



The Association of
Muslim Lawyers (UK)

THE MAKING AND FUTURE OF ARTICLE 13 OF THE TREATY OF THE EUROPEAN COMMUNITY AND ITS IMPLICATIONS FOR MUSLIMS IN EUROPE

Shakila Khan

There have been calls for legislation at the European level to deal with racial and religious discrimination for many years now. The problem of racial and religious prejudice across Europe ranges from discrimination in the work place, and less favourable treatment in the provision of goods and services, to its worst expression in instances of violence and harassment. Racial and religious hatred manifest themselves in many different forms: arson attacks on people's homes and refugee hostels, killings and beatings; desecration of Muslim and Jewish cemeteries; everyday instances of property being damaged and defaced, threats and insults. More insidious is the publication of racist and anti-Muslim propaganda; this is sometimes by parties of the extreme Right but often also by authors in more respectable positions. The problems experienced have attracted varying degrees of attention from NGO's and the Community institutions themselves. Instances of religious discrimination are not always labelled as such, and the growing problem of Islamophobia still eludes widespread and conclusive recognition.

The European Parliament has conducted two major inquiries into racism and xenophobia. In 1984, the Parliament commissioned a Committee of Inquiry into the Rise of Fascism and Racism in Europe.¹ The report placed emphasis 'on the fundamental importance of defending a democratic and pluralistic European society and respecting the dignity of men and women whatever their race, religion, nationality or ethnic origin'.² The conclusions of the report were that although openly fascist or racist groups were small, they had increasingly turned to violent action in 'a general climate of thoughtless toleration towards violence, extremism and depreciation of constitutionality'. The committee also expressed concern over a more widespread xenophobia noting that: 'It has a distressing effect on the immigrant communities which are daily subject to displays of distrust and hostility, to continuous discrimination which legislative measures have failed to prevent. . . . These minorities have little confidence in the institutions on which they should be able to call to uphold their rights and to offer them protection'. One of the recommendations of the committee was that 'an effort must be made to define more broadly Community powers and responsibilities in the area of race relations by applying a teleological interpretation of the treaties, on the basis, inter alia of seeking the useful effect of the relevant provisions and of the European Community's implicit powers, by recourse to the procedure under Article 235 of the EEC Treaty, and, if necessary, by revision of the Treaties'.

In response to this first report, a joint declaration of the Community institutions was issued against racism and xenophobia.³ However, no mention was made of using the EC Treaty to make binding legislation.

The European Parliament in its initiatives to get legislation on this area began working closely with the Starting Line Group (SLG).⁴ Today, the Starting Line Group is an informal network of nearly 400 non-governmental

organisations, semi-official organisations, trade unions, churches, independent experts and academics in the European Union whose principal aim is to promote legal measures to combat racism and xenophobia at the European level. At first, the Starting Line proposal took the form of a Draft Council Directive. It would have required Member States to develop legal measures to prohibit direct or indirect discrimination on the grounds of race, colour, descent, nationality, national or ethnic origin as applicable to various fields. The Directive was also to deal with sanctions for the perpetrators of racial discrimination, compensation for victims, and the prohibition of racist/xenophobic propaganda and organisations responsible for such propaganda. The European Parliament twice called upon the Commission to draw up a directive on racial discrimination using 'the Starting Line' (as the SLG's proposal was called) as the basis from which to work from.⁵

In fact, although the Parliament has been active in calling attention to the problems of discrimination, the Commission and the Council have been resistant to extending the non-discrimination principle to race, ethnicity and religion. The Commission remained divided on whether the treaties making up the European Community provided the basis for legislation to act on racial and religious discrimination. Article 235 was seen as providing the Commission with the necessary competence to legislate in this area. This was suggested both by the Committee report to the European Parliament in 1985 and subsequently by the Starting Line Group.

Article 235 of the EC Treaty provides that:

'If action by the Community should prove necessary to attain, in the course of the operation of the common market, 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.'

The blanket power given by this Article was used as the basis for legislation on the equal treatment of men and women. However, as there did not seem to be the political will to act on this, the Commission's legal services failed to find a basis for the Commission to act in Article 235.⁶

This led the Starting Line Group to change its proposal, campaigning for a change to the treaties instead. The Group campaigned for the following addition to the existing Article 3 TEU:

'The elimination of discrimination against persons or groups of persons, whether citizens of the European Union or not, on the grounds of race, colour, religion, or national, social or ethnic origin, and the promotion of harmonious relations between such persons or groups of persons.'

This would give the European institutions competency to legislate by introducing the abolition of racial and religious discrimination to the list of European Community objectives. They also campaigned for a treaty provision that gave an express Community competence to legislate in this area. The proposal, known as 'The Starting Point', was designed to have direct effect, and that following the co-decision procedure it would require a qualified majority for the adoption of measures.

The Starting Line Group began its campaign for the 1996 Intergovernmental Conference. They also began working closely with the Consultative Commission on Racism and Xenophobia whose own proposed treaty amendment was similar to that of the SLG. What is significant is that both of these proposals now included religious discrimination along with racial discrimination. The distinct problem of religious discrimination had been recognised. The SLG had not included religious discrimination in its original proposal because it was thought that Article 235 could not support it. Now with a proposal to amend the Treaty itself it felt it necessary to bring in religious discrimination because racial discrimination did not cover all the problems, particularly those caused 'by the growing sense of 'Islamophobia' throughout Europe'.⁷

In June of 1997, the Amsterdam Treaty was signed and an anti-discrimination clause adopted. However, in order for the treaty amendment in this area to be accepted by Member States, significant compromises on the proposals of

those campaigning for legislation on racial and religious discrimination had taken place. The result was the new Article 13:

'Without prejudice to the other provisions of this Treaty and within the limits of the powers conferred by it upon the Community, the Council, acting unanimously on a proposal from the Commission and after consulting the European Parliament, may take appropriate action to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation.'

Thus this Article although giving competency to the European Union to act on issues of racial and religious discrimination fell short of expectations in a number of ways. First, it was not exclusively on the issue of racial and religious discrimination, as the NGO's and the European Parliament had proposed. It does not have direct effect, which means that individuals in Member States cannot rely on it in national courts until it has been implemented in domestic law. In addition, the measures to be adopted under it require unanimity instead of a qualified majority to be passed. This makes it much harder to get measures passed under this Article. It also increases the possibility that any measures that are passed, will be so much a product of compromise that they bear little resemblance to what the NGO's and Committees had first envisaged.

Nevertheless, the adoption of Article 13 was a beginning in the fight against racial and religious discrimination. At the end of the European Year against Racism in December 1997, the Commissioner responsible for Social Affairs said that the Commission would use Article 13 to present a directive to fight racism and xenophobia before the summer of 1999. In the mean time, the Starting Line Group had begun working on a new draft directive to be adopted under Article 13. It was to remain exclusively on the issue of racial and religious discrimination. It was called 'The New Starting Line'. They chose to include religious discrimination in the draft directive this time as Article 13 could now support it. It was also felt that religious discrimination should go concurrently with racial discrimination as it is often difficult to differentiate between the two, and they are often inter-connected especially where Islamophobia is concerned.

The New Starting Line draft directive would prohibit direct and indirect racial and religious discrimination in the work place and in the provision of goods and services. Amongst other measures, it would also provide sanctions for any such discrimination, as well as for incitement or pressure to racial or religious discrimination by individuals and organisations. There would also be an additional responsibility placed on educators and persons in mass media to combat racial and religious discrimination.

As the campaign for the draft directive progressed it met up with a lot of opposition from Church groups, on the inclusion of religious discrimination. Some of these concerns were met by ensuring that an exception to religious discrimination in the work place was included. This was necessary in situations where the work by its very nature had to be carried out by someone of a particular faith e.g. clergymen etc. However, the inclusion of this exception did not allay all opposition. The Starting Line Group felt that despite this opposition it was necessary to retain the measures against religious discrimination in its draft directive.

Unfortunately, the directive that the European Commission is likely to propose will only include religious discrimination in a general directive on discrimination in employment. There will be a directive dealing specifically with racial discrimination, but this will not contain any reference to religious discrimination whatsoever.⁸ Again, efforts to enact substantive legislation dealing with religious discrimination have been thwarted. This is at a time when the problems of Islamophobia are rife across Europe.

¹ Committee of Inquiry into the Rise of Fascism and Racism in Europe (rapporteur: D. Evrigenis), *Report on the findings of the inquiry* (European Parliament, 1985).

² Resolution adopted of 16 January 1986 on the rise of fascism and racism in Europe, European Parliament.

³ European Parliament, Council and Commission, 'Declaration against racism and xenophobia', *Official Journal of the European Communities*, C 158 (25 June 1986) pp.1-3.

⁴ SLG was formed in 1991 at the initiative of the British Commission for Racial Equality, the Dutch National Bureau against Racism and the Church Commission for Migrants in Europe. Other national and European organisations

soon joined the Group, including the Commissioner for Foreigners of the Berlin Senate, the Belgian Centre for Equal Opportunities and against Racism, Caritas Europa; the European Jewish Information Centre, the Migrants Forum and the European Anti-Poverty Network.

⁵ European Parliament, Resolution on Racism and Xenophobia, 2 December 1993, PE 177.105 and European Parliament, Resolution on Racism, Xenophobia and Anti-Semitism, 27 October 1994, PE 184.353.

⁶ See 'The Starting Line Group: A Harmonised Approach to Fight Racism And to Promote Equal Treatment' Isabelle Chopin (to be published soon in the Nymegen University Law Review).

⁷ Ibid.

⁸ See speech by Pdraig Flynn, European Commissioner with responsibility for Employment and Social Affairs 'Anti-Discrimination: the way forward' at the European Conference on Anti- Discrimination Vienna - 4 December 1998.