

NATIONAL LEGAL MEASURES TO COMBAT RACISM AND INTOLERANCE IN THE MEMBER STATES OF THE COUNCIL OF EUROPE

DENMARK, Situation as of 1 December 2004

General Overview

Preliminary Note: this table is accompanied by an explanatory note.

COUNTRY: DENMARK	Constitutional provisions	Specific legislation	Criminal Law	Civil and Administrative Law
Norms concerning discrimination in general	No.	No.	No.	Act 1996/459 prohibiting discrimination in the employment market.
Norms concerning racism	No.	Act 2003/374 on ethnic equality.	Article 266b of the Criminal Code. Act 1971/289.	Yes, Act 466/1993 setting up the Committee on Ethnic Equality and Act 2002/411 establishing the Institute of Human Rights.
Relevant jurisprudence	No.	No.	Yes.	No.

EXPLANATORY NOTE

DENMARK / GENERAL OVERVIEW

Denmark's legislation was long solely organised around two provisions of criminal law, one aimed at combating the spread of racial hatred and the other at prohibiting refusal to supply a public service. These standards had been adopted in the wake of Denmark's ratification of the United Nations Convention on the Elimination of All Forms of Racial Discrimination in 1971. Initial steps to strengthen the legal provisions

were taken in 1996 with the passing of a law banning discrimination in the employment market.

That reinforcement effort continued in 2002 with the establishment of the Danish Institute of Human Rights, a body devoted to studying and raising awareness of issues linked to fundamental rights, notably discrimination.

The real advance nonetheless came in 2003 with the passing of the Ethnic Equality Act and the creation – within the Institute of Human Rights - of a board to deal with complaints of discrimination.

Constitutional Law: Denmark

Preliminary Note: this table is accompanied by an explanatory note.

Constitutional provision	Scope	Relevant jurisprudence	Remarks
Article 70.	Old provision which secures the exercise of "civil and political rights" irrespective of creed or descent. At a pinch, it might prohibit all serious, arbitrary discrimination.	UfR 1965 393.	This provision has never been used in a racial context.

EXPLANATORY NOTE

DENMARK / CONSTITUTIONAL LAW

General comment

The Danish Constitution is one of the oldest in Europe. Although, strictly speaking, the text dates from 1953, many of its articles go back to the 19th century.

The principle of equality

None of the articles of the Danish Constitution expressly prohibit racial discrimination, but Article 70 does contain a clause prohibiting any restriction of civil or political rights for reasons of creed or descent. Can this guarantee, which applies to everyone, irrespective of whether they are Danish nationals, be construed as something which generally establishes the principle of equal treatment? Case-law and legal theory refuse to go as far as this. At most, it has been accepted that "serious, arbitrary discrimination" could be censured by the courts¹. No such case has yet arisen.

Moreover, the precedents are unanimous that administrative authorities must abide by the principle of equal treatment as an unwritten principle of administrative law².

Criminal Law: Denmark

Preliminary Note: this table is accompanied by an explanatory note.

Offence	Source	Scope	Sanction	Relevant jurisprudence	Remarks
Expressing and spreading racial hatred.	Article 266b of the Criminal Code.	Covers any threatening, vilifying or insulting statement intended for the general public or a wide circle of persons. In practice less serious cases are not punished.	Fine or up to two years' imprisonment.	A politician was convicted for verbal attacks on Muslims (U.2004.1360V). Conviction of a candidate in the general election who had set up an anti-Islamic web-site (U.2004.734H)	Several prison sentences handed down in 2003/2004
Genocide	Act 1955/132	Partial or total destruction of a national, ethnic, racial or religious group	Up to life imprisonment		
Racial discrimination.	Act 1971/289, Sections 1 and 2.	Refusal to supply a public service/denial of access to a public event.	Fine or up to six months' imprisonment.	U.2004.641V (conviction of two head waiters and a manager who had refused Turkish nationals access to a restaurant) and UfR 1991 358 (judgment against a local authority which refused to let low-rent housing to refugees).	

EXPLANATORY NOTE

DENMARK / CRIMINAL LAW

General comments

In pursuance of the UN Convention on the Elimination of all Forms of Racial Discrimination, Denmark has introduced two specific criminal provisions: Article 266b of the Criminal Code, which makes expressing and spreading racial hatred an offence and Section 1 of the Act prohibiting racial discrimination (Act 1971/289) which penalises refusal to supply a public service.

Apart from these particular offences, existing provisions of criminal law have been used on several occasions to punish racist offences (e.g. abuse, bodily injury, prohibited mail consignments).

It can be noted that convictions for racist offences were, until recently, still rare; however, in the past two years (2002/2004) their number has increased considerably. What is more, the courts no longer hesitate to impose prison sentences (see, inter alia, U.2003.1947Ø, U.2003.1428Ø, U.2003.1411Ø and U.2004.734H).

Article 266b of the Criminal Code

Until recently, this provision had scarcely been applied. The explanation apparently lay in the fact that the preparatory work to Article 266b stresses that it must be interpreted narrowly, as freedom of expression is enshrined in the Constitution. Less serious offences are not therefore necessarily punished (BT 553/1969, p. 34).

For example, the Regional Court for the west of Denmark (UfR 1988 788) refused to extradite to Germany a German citizen, resident in Denmark, who had published remarks in a German newspaper, in which he cast doubts on the holocaust and insinuated that the Jews were exaggerating the number of victims in order to claim higher reparations from the Federal Republic. The Danish Minister for Justice had agreed to the extradition, on the grounds that the condition of dual criminal liability had been met, as the remark in question came within the ambit of Article 266b of the Danish Criminal Code. Extradition was refused at the appeal stage, as the court considered that the case was less serious.

In two further cases (UfR 1980 1065 and, above all, UfR 1989 389), the courts convicted journalists who had given extremists the opportunity to broadcast racist remarks, of aiding and abetting the spread of racial hatred. In both cases, the courts refused to allow freedom of the press or, more precisely, the need to inform the public about the ideas being bandied about in certain circles, to take precedence over Article 266b. The second case, concerning a producer and a journalist from the national television company, was brought before the European Court of Human Rights, which found in favour of the television employees and held that Denmark had breached Article 10 of the European Convention on Human Rights, which safeguards freedom of expression (*Jersild against Denmark*, Series A 298). Since then, the new Act on media liability (Act 348/1991, Section 18) has exempted producers of television broadcasts from prosecution for punishable remarks made by a person taking part in the programme, provided that the identity of that person is revealed.

In recent years judgments have nonetheless been pronounced against people who had launched verbal attacks on asylum seekers or refugees in what was in fact a political context. The degrading nature of the statements made was cited as justification for the penalties imposed. For instance, a politician who had vilified foreigners in 44 e-mails

sent to members of parliament was fined (U.2004.1360V). The same applied to a candidate in the general election who had set up an anti-Islamic web-site and called for Muslims to be interned in concentration camps (U.2004.734H). In this decision, as in another (U.2003.2435V), the court held that the fact that the anti-Islamic statements had been made when emotions were running high following the terrorist attacks of 11 September was no ground for dispensing the perpetrator from a penalty; at most it could be regarded as a mitigating circumstance that could be taken into consideration when determining the extent of the penalty.

In 1995 the Danish parliament strengthened Article 266b by adding a second sub-paragraph, which makes the intention to spread "propaganda" an aggravating circumstance; propaganda means the deliberate intent systematically to influence a section of the population, particularly by using media making it possible to reach a broad audience. According to the case-law, this applies to televised statements (U 1999 1113). The courts have consistently held that publishing information on a web-site comes under this aggravating circumstance (U.2003.1428Ø).

The offence of spreading racial hatred is actionable *per se* (Article 719 (2) of the Code of Procedure). When the new second sub-paragraph to Article 266b was adopted, members of parliament specifically urged the public prosecutor to increase prosecutions for incitement to racial hatred: the majority of members of parliament considered that the public prosecutor must use the possibility of instituting proceedings *proprio muto* to combat racial hatred more actively³.

The Act prohibiting racial discrimination (Act 1971/289)

The first section covers the refusal to supply a public or commercial service. As a result of this restriction, refusal to hire a person is not penalised by law. The same applies to a refusal to let a dwelling, if the person who refuses does not let or sell dwellings as their occupation.

The case-law primarily concerns refusals of housing or of access to public places. In the first category, mention can be made of a decision of 1991, in which the Supreme Court imposed a penalty on a local authority which had introduced a 10% limit on the number of council dwellings which could be allocated to foreigners. A Turkish national was refused a flat on the grounds that this ceiling had been reached. The Supreme Court considered that this quota was discrimination breaching Act 1971/289 (UfR 1991 358). It must be noted that the local authority pleaded in its defence that these quotas had been introduced to prevent xenophobia by avoiding concentrations of immigrants.

In the second category note can be taken of the imposition of fines on a restaurant owner who had refused to serve Moroccan nationals (U.1999.1286Ø) and, above all, on two head waiters and a manager who refused anyone not of Danish nationality access to their public establishment. The court also fined the firm which owned the restaurant (U.2004.641V).

The offences introduced by Act 1971/219 are prosecuted subject to the lodging of a complaint. Under the rules of the Code of Procedure, the complainant may either request the public prosecutor to bring an action, or they may do so themselves

(possibly through an association acting on their behalf - the course taken in the above-mentioned case).

Civil and Administrative Law: Denmark

Preliminary Note: this table is accompanied by an explanatory note.

Provision	Scope	Consequences of breach	Relevant jurisprudence	Remarks
Act 1996/459 prohibiting discrimination in the employment market	Prohibits employers from discriminating against their employees (or candidates for a vacant post), especially on the basis of race, religion or skin colour.	Compensation for non-pecuniary injury. Compensation for difference in wages. Fine for violating the prohibition of discrimination in the employment market.	An employer was ordered to pay DKK 10,000 in compensation to an employee dismissed for wearing an Islamic veil (U 2000 2350Ø).	The Act is not applicable if a collective agreement guarantees at least the same level of protection.
Section 7 of the Act on Personal Data	There is a qualified prohibition on recording data about race.	Fine or up to four months' imprisonment Eradication of the data at issue.		The corollary of this provision is a prohibition on communicating sensitive data that may, in particular cases, have been recorded (Art 15 (2)).
Section 7, paragraphs 5-7, of the Act on Personal Data	Data concerning race or ethnic origin may be processed exceptionally for reasons of health, in connection with criminal proceedings or on other overriding public-interest grounds.			In the case of processing on public-interest grounds, the supervisory body's permission must be obtained.
Art.28 of the Act on public	An administrative			A similar provision limits

administration 1985/571	service may only transmit data on race, religion and skin colour to another administrative service with the consent of the person concerned, or if there is a more important reason for communicating it, or if authorised by a statutory provision.		the disclosure of information held by the Auditor-General's Department (Rigsrevisionen), see Art.31 of Act 1992/447.
Art.5(3) of Decree 2003/350 on the radio broadcaster DR Art.3(3) of Decree 2003/1031 on the television broadcaster TV2 Section 4, paragraph 3 of Act 2004/104 on local broadcasting	The programmes must not incite to racial or religious hatred.		Similarly, broadcast advertising must not show racial discrimination (Decree 1994/108, Art.9(2)).
Act 2003/374 on ethnic equality	Prohibits all forms of discrimination (direct or indirect) in the public and the private sectors	Compensation for non-pecuniary harm Contractual or regulatory provisions entailing discrimination are invalid	Transposes EU Directive 2000/43
Act 466/1993 on the Committee for	Sets up a body to combat racial discrimination.		This body can only make recommendations;

EXPLANATORY NOTE

DENMARK / CIVIL AND ADMINISTRATIVE LAW

Act 2003/374 on ethnic equality

This Act, which transposes EU Directive 2000/43 into Danish law, bans all forms of discrimination (direct or indirect) in the public and the private sector (apart from entirely individual activities). It also provides for a (partial) reversal of the burden of proof, since the complainant must produce prima facie evidence (documents or witnesses) of discrimination and it is then for the accused to prove that no discrimination took place in the case under consideration or that any difference in treatment (indirect discrimination) was founded. The law also deals with harassment designed to engender an atmosphere that is intimidating or degrading for a person on account of his or her racial or ethnic origin.

The law enables victims to claim reparation. It also provides that contractual provisions (including collective labour agreements) or regulations which breach the ban on discrimination or harassment shall be invalid.

Act 2002/411 establishing the Danish Institute of Human Rights

This law establishes a body devoted to studying the enforcement of fundamental rights, with the specific role of raising public awareness of anti-discrimination measures. Since 2003 it has also been responsible for hearing complaints of discrimination under the Act on ethnic equality. To that end, it has set up an ad hoc board which can deal with cases of its own motion or at a victim's request. This board is not empowered to award damages (which remains a matter for the civil courts) but can nonetheless give an official finding that discrimination has taken place.

Act 1996/459 prohibiting discrimination in the employment market

This Act expresses the legislator's resolve to transpose the UN Convention on the Elimination of All Forms of Discrimination into national employment law. This Act, which contains a dozen Articles and is inspired by the Act on equality between men and women, places a general prohibition on discrimination against workers when hiring (it is forbidden to make enquiries about a candidate's racial background, or to state a preferred racial group in the job advertisement), in working relations (e.g. wages, access to further training), and at the end of employment; the Act concerns both direct and indirect discrimination. It provides for exceptions only in the cases of employers who are involved with promoting certain religious or political ideas (Art.6); other exceptions are subject to a ministerial decision (for example, when it is decided to give priority to recruiting representatives of the ethnic minorities to the civil service).

Act 466/1993 on the Committee for Ethnic Equality

This Act set up a body to combat racial discrimination: the Committee for Ethnic Equality.

The purpose of this committee, which has fifteen members drawn from various circles in contact with refugees and immigrants, is to advise the Danish authorities and private associations about anything related to the combating of racism. The committee's terms of reference are formulated in very general terms and it is up to the body itself to define precise areas of activity.

The committee has no power of decision; it may however conduct inquiries on its own initiative or in response to a complaint and, to this end, is empowered to carry out investigations (right of access to documents and to hear witnesses). While it may not interfere in cases which are *sub judice* or pending before administrative authorities, it can issue recommendations in which it gives an opinion on the principles at stake. The committee reports annually to parliament and the government.

Note

¹ Judgment of the Supreme Court published in UfR 1965 293. See also the judgment of the same court in UfR 1986 898 and the legal theory quoted by Riis in UfR 1987 B 53.

Note

² Basse, *Forvaltningsrett* (1990), p. 242 *et seq.* Gammetoft-Hansen, *Forvaltningsrett* (2002), p. 366 *et seq.*

Note

³ Karnovs Lovsamling, Copenhagen 1997, add 7378, note 847.