no excuse for failing to act. A legal basis for action can be found within Article 235 of the EC Treaty and Articles F and K of the Maastricht Treaty.

Article 235 of the EC Treaty provides: "If action by the Community should prove necessary to attain . . . one of the objectives of the Community and this Treaty has not provided the necessary powers, the Council shall, acting unanimously on a proposal from the Commission and after consulting the European Parliament, take the appropriate measures."

Article F of the Maastricht Treaty stipulates that the Union shall respect those fundamental rights guaranteed by the ECHR, including Article 14, which states that the enjoyment of rights and freedoms "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 other status."

Article K of the Maastricht Treaty governs cooperation in the fields of justice and home affairs, and allows the Council to adopt joint positions and joint actions on the initiative of any Member State with regard to criminal, customs, or police matters. It also allows positions or actions on the initiative of any Member State or the Commission on other enumerated matters, including civil matters and immigration and asylum matters.

Conceivably, then, the European Commission could initiate and the Council could enact legally binding instruments such as regulations, directives, and conventions under these provisions of the Treaty. The European Parliament has called upon the other institutions to assist in these objectives. During a debate with the Council and the Commission, the Parliament said it was "time to switch from declarations of intent to forceful action backed by resolute political will to tackle the tide

of racism and xenophobia."

The European Parliament considers it essential for the Council to adopt a directive under Article 235. In its 1993 report on the resurgence of racism and xenophobia in Europe and the danger

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of right-wing extremist violence, the Parliament's Committee on Civil Liberties and Internal Affairs said that such a directive should mandate the introduction of national legislation in each Member State on the basis of the most stringent measures existing in the Member States, and should create Community-wide penalties for racist, xenophobic and anti-Semitic acts.

The European Commission, however, has refused to propose legislation against racism to the Council without explicit legal authority. Due to the lack of Commission proposals, at its June 1994 Summit, the Council mandated that the Justice and Home Affairs ministers investigate alternative options to combat racism under Article K of the Maastricht Treaty. In particular, the mandate was to define what constitutes racist or xenophobic acts, with the goal of harmonizing laws and practices of the Member States.

At the same summit, Chancellor Helmut Kohl of Germany and former President François Mitterrand of France spearheaded a Joint Initiative on racism and xenophobia, which established a consultative committee, chaired by Jean Kahn of the European Section of the World Jewish Congress. The Kahn Committee, consisting of delegates from the Member States, the Council of Europe, the European Commission, and the Parliament, was assigned to make recommendations and to help develop a "Global Strategy of the Union" aimed at combating acts of racist and xenophobic violence.

In May 1995, the Kahn Committee reported its far-reaching conclusions: the duty to combat racial discrimina-

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tion should become a matter of full EC competence, allowing the European Court to ensure compliance; the Council of Ministers should have the competence to pass directives on a qualified majority as opposed to requiring unanimity; the Commission should have authority to take enforcement measures; common legislation should be instituted to prohibit discrimination in employment; an explicit criminal offense should be created in the Member States for incitement to racial hatred, as well as specific offenses for denying the Holocaust and trivializing other crimes against humanity; and a mechanism to control the distribution

The Kahn Committee strongly supported the position that "an explicit Treaty change, confirming Community competence, will be the clearest expression of a real intent of the European Union to combat and not merely protest against, the rising tide of racism and xenophobia."

of racist material across borders should be developed.

Furthermore, the Kahn Committee strongly supported the position that "an explicit Treaty change, confirming Community competence, will be the clearest expression of a real intent of the European Union to combat and not merely protest against, the rising tide of racism and xenophobia."

Responding to the conclusions of the Kahn Committee Report, the Commission, under the guidance of Employment, Industrial Relations and Social Affairs Commissioner Padraig Flynn, adopted its first-ever Communication on racism, xenophobia and anti-Semitism. In the Communication, adopted in December 1995, the Commission announced its short- and long-term legal strategies to combat racism. In the short-term, in future legislation governing those areas over which the Community does have competence, the Commission will include a clause prohibiting discrimination based on Article F's human rights provision in the Maastricht Treaty. In the long-term, the Commission hopes to honor its

promise, made in the 1994 White Paper on European Social Policy, to "press for specific powers to combat racial discrimination to be included in the Treaty during the 1996 review."

Therefore, although the Commission is now willing to utilize already-existing provisions in the Maastricht Treaty to combat racism, it is still unwilling to initiate legislation specifically addressed to this task unless the Maastricht Treaty is amended. In that respect, the Commission's approach is in compliance with the Council's new approach.

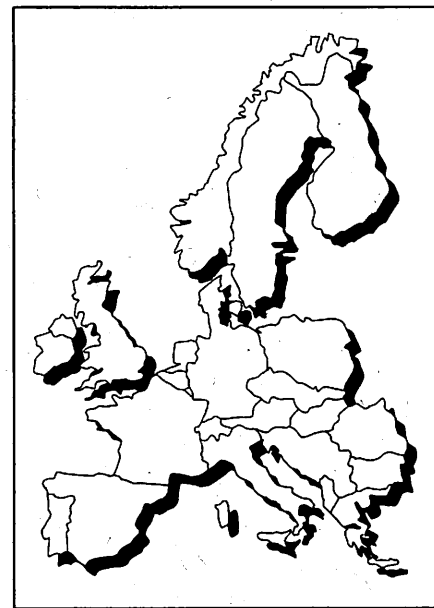
Council President Carlos Westendorp of Spain, in response to the Kahn Committee Report, proposed a Draft Joint Action against racism and xenophobia based on Article K of the Maastricht Treaty, rather than waiting until the Treaty is amended. The draft was most recently considered at the European Council Meeting in Madrid in mid-December 1995. The Draft Joint Action obliged Member States to criminalize: public incitement to discrimination, violence or racial hatred based on color, race, religion, or national or ethnic origin; excusing crimes against humanity and violations of human rights; public distribution of writings, pictures or other media containing racist or xenophobic manifestos; and participation in activities of groups, organizations or associations which involve discrimination, violence, or racial, ethnic or religious hatred.

Though the type of instrument to implement the Draft Joint Action had not been decided upon, most of the Member States clearly preferred a binding legal instrument. Fourteen out of fifteen Member State delegations voted in support of the Draft Joint Action, with Britain alone blocking the first potentially legally-binding instrument against racism by the European Union.

When Britain blocked the Council's Joint Action, Spain, Germany and France were severe in their criticism, which prompted Britain's Home Secretary to retort that Britain did not need lectures from anybody since it had "a longer history of laws affecting race relations than almost any other country in the EC, more comprehensive legislation and better race relations." Britain rejected the Draft Joint Action because it was not willing to oblige itself to enacting laws contrary to its current legislation, preferring instead a non-binding resolution.

Britain's legislation outlaws racial discrimination in employment, housing, education and advertising; forbids incitement to racial hatred and harassment; and now prohibits distribution of racist literature. The legislation, however, does not proscribe religious discrimination or make racist speech a criminal offense unless the speaker intends to incite racial hatred.

Britain's Anti-Racist Alliance and



Italy's S.O.S. Razzismo Italia, both members of the Secretariat of the Anti-Racist Network for Equality in Europe, believe that Britain's legislation, although comprehensive, can be significantly improved and that Britain has the responsibility to advance rather than impede the protection of victims of racism and xenophobia throughout the European Union.

The success of a Union-wide policy to combat racism will depend on whether a consensus can be reached to enact binding legislation and to amend the Maastricht Treaty at the 1996 Intergovernmental Conference in Italy. ☉

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