

SKETCHES OF SPAIN: RACE, JUSTICE AND THE STRUGGLE FOR HUMAN RIGHTS

By
Kwame Dixon



American Consortium on European Union Studies (ACES)
EU Center of Excellence Washington, D.C.

ACES Cases, No. 2005.1

Stephen J. Silvia, American University, editor

Kwame Dixon is currently a distinguished visiting Professor of Black Studies at DePaul University. His primary research is focused on Latin America and the Caribbean. He is interested in the social construction of racial categories; how racial and gender discrimination intersect to create particular forms of discrimination that lead to human rights violations; and the ways in which Afro-Latinos create alternative forms of political participation that expand the narrow parameters of Democracy in the Americas. Dr. Dixon is a Fulbright scholar and has conducted extensive field research on Afro American communities in Ecuador, Colombia, Brazil, Cuba, and Nicaragua. Currently he lives in Madrid, Spain. He can be reached at: kwamedixon@cs.com

Copies of the case can be downloaded free of charge, and information on other cases in this series can be found, at the ACES website: www.american.edu/aces/cases.htm

Copyright © 2005 American Consortium on European Union Studies

Summary

This article analyzes racism, racial discrimination and other forms of intolerance in Spain from a human rights perspective. It will critically evaluate Spain's formal legal obligations relative to the Convention on the Elimination of All forms of Racism Discrimination (CERD), and Article 13, as well as the recently enacted antidiscrimination measures of the European Union commonly known as the Race and Employment Directives (Race Council Directive 2000/43/CE, June 29, 2000 and the Employment Council Directive 2000/78/CE November 27, 2001).

CERD is the main United Nations treaty dealing with racial discrimination and was one of the first core international human rights treaties to be adopted. Spain as a state party to CERD, must take a series of specific steps aimed at eliminating racial discrimination. Additionally, it is required to submit detailed periodic reports to the CERD committee (the CERD committee monitors the implementation of the treaty) on its overall anti-racist policies, practices and procedures.

On a regional level, Article 13 as well as the Race and Employment Directives represent an important layer to antidiscrimination human rights laws. Article 13 is a result of the Amsterdam Treaty and provides the Europe Union with a legal basis to take action to combat discrimination based on racial or ethnic origins, religion or belief, disability, age or sexual orientation. The general principles of Article 13 are non-binding, therefore, in order to effect them, the Race and Employment Directives were elaborated which proposed minimum standards of legal protection against discrimination throughout the European Union.

Human rights analysts and activists argue that collectively CERD, the European Union's Article 13, and the Race and Employment Directives, are crucial tools in the overall struggle against racism and racial discrimination, and if used properly, will have a major impact on human rights discourse and equality across Europe. Also, as a member state of the European Union, Spain must fully comply with all aspects of the Directives and is required to implement a series of concrete antidiscrimination measures into its national laws. The question is: what steps have Spain undertaken to comply with the antidiscrimination measures required by the Directives? If states are unwilling to abide by these antidiscrimination measures, then what should be the response of the European Union? If the current anti-racist human rights laws and mechanism are not sufficient, then what should be the appropriate response of civil society?

Human rights analyst Clarence Lusane argues that a robust legal regime is not a cure for racism. He accurately points out that in the US civil rights laws have existed for over a half of a century and constitutional protections have existed for twice as long, however, racism in the form of economic disparity, racial profiling, political disenfranchisement and other forms of institutionalized discrimination continues (Lusane 2005). Legal remedies – ipso facto – are not enough to fight racial discrimination; however, they are crucial in the construction of anti-racism policies.

Critical Race Analysis and Spain

In Spain, Critical Race Theory or theoretical frameworks that inform our understanding of racism and racial discrimination are not well developed because of the following; first, analysis of racial discrimination is complicated by hegemonic discourse or traditional ways of thinking that argues that racism and racial discrimination do not exist. According to this discourse, there is no racism and therefore, no racial discrimination. This perspective, however, untrue and problematic, is widely accepted by the social culture. Second, social inequality and poverty, the administration of justice, and access to education and employment for marginalized groups, like the Gypsies, are explained or rationalized in ways that strongly criticize, if not blame, the individual or group.

Mainstream discourse, therefore, ignores, suppresses or downplays racism and racial discrimination as phenomena not worthy of critical debate. Third, racist practices are seen in simplistic airtight parameters; therefore, leading most observers to conclude that skinhead or neo-Nazi violence are the only 'legitimate' forms of racism. From this angle, other forms of institutional or individual racism are camouflaged or made socially invisible to the society at large – 'we don't see it, therefore it does not exist.' Thus the centrifugal forces of racism continue unabated.

Fourth, until recently, there was no comprehensive or critical discussion on the myriad of ways in which racial discrimination structures social inequality. Anti-racist organizing and the struggle to combat racial discrimination, despite the excellent work by civil society organizations, like *SOS Racismo*, and some Gitano and immigrant groups, is

weak. Civil society groups have not been able to effectively articulate an alternative narrative that explains how racial discriminations leads to social inequality.

Finally, Spain is one of the few western European democracies that do not have far right political parties elected to or with seats in its bicameral Congress.

Table 1: States with far right political parties that have won impressive electoral parliamentary victories.

Austria

Freedom Party – In 1999 parliamentary elections it won 27% of the total votes.

Belgium

Vlaams Block – In the 2003 parliamentary elections it won 24 % of the total vote.

Denmark

Danish Popular Party – In the 2001 parliamentary elections it won 13.2 per cent of the total votes earning 24 seats.

France

National Party – In the 1997 parliamentary elections it won 15.3 per cent of the total vote; and in 2003 presidential elections it won 18 per cent of the total vote in the second round.

Italy

National Alliance – In the 2001 parliamentary elections it won 12 per cent of the total vote and earning 99 seats.

The Netherlands

Lijst Pim Fourtuyn – In the parliamentary elections of 2002 it won 26 seats aligned with the Christian Democrats and Liberals.

Switzerland

Swiss People's Party–In 2003 it won elections with 28% of the total vote and 55 seats.

Source: Associate Press/*El Pais* April 11, 2005

In other European Union countries, the far right has made impressive electoral gains in parliament; and moreover, millions of European voters, roughly between 10 to 27 per

cent support a populist, xenophobic political agenda that is directly or indirectly rooted in neo-fascism and neo-Nazism ideologies that blame immigration and globalization as the source of their countries problems (Barberia 2005). However, some argue that the ideas and political agenda of far right parties in Spain have found expression or are integrated in the *Partido Popular* (Popular Party), the mainstream national conservative party. Currently, the most visible and active far right party in Spain is the *Alternativa Española* (Alternative Spain). It grew out of the *Fuerza Nueva* (new force), which represented the most militant wing of fascism during the reign of Francisco Franco. *Alternativa Española* over the past year and a half has opened headquarters in eight different regions of Spain and has participated in important far rights summits in Eastern Europe, like the recent one in Lithuania in February 2004 (Diaz 2005). Given that no far right party has actually won or gained any key electoral victories in Spain lends credence to the mistaken idea that it is free of xenophobic, anti-immigrant expressions.

According Carmen Gonzalez, a sociologist who has studied public opinions and immigration, Spain is ripe for the appearance of an anti-immigration political party. Her studies suggest that there are wide-spread and deep-rooted attitudes that reject co-existence with immigrants, a sentiment more patent with voters from the from the right than from the left. There is the perception that immigration is contributing to the deterioration of social services. The increase in overall population due largely to immigration – starting in the early 1990's – has not been met by an increase in social services which results in overcrowded health centers, hospitals, post offices, public day care facilities and services to assist citizens with special needs. In short Spanish families

that use to occupy the lowest income bracket now have been bumped up to next to last (Barberia: 2005). In real terms this situation suggests many lower to middle income families may be denied or have difficulty receiving certain social services while someone else perceived as a non –Spaniard may benefit.

These are real and legitimate tensions, and if left unresolved, may lead to serious conflicts between citizens and immigrants. Spain’s upper-class families are for the most part isolated from the realities of the influx of immigrants; moreover, many of Spain’s local political institutions known as the *ayuntamiento* or regional governments that deliver local social services simply do not have the expertise nor are they not prepared for these new social realities. Therefore, working and middle class constituents are left to sort out these problems. As social services are stretched and tensions increase many working class constituents are caught in a “catch 22;” if they speak out they may be labeled ‘racist’ and xenophobic by the political elite, civil society and an opportunistic media; whereas, if they remain silent, no one will address the core issues.

Human Rights in Spain

Synopsis of March 11, 2004

On March 11, 2004, Spain suffered a devastating terrorist attack against its civilian population. An armed group reportedly linked to Al-Qaeda exploded 10 bombs on four commuter trains in Madrid, killing 191 people and injuring over 1,600 (Amnesty International 2005). These attacks happened four days before Spain’s national elections. The conservative *Partido Popular* (Popular Party), the ruling party at the time,

immediately blamed the armed Basque group *Euskadi Ta Askatasuna* (ETA), which denied any involvement. These attacks radically altered the dynamics of the Spain's upcoming national elections. The attempt by the *Partido Popular* (Popular Party) to manipulate public opinion by blaming the armed Basque group *Euskadi Ta Askatasuna* (ETA), given that the evidence suggested otherwise, may have contributed to their humiliating electoral defeat. The *Partido Socialista Obrero Español* (Spanish Socialist Workers Party), trailing in the polls before the attacks, won a surprise victory.

According to Amnesty International, an increase in racist abuse and ill-treatment was reported in the aftermath of the Madrid massacre. In some police and prison ill-treatment cases Muslims were abused as "terrorists." Throughout the year of 2004 over 100 Muslims were arrested in connection with various judicial inquiries into the bombings and the alleged perpetrators of other crimes (Amnesty International 2005). Before the attacks of March 11, racism, xenophobia and other forms of intolerance were being widely reported by human rights groups. These attacks only served to exacerbate tensions between law enforcement and communities of color – in particular Muslims and Arabs.

Currently in Spain, people of color like Blacks, Africans, Gypsies, Muslims, Arabs, as well as Jews, and individuals or groups perceived as non-white or "other," are the objects of racist attacks, assaults, verbal threats, and other degrading and dehumanizing treatment. Moreover, racist attitudes and behaviors, and expressions in speech and language, which reflect social norms and mirror racist thinking, currently constitute the European political landscape. Across Spain police brutality, racial profiling, torture,

torture as rape, and other forms of torture and degrading treatment are being reported with greater frequency by members of racial and ethnic groups. Also, beginning in 2001, the number of Spaniards and foreigners behind bars has increased dramatically as well as the numbers of deaths in jails, prisons and police custody.

Despite an impressive body of reliable empirical evidence, human rights reports, and reliable testimonies from victims, the common perception in Spain is that racism and racial discrimination are an exaggerated phenomenon or simply do not exist. After years of contentious debates, the European Community has recognized that its societies are experiencing increased racist and xenophobic expressions. As a result, the struggle against racism, xenophobia and other forms of intolerance now forms part of a comprehensive and coherent strategy in the effort by the European Union to guarantee and protect the human rights of racial and ethnic groups. In order to advance its work, and develop anti-discrimination measures based on reliable empirical data, the European Monitoring Centre on Racism and Xenophobia was established in 1997 and it began its work in 1998. The main responsibility of the EUMC is to provide the European Community and its Member States with empirical data on racism, xenophobia, anti-Semitism and Islam-phobia. Functioning mainly as a research centre, the EUMC assists the Europe Union and its Member States in establishing measures to combat racism and xenophobia.

Towards the end of the 1990's, the EUMC, along with international and regional human rights groups like, Amnesty International, Human Rights Watch, and SOS RACISMO –

only to a name a few – started to publish steady streams of reports documenting racial discrimination, xenophobia and racist violence in Spain and across Europe. *Crisis of Identity: Race related torture and Ill-Treatment by State Agents*, published by Amnesty International in 2002, is to date the most comprehensive report on race related torture and ill-treatment by public officials in Spain. This report focuses on the intersection of race, gender and torture as human rights violations and vividly illustrates how some vulnerable groups like the Roma, and undocumented persons, like immigrants, are subjected to human rights violations. It systematically details specific acts of race-related torture, and degrading and ill-treatment by public officials during a seven-year period between 1995 and the beginning of 2002.

According to the report, there has been an increase in the number of reported cases of ill-treatment of foreign nationals corresponding with the increase in the numbers of immigrants arriving in Spain. Human rights groups believe that disturbing patterns of policing, including racial profiling, are widespread. In Spain ethnicity and race, may be seen by law enforcement officers as indicators of criminality; and in Spain, blacks and Africans as well as other ethnic minorities are routinely detained on offenses such as drug dealing or not having identity documents in order. Moreover, allegations of race-related ill-treatment are rarely investigated effectively and prosecuted. The report charges that Spanish police officers appear to regard skin color and facial characteristics – racial profiling – or other differences of appearance, as a legitimate reason for stopping individuals and asking for their identity papers and it is in these circumstances that a large number of ill-treatment cases arise. Many human rights groups argue that against

this backdrop racial profiling leads to torture, illegal detention or other human rights violations.

Women of foreign origin, particularly those from South America or North Africa, may, in addition, be suspected by police of being sex workers. It also highlights the increase in racist violence across Spain. In July 1999, in Girona (Catalunya), three Gambian women were injured when petrol bombs were thrown at their home and a mosque was burned during racist disturbances. Also, the three days of racist riots in parts of Almería (Andalucía) in February 2000 were described at the time as being among the worst in Europe and the worst incident of mass racist violence in the southern European Members States [of the EU], but not the only one. According to the annual report for 2000 published by the European Monitoring Centre on Racism and Xenophobia (EUMC) of the EU, 55 neo-Nazi or skinhead ultra-rightist groups known to be active in Spain had more than quadrupled since 1995, from 2,300 members to 10,400. According to the report, the real number could be twice as many and the number of racist websites has been proliferating.

Additionally, increasingly large numbers of North Africans and sub-Saharan Africans who have made the clandestine and dangerous sea crossings to Andalucía and the Canary Islands in recent years face a lack of basic humanitarian care after arriving on the beaches, or may be held in inhuman and degrading conditions in detention facilities. Allegations of ill-treatment have also arisen regarding reception centers for immigrants, where the length of time to process applications for work and residence may take months,

and the consequent uncertainty, as to whether they will be successful, can build and nourish a climate of tension.

Another alarming phenomenon is the rapidly increasing rate of incarcerations, overcrowded prisons and deaths in custody. Currently in Spain there are approximately 60,626 people behind bars, and the male population has increased 33 percent since 1997. The total male population is approximately 55, 885 or 92.2 percent; and, the total female population is approximately 4,741 or 7.8 percent as of May 2005 (Martin: 2005). Roma women represent approximately 25 per cent or 1 out of 4 Spanish female prisoners. It should be noted that the total Roma population of Spain is estimated to be roughly 1.4 per cent which means that Roma women are incarcerated 20 times greater than there numbers relative to the general population (Proyecto Barañí 2001).

Never in history have there been this many people behind bars. It is estimated that 3 out of 10 prisoners are foreigners which means that they constitute roughly 33 percent of the total prison and jail population. At times two or three prisoners are confined to a small cell measuring 10 square meters where they must live, sleep, and watch television (Martin: 2005). The activist groups *La Coordinadora de Solidaridad con las Personas Presas* (CESPP/the Coordination for Solidarity with Persons in Prison) estimates that between 2001 and 2004, 871 people died in prisons, jails and police stations throughout Spain. It is estimated that 262 of the 871 during this time frame occurred in police stations and 24 percent resulted from police shootings (Chalmeta 2005).

The Role of International and Regional Human Rights Law: CERD and Antidiscrimination Instruments of the European Union

The struggle against racial discrimination is based on principles contained in the United Nations Charter and several important international human rights instruments. The right to enjoy human rights without discrimination is one of the fundamental principles underlying international human rights law. The Universal Declaration of Human Rights (UDHR), the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR) all prohibit discrimination on the basis of "race, color, sex, language, religion, political or other opinion, national or social origin, property, birth or other status" (Symonides 1996).

Moreover, the United Nations (UN) has challenged institutional forms of discrimination such as colonialism and apartheid and has made the struggle against racial discrimination a major priority over the years. In an effort to address racism and related forms of discrimination the UN has convened several major world conferences focused on racism and xenophobia, the most recent being held in Durban, South Africa in the summer of 2001. The work of the United Nations and its World Conferences against Racism has made important contributions to the following:

- To the current theoretical debates on racial discrimination as a form of discrimination within the human rights paradigm;
- To understanding the role of global civil society in addressing the underlying causes and consequences of racism, racial discrimination and xenophobia as global phenomena;

- To identifying concrete remedies and strategies based on an integrated global approach;
- To the worldwide anti-racist human rights movement strategies in combating racism as a core human rights violation.

The Convention on the Elimination of Racial Discrimination (CERD) is the main human rights instrument that specifically addresses racial discrimination. The Convention was adopted by the UN general assembly in 1965 and entered into force in 1969 (Amnesty International 2001). Signatures to CERD agree to commit and implement concrete measures aimed to prohibit and eliminate racial discrimination.

The enforcement component of the Convention is composed of 18 members and they are elected by the state parties and serve in their individual capacities. Additionally, CERD administers a comprehensive reporting system which requires all state parties to submit detailed data on their legislative, judicial, and administrative efforts which they have adopted regarding compliance. As of February of 2001, there were 157 states parties to CERD (Amnesty International: 2001).

At minimum, state parties to CERD, are obligated to take the following steps.

- Submit periodic reports to the UN treaty body that monitors compliance, the Committee on the Elimination of Racial Discrimination, describing the legislative, administrative and judicial measures taken to implement the treaty obligations and an assessment of the degree to which these measures have been in effective practice.

- Identify any areas in the law and/or practices which fall short of the treaty and take the appropriate legislative or administrative initiatives in order to be in full compliance.
- Establish a clear mechanism to monitor compliance.
- Establish programs to educate government workers, citizens, policy and decision makers, along with member of civil society.

According to CERD, racial discrimination is:

“Any distinction, exclusion, restriction or preference based on race, color, descent, or national or ethnic origins which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life”

(Convention on the Elimination of Racial Discrimination 1969).

There is no one single definition on what is or what constitutes racial discrimination. The nature of racial discrimination is complex and no one definition may be able to define it with precision. However, CERD’s definition of racial discrimination is the commonly agreed upon international human rights interpretation and is widely accepted. According to the International Court of Justice, CERD’s definition of racial discrimination is an authoritative interpretation of the meaning and scope of the non-discrimination clause of the UN Charter (Buerghenthal 1988).

The strength of CERD's definition is its breadth. It covers distinctions based on race or color and also distinctions based on descent and national or ethnic origin. For example, the caste system that discriminates against lower castes such as the Dalits (India) and other castes, according to CERD, would constitute a form of racial discrimination as defined by the Convention. CERD while widely regarded as a useful treaty has no real enforcement power, and thus its overall usefulness is hotly debated by human rights activists. However, it is largely regarded by international human rights experts as an important tool in the fight against racial discrimination.

Spain and the Convention on the Elimination of Racial Discrimination

CERD was one of the first international human rights instruments to be ratified by Spain. It has submitted a total of 17 periodic reports to the CERD committee, the sixteenth and seventeenth being presented together and considered by the Committee in March 2004 (CERD Summary Report /C/SR/1616/1617:2004). These reports, along with the comments of the CERD committee, offer crucial insights into the ways in which states seek to construct a narrative discourse regarding human rights issues. The CERD committee, at the same time, attempts to counter the narrative by posing probing and detailed questions on the states human rights record. The CERD committee will also offer non-binding recommendations to the state party on ways to improve their human rights record. The work of the CERD committee and the submission of periodic reports are

crucial because they offer valuable perspectives on how international human rights operate.

In Spain's sixteenth and seventeenth periodic reports submitted in March of 2004 concerns about the occurrence of racist and xenophobic incidents and the re-emergence of discriminatory attitudes, especially towards Gypsies, North Africans, Muslims and Latin Americans were raised (CERD Summary Report /C/SR/1616/1617:2004). Also, four years earlier in March 2000 regarding Spain's fourteenth and fifteenth reports concerns were expressed in reports of racist attitudes on the part of the police and Civil Guard officers. The committee also focused on the lack of adequate information on statistics of allegations of racially-motivated and related offenses, their investigation and the punishment of those responsible. Recalling that it had previously expressed concern about reports of racist attitudes on the part of the police and Civil Guard officers, CERD wished to know what evaluation Spain had made of the effectiveness of non-discrimination training schemes for these officers. Among other concerns, it commented on the remarkably few cases before national courts that have been identified as incidents of racial discrimination, despite a recognized general increase in violence, including attacks on foreigners by extremist groups, neo-Nazi movements and gangs (CERD/C/304/Add. 95, April 19, 2000).

In 1996 in its Concluding Observations on Spain, the CERD committee expressed concerns about the increasing manifestation of racism, xenophobia and discrimination against foreigners, asylum-seekers and members of the Gypsy community. It also noted

with serious concern that evidence of racist attitudes on the part of members of the police and the Civil Guard seems to be increasing, and that the number of convictions resulting from such incidents does not seem to increase proportionately (CERD/C/304/Add. 8, March 1996).

Given the nature of international human rights and the CERD committee in particular, the enforcement mechanisms, beyond ‘concerns’ expressed and ‘non-binding recommendation,’ are quite weak. This is one of the gravest defects of international human rights laws. Oftentimes nongovernmental organizations and civil society will attempt to shed light on the more egregious human rights violations by mobilizing public opinion. In doing so the state party may face negative publicity and in some cases might decide to address some of the more serious human rights concerns.

Article 13 and Antidiscrimination in the European Union

The antidiscrimination Directives of the EU are based on the principle of equal treatment, and mandate that member states implement, where needed, new policies, enforcement mechanisms and institutions to address discrimination in the areas of race, gender, age, disability, religion and sexual orientation. Article 13 and European Directives on Race (2000/43), and Employment (2000/78), are the direct result of progressive social movement activity, on the one hand, and a reaction and repudiation of far-right ultraconservative movements, on the other. These two opposing social currents must be

seen as having had a strategic impact on how the European Union has approached the question of race, gender, and social discrimination.

On one side of the equation are the broad based social movements against racism and xenophobia that emerged in Western Europe during the early 1990's. During this time a sophisticated network of social movement actors and well-organized NGO's, referred to as the Starting Line, coalesced to pressure the European Union to put into place effective anti-discrimination measures in the areas of race, gender, sexual orientation, religion, and immigration.

In stark contrast to these social movements was the rise of far right, extreme, nationalist parties spreading across Europe. The ascendancy of Jörg Haider and his far right Freedom Party in Austria in 1999, coupled with the rise of similar parties or ideological formations in other countries, sent a strong signal to the European Union that it would soon have to put into place strong antidiscrimination measures for member states to adopt (Cachón 2004).

Since the economic difficulties of the 1980's and 1990's, the leading theme of the political programs of far right parties has been immigration and national policy. Immigration is presented as the principle cause of unemployment and other social problems. According to extremist far right parties, undocumented workers or immigrants, take jobs that are reserved or belong to nationals. They argued that undocumented workers increase expenses on the social security system – because they do not contribute

to it – thus damaging the national economy. Also, the flow of immigration is seen as a threat to national identity, culture and language. Organized crime, terrorism and crime are then directly attributed to immigrants and foreign nationals. The solution is the expulsion of immigrants, asylum seekers and refugees, and stricter and tightened immigration controls. Along with Austria's Freedom Party, others parties include, the National Party in Britain, the National Front in France, and the Northern league in Italy – only to name a few.

However, progressive social movements actors, like the Starting Line, through grass-roots mobilization, educational outreach campaigns and intense lobbying, forced the European Union to place racial discrimination on its agenda, and to adopt important legal instruments in the fight against social discrimination. The Starting Line created the social and political conditions that paved the way for article 13 and the European Unions' two ground-breaking Directives on race and employment. With Haider's arrival, the EU would approve the Directives with breakneck speed. Article 13 and the Directives should therefore be seen in this political context.

Article 13 emerged from the Amsterdam Treaty of 1999, which lead to the adoption by the European Council in 2000 of these two anti-discrimination Directives. The first, referred to as the "Race Directive," bans racial and ethnic discrimination and it covers employment, training, education, social security, healthcare, housing and access to goods and services (Council Directive 2000/43/CE, June 29, 2000).

The second, referred to as the “Employment and Equality Directive,” focuses on discrimination in employment and occupations, and it covers religion, or belief, disability, age and sexual orientation (Council Directive 2000/78/CE November 27, 2001). Collectively these antidiscrimination measures reflect the European Unions’ attempt to develop and implement an integrated approach to fight against racial and ethnic discrimination and other forms of intolerance. All Member States are obliged to comply with these Directives.

States are required to act in the following areas: First, those that have not done so or those without pre-existing laws, as well as those wanting to join the European Union, are required to put into place effective antidiscrimination measures into their national laws. Second, states are obliged to fully transpose these Directives into national law. Third, states are obliged to establish effective judicial frameworks or “equality bodies” to deal with complaints of racial discrimination. Finally, states are encouraged to consult and solicit the input of civil society organizations working on racial relations regarding the establishment of the “Equality body” and on the implementation of anti-discrimination measures.

Substantively, as legal instruments these Directives represent a qualitative leap in the struggle against racial discrimination, and for the first time, they establish a common European wide agreement on the definition of discrimination. Two types of discrimination are codified: direct and indirect. Direct discrimination is defined as “when a person because of race or ethnicity is treated less favorably than another is, has been, or

would be, in a comparable situation.” Likewise, indirect discrimination is “when an apparently neutral provision, criteria or practice would place persons of racial or ethnic origins, religion or belief, disability, age or sexual orientation at a particular disadvantage compared with other people” (Chopin and Niessen 2001).

Also, the burden of proof is inverted and is now placed on the defendant or the institution to prove that there was no discrimination. And, unlike regional or international human rights antidiscrimination instruments, the Directives have a coercive authority, as states may be rebuked, fined or sanctioned. Another key substantive requirement is the provision requiring states to establish effective “equality bodies” or a judicial framework to deal with racial and other forms of discrimination. The European Union did not elaborate in great detail the main powers of this “Equality Body.” However, it should be independent and have the power to effectively deal with discrimination.

Symbolically, these Directives send a clear and powerful message to member states that racial discrimination, xenophobia and intolerance will be taken seriously and dealt with by the Europe Union from an integrated approach. Racial discrimination in one European Union state becomes a matter of concern for other member states. Therefore, states are not able to invoke national sovereignty as a tactic to prevent their practices from being investigated.

Compliance or Non-Compliance

To be in full compliance of the Directives, Spain must elaborate clear and effective antidiscrimination measures into national law, (if it has not already done so); transpose the directives into national law; establish a national Equality Body to receive racial discrimination complaints; and consult as well as solicit input from civil society organizations working on racial discrimination. What steps has Spain undertaken so far?

The transposition of the Anti-Discrimination Directives into Spanish National Law

The two Directives were transposed into Spanish Law in Chapter III – measures for the application of equal treatment – of title II of law 62/2003 of fiscal, administrative and social measures on December 30, 2003; and were put into force on January 1, 2004 (Cachón 2004). The *Partido Popular*, the ruling party at the time, held no public debates or discussions on the meaning, significance and relevance of the Directives as required by the European Union. Moreover, the *Partido Popular* chose not to consult with civil society groups another stipulated requirement of the Directives (Lorenzo 2005). Curiously, the Directives were attached to a parliamentary procedure referred to as Accompanying Laws – a process whereby many laws or passed or amended simultaneously – which oftentimes result in them being buried deeply within bureaucratic maze of government, and thus, go unnoticed. The timeline for transposition spotlights another problem. The timeline established by the European Union was July 19, 2003; meaning that Spain was roughly about five months late in transposition.

The wording of the Race Directive and its transposition also raises concerns. The definition of key legal terms or principles in the Spanish version of the transposition does not match exactly how they are defined in the Directives. Additionally, the exclusion of key words in the Spanish version that are part of the Directive is worth noting (Cachón 2005).

The Spanish Version of the Law:

- a. The definition of direct discrimination includes the words “when a person is treated less favorably” but the words “has been or would have been” are excluded.
- b. The definition of indirect and direct discrimination does not include the words “criteria or practice.”
- c. The principle of protection against victimization is transposed but only in cases involving labor.
- d. The word “independent” does not appear in the function of the Equality Body.

According to the *SOS Racismo* and other civil society groups, the Spanish government has failed to adequately and properly transpose these Directives into national law. Given this failure to comply, SOS filed an official complaint with the European Union on Spain’s alleged non-compliance. As a result, Spain was denounced at the Luxembourg Tribunal for its delay and failure to properly transpose the Directives. Until an official decision is rendered by the European Union, it is difficult to say if the Transposition conforms to European Union standards (Lorenzo 2005).

Spain's Equality Body

Spain's Equality Body, which is still being elaborated, is attached to the Ministry of Labor and Social Affairs, and its composition will be mainly of government officials, with the participation of autonomous regions, local authorities, and trade organizations; and in theory, civil society organizations, may be invited to participate or collaborate (Cachón 2005). The Ombudsman may establish cooperation with this body. Its main functions will include, at minimum, the following:

- a. To provide assistance to victims of discrimination at the time when they file their claims.
- b. To conduct independent studies on discrimination.
- c. To publish reports and make recommendations on discrimination.

The main problem with Spain's Equality Body is that it will not be independent because it appears that it will be mainly composed of government official. It will not have its own budget and will receive the necessary support from a social service body attached to the Ministry of Labor. Moreover, the current composition of the body makes it just another part of Spain's bureaucratic maze without its own unique identity. Therefore, its ability to deal with the multiple forms of social discrimination is seriously compromised.

Brief overview of Spain's antidiscrimination measures

In theory Spain has a number of important antidiscrimination measures incorporated in its Constitution, penal code, and national laws. Collectively these measures deal with discrimination in most areas of public and private life, and include employment, labor and social security. They are aimed at punishing citizens and public functionaries (civil servants, policemen, judges, etc) who engage in acts defined as discriminatory: these categories cover race, ethnicity, anti-Semitism, sex and sexual orientation, religion and ideology – only to name a few.

The Spanish Constitution of 1978 provides for conformity of norms on fundamental rights and freedoms with the Universal Declaration of Human Rights and other relevant international instruments and agreements that Spain has ratified. Article 10 states that provisions relating to fundamental rights and freedoms recognized by the Constitution shall be interpreted pursuant to the Universal Declaration of Human Rights and relevant treaties and agreements ratified by Spain. According to the Constitution and Article 14, Spaniards are equal before the law. Article 14 establishes the principle of total non-discrimination on grounds of birth, race, sex, religion, opinion or other personal or social condition or circumstance (Amnesty International 2002).

Additionally, a number of articles in the Penal Code punish racial discrimination or racial hatred. The new Penal Code, which entered into force on 26 May 1996, recognizes a number of offenses against the exercise of fundamental rights and public freedoms, involving the provocation of discrimination, hatred or violence on racist grounds. Spain, therefore, has a broad range of legal measures offered by the Constitution and the Penal

Code, and it has ratified relevant international human rights instruments, like Convention on the Elimination of all forms Racial Discrimination (Amnesty International: 2002).

But, recent laws and legal decisions, has severely limited their scope. Consequently, antidiscrimination laws are rarely enforced.

For example, an important addition to the new Penal Code is Article 22.4 and Article 66.3, which collectively establish aggravating factors in crimes motivated by racist or other discriminatory motives. The difficulty, however, involved in applying the new laws, is reflected in the case of Mamadou Kane, an immigrant from Senegal. In this novel case, racist abuse by police had been alleged, and ill-treatment and illegal detention, firmly established. Mr. Kane, after being beaten and detained by four policemen in (Samil) Vigo near the University of Campus of Marcosende, filed a complaint and sought judicial relief based largely on Article 22.4 and 66.3 (Amnesty International 2002).

The prosecutor on behalf of Mr. Kane argued before the Constitutional Court that the aggravating circumstance of racial motive – the intersectionality of race, class and immigrant status – should be taken into account as intrinsic to the crime. He argued that since the officers had taken Mr. Kane to an outlying area where they beat him while using racial slurs in the process, that such abuse was directly related to his race and immigrant status.

Despite these circumstances, the court, however, did not accept the prosecutor's argument. On 12, July 2001 the Constitutional Court upheld the convictions against the four officers for ill-treatment. But it did not accept the aggravating circumstance of racial motive could be proven. So while the officers were successfully tried for ill-treatment and illegal detention, the Court refused to link the aggravating circumstance of racial motive to the crime.

Another clear example where the Constitutional Court refused to apply and interpret antidiscrimination laws is a case dated January 2001. It ruled that skin color or other foreign appearance could be used as a criterion for deciding when police officers could carry out identity checks, thereby raising concerns that individual police practices involving racial discrimination, like racial profiling, had been converted into a constitutional doctrine. An Afro-American woman, with Spanish citizenship, was stopped for a routine search in a train station based solely on her appearance. Objecting to such dehumanizing treatment, she sought judicial relief relying on article 14 of the Spanish Constitution, which forbids racial discrimination (Dixon 2002).

The court's majority verdict found that police checks on foreigners in Spain did not constitute racial discrimination and, moreover, that "specific physical or ethnic characteristics can be taken into consideration as reasonable indicators of the non-national origin of the person who possesses them." However, one of the six judges, Julio Diego Gonzalez Campos, sharply disagreed. In a separate judgment, he argued that to introduce race as a criterion for selecting who should be subjected to police identity

checks was an infringement of Article 14 of the Constitution (Amnesty International 2002).

Conclusion

Spain's legal system has antidiscrimination mechanisms, but few cases reach the courts; and the recent legal rulings on the small portions of antidiscrimination cases heard, have limited scope and range, and do not punish or deter racial discrimination. Regarding the Race and Employment Directives, it is up to the Europe Union to issue official rulings on the compliance: however, this analysis demonstrates that Spain is not in full compliance with the minimum standards of the Directives. The transposition of the Directives falls way short of what the EU prescribed; it was transposed late, and without consulting civil society groups. Moreover, after two years the Equality Body is still ill-defined and amorphous; it has no power or influence, and is not independent. Moreover, under the *Partido Popular* civil society organizations were excluded from the consultative process.

The newly elected Socialist government appears to be more approachable and concerned about antidiscrimination and practical immigration policies. However, it is too early to know what the Socialist party's policies will be regarding the Europe Union's Directives. More importantly, there are still no clear signs from the Socialist Party's on their position toward the Equality Body. At minimum, the Socialist should insure that the Equality body is independent, has real power and is able to deal effectively with racial and other forms of discrimination. Moreover, civil society groups, like *SOS Racismo*, should be fully consulted on the issues pertaining to racial and other forms of discrimination; and

SOS Racismo should play a role in establishing the Equality Body given their expertise in the areas of racial discrimination and immigration. Meanwhile, the European Union and civil society organizations must pressure Spain to conform to the standards of the Directives. Filing petitions and denouncing Spain's non-compliance is a reasonable legal strategy, but it is not enough. A human rights campaign focused on racial discrimination that highlights racism and intolerance would surely attract the attention of the Spanish government.

Sources:

- Amnesty International. 2005. *World Report – Spain: 2005*.
- Amnesty International. 2002. *Spain Crisis of Identity: Race related torture and Ill-Treatment by State Agents*. (EUR 41/001/2002).
- Amnesty International: Using the International Human Rights System to Combat Racial Discrimination: A Handbook: 2001.
- Barberia, José Luis. Political Extremism. *El Pais*. 11 April 2005.
- Buerganthal, Thomas. 1988. *Human Rights in a Nutshell*. St. Paul, MN: West Publishing Co.
- Cachón, Lorenzo: Executive Summary on Race and Equality Directive: State of Spain, January 7, 2004.
- Choppin, Isabelle and Jan Niessen, Combating Racism in the European Union with Legal Means: A comparison of the Starting Line and the EU's commissions' Proposal for a Race Directive (London Commission for Racial Equality:2001)
- Chalmeta, Alvar: Casi. 1.000 personas han muerto bajo custodia en cuatro años. *Diagonal* 6, May 12, 2005.
- Diaz, Lorenzo. The Ultra-right Reorganizes Itself Towards Racism. *Diagonal* 3, March/April 2005.
- Dixon. 2002.
- European Monitoring Centre on Racism and Xenophobia 2000 Report.
- European Network Against Racism. Fact Sheet number 18 and 19.
- European Network Against Racism. Spain's transposition process and the EU's anti-discrimination Directives (Interview with Diego Lorenzo of SOS Racismo), December 2003.
- Lorenzo, Diego, S.O.S. Racismo. Interview by author. January 8, 2005: Madrid.
- Lusane, Clarence. Interview by author. January 4, 2005: Madrid.
- Martín, Patricia: "Siete cárceles para legislatura" *El Pais* June 7, 2005.
- S.O.S. Racismo Informe Anual – 2004 Sobre el racismo en el Estado español "Otra

ocasion perdida: la transposición de las Directivas 2000/43 y 2000/78 de la Unión Europea” (38-44), Lorenzo Cachón Rodríguez.

Proyecto Barañí: Mujeres Gitanas y Sistema Penal. (METYEL : 2001)

Symonide, Janusz. 1996. *The Struggle against Racial Discrimination: A Collection of International Human Rights Instruments adopted by the United Nations*. UNESCO.

United Nations, Committee on the Elimination of Racial Discrimination. 1996. *CERD/C/304/ADD. 8 March 28, 1996*.

2000. *CERD/C/ 304/ ADD. 95, April 19, 2000*.

2004. *CERD /C/SR/1616 and 1617, March 2004*.

Wagman, Dan. Interview by author. January 4, 2005. Madrid.

Williams, Rosiland. Interview by author. February 2001