



Universal Periodic Review – Austria
Report by
ZARA – Zivilcourage und Anti-Rassismus-Arbeit

Luftbadgasse 14-16
A – 1060 Vienna
Tel: +43 (0)1 929 13 99
E-mail: office@zara.or.at
Web: www.zara.or.at

Vienna, July 2010

1 Introduction

- [1]. This report was drafted by ZARA – *Zivilcourage und Anti-Rassismus-Arbeit* a Vienna based anti-racism NGO established in 1999. We perceive racist discrimination as any form of disadvantageous treatment on the grounds of skin colour, language, appearance, religion, citizenship and/or origin. ZARA operates a counselling, information and documentation unit for victims and witnesses of racism, it offers educational and awareness raising measures for different target groups (students, teachers, companies, civil servants, etc.), publishes material on civil courage, racism¹ and related issues as well as lobbies for the development and improvement of anti-discrimination legislation.

2 Short Summary

- [2]. The **promotion of the right to non-discrimination** on the ground of ethnic origin is **hampered by not implementing recommendations** of international treaty bodies, **insufficient anti-discrimination legislation, inadequate resources** for both public and private organisations combating discrimination, **reluctance to collect data** on racism and **to acknowledge racism** as an everyday social phenomenon **embedded in legislation, administrative practices and structures. Improvements are slow**, awareness raising and support of victims of discrimination is to a great extent provided by NGOs.

3 Legal and Institutional Framework

3.1 International and Regional Obligations

- [3]. We ask the **Austrian government to withdraw** the following **reservations**:
- **ICERD Art 4 sub-paragraphs (a), (b) and (c)**, the aims of which may not jeopardise the right to freedom of opinion and expression and the right to freedom of peaceful assembly and association. Therefore, national courts interpret sec 283 Penal Code (incitement to hatred) in a rather restrictive way. So far no individual complaints have been filed with CERD. The reservation might prevent claimants to bring individual cases to CERD, after national courts have not established a violation of sec 283 Penal Code.
 - **CCPR Art 14 (3) (d)**: National regulations allow for the exclusion of a defendant in case s/he disturbs the orderly conduct of the trial or his/her presence would impede the questioning of another accused person, a witness or an expert. In March 2008, a female defendant – who refused to take off her burqa in court – was removed from the proceedings on the ground of her “unseemly behaviour” (sec 234 Code of Criminal Procedure). The judge could not assess her trustworthiness without being able to see her face and deemed it “rude” to “cover one’s face in a free country like Austria”.
 - **CCPR Arts 19, 21 and 22**: The restrictions limiting these freedoms provided for by CCPR are further limited by Art 16 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR), which allows the contracting parties to restrict political activities of aliens. This further general restriction exclusively aiming at the prohibition of political activities of aliens seems disproportionate and discriminatory.
 - **CCPR Art 26**: Austria understands the article as not excluding unequal treatment of Austrian nationals and aliens. However, a differentiation of these two groups is also only allowed when based on well-founded and objective criteria. In the case of *Karakurt v. Austria* the UN Human Rights Commission established a violation of Art 26, on the ground of unsubstantiated differen-

¹ See: Annual Racism Report <http://www.zara.or.at/index.php/beratung/rassismus-report>

tial treatment between different categories of aliens (citizens of the EEA and other aliens). Austria will have to expect further condemnations when it continues to differentiate between different categories of aliens not based on substantial grounds.

- [4]. We ask the **Austrian government** to **ratify** the following international obligations:
- **Protocol No 12** to the **ECHR** guaranteeing an all-inclusive protection against discrimination,
 - **Additional Protocol to the Convention on Cybercrime**, concerning the criminalisation of acts of a racist and xenophobic nature committed through computer systems.

3.2 Constitutional and Legal Framework

- [5]. Unequal treatment of nationals and aliens is protected by the Constitution (Art 7 para 1) and the jurisdiction of the Constitutional Court. In 1995, the Constitutional Court established that the Constitution only guarantees equality before the law to nationals and not to aliens. This provision makes it possible to grant social, housing and family benefits to Austrian and EU nationals but not to third-country nationals. This practice has been restricted by the EU Directive concerning the status of third-country nationals who are long-term residents (2003/109/EC), but recently arrived aliens are excluded. We ask the **government** to **amend** the **Constitution** and **guarantee equality before the law for all people** residing in Austria **independent of their national origin**.
- [6]. The Austrian Equal Treatment Act was amended in 2004 in order to transpose the EU anti-discrimination directives (2000/43/EC and 2000/78/EC). This amendment would not have taken place without the EU-pressure. We ask the **government** to take the following steps to **improve** the **equal treatment legislation** currently in place:
- **Harmonise** the **scope** and the **prohibited grounds** of discrimination of the approximately 30 different acts in place, in order to equally protect everybody against discrimination no matter whether s/he lives in Vienna, Salzburg or Vorarlberg.
 - Make **legislation** easier to read and understand to make the right to non-discrimination more easily **accessible** for potential **victims of discrimination**.
 - **Abolish** the **hierarchisation** of the **grounds** of discrimination established by the EU directives.
 - **Provide for class action** for NGOs competent in the field of anti-discrimination. The Court of Justice of the EU established in the case of Feryn (C-54/07) that discrimination also takes place in the absence of an individual directly affected by it and should have legal consequences. Class action could contribute to achieving this aim.
 - **Introduce the concept of discrimination on the ground of association** into legislation. The Court of Justice of the EU established in the case of Coleman (C 303/06) that the protection against discrimination should also cover persons that are discriminated against because of their family ties or other relationships with potential victims of discrimination.
 - Support further measures – such as strategic litigation – to **improve legal certainty** especially regarding immaterial damages, a concept rather alien to the Austrian legal system
- [7]. Draft legislation foresees the amendment of sec 283 (incitement to hatred) Penal Code in order to transpose the Council Framework Decision 2008/913/JHA on combating certain forms and expressions of racism and xenophobia by means of criminal law. Sec 283 solely aims at protecting the public order and not human dignity and the groups protected no longer correspond with the groups currently most often affected by incitement to hatred. We call on the **government** to **amend sec 283 Penal Code** in order to **protect “migrants”, “immigrants”, “aliens” and “asylum seekers”**, who are quite often targeted by hate speech especially during election campaigns.

3.3 Human Rights Infrastructure

[8]. A survey among members of ethnic minorities conducted by the Fundamental Rights Agency of the EU² showed that about 70% of the interviewees in Austria (EU average: 57%) did not know of a law against discrimination. Only about 15 % knew about the Ombud for Equal Treatment (OET) (EU average: 37%). We call on the **government to improve the human rights infrastructure:**

- Support **awareness raising** campaigns and the **promotion of equality bodies,**
- Establish **regional offices of the OET** competent for **all grounds of discrimination,**
- Provide all **equality bodies, equal treatment contact points** and **competent NGOs** with **adequate resources** to be able to deal with more complaints, do public relations work and actively monitor whether their recommendations on how to eliminate and prevent discrimination are implemented.
- Define **standards** for the **proceedings** before the Austrian **Equal Treatment Commission (ETC),** which are in accordance with the **rule of law,**
- Define **standards** for the **competences** of the **members** of the **ETC,**
- Provide for **membership** of **competent NGOs** in the **ETC** as well as their right to vote on the decision taken.

[9]. We ask the **government to establish a really independent mechanism investigating police violence against ethnic minorities** as well as **allegations of ethnic profiling.** Whenever the Federal Ministry of the Interior or police officials assess allegations of racist violence by the police, the respective police officers are absolved of any criminal offences even before the case is investigated thoroughly. Officials sometimes try to legitimise the incidents by publicly announcing the victim's criminal record. There is no legal provision guaranteeing the independence of the two authorities currently responsible for investigating criminal offences committed by police officers – the Office for Internal Affairs located in the Federal Ministry of the Interior and the Office for Special Investigations within the Viennese Police Department. Both offices report their investigations to the department of public prosecution, which is bound to the instructions of the Ministry of Justice, and may be ordered to gather evidence, by which they can influence the decision of the public prosecutor.

3.4 Policy Measures

[10]. Most of the legislative or integration measures taken reinforce the social construction of two “homogenous groups” – “we”, the white, German speaking, Roman Catholic Austrians and “the others” who are ascribed specific behaviours on the ground of arbitrarily chosen characteristics such as their ethnic belonging. These two socially constructed “groups” are constantly juxtaposed and played off against each other in different political and social contexts. Prejudices and stereotypes, racist attitudes and statements not only by political decision makers but also reflected in the media legitimise individual everyday racism as well as structural racism. **Structural racism** manifests itself in legislation, in acts by the administration, within the police and the judicial system as well as in the educational system and on the labour market.³ There is hardly any official

² European Union Agency for Fundamental Rights (2010) Data in Focus Report No 3 – Rights Awareness and Equality Bodies, European Union Minorities and Discrimination Survey, http://fra.europa.eu/fraWebsite/attachments/EU-MIDIS_RIGHTS_AWARENESS_EN.PDF (29.06.2010)

³ See: Racism Reports by ZARA, <http://www.zara.or.at/index.php/beratung/rassismus-report> (29.06.2010) and Amnesty International (2009) Austria: Victim or suspect - A question of colour: Racial discrimination in the Austrian justice system, <http://www.amnesty.org/en/news-and-updates/report/austria-urged-tackle-police-racism-20090409> (29.06.2010)

data available – except for the Reports on the Protection of the Constitution⁴ – documenting racism. The official data rather focuses on racism in connection to right wing extremism and does not reflect racism as an everyday social phenomenon. This kind of racism is documented by NGOs, since 2005 also in the biannual reports of the OET. We urge the **government to make use of the data available as a basis for developing general anti-discrimination policies also combatting structural discrimination.**

- [11]. In January 2010, the Federal Ministry of the Interior launched its National Action Plan on Integration (NAPI). The language used still suggests that Austrian society is based on “we” and “the others”, whose deficits have to be remedied. The involvement of a handful of NGOs in drafting the plan resulted in including combating racism and discrimination as elements of integration policy. NAPI does however not provide for measures aiming at social cohesion, promoting the Equal Treatment Act, giving more support to victims of discrimination or tackling the issue of structural discrimination. The plan is supplemented by indicators trying to measure integration which do not contain any references to (racist) discrimination. The **NAPI is not a supplement for the National Action Plan against Racism**, which Austria should have launched following the UN World Conference against Racism in Durban in 2001.

4 Promotion and Protection of Human Rights

4.1 Cooperation with International Human Rights Mechanisms

- [12]. Austria is rather reluctant in implementing recommendations aiming at enhancing the legal protection against discrimination on the ground of ethnic belonging and improving the anti-discrimination infrastructure. Many of the **recommendations issued by ECRI** in its third report on Austria did not result in any changes; therefore the fourth ECRI report includes quite a lot of reiterated recommendations⁵, which the **government should immediately be implemented.** The **reservations** regarding ICERD and CCPR **should be withdrawn** in order to promote the cooperation with International Human Rights mechanisms.

4.2 Cooperation with NGOs and rights holders

- [13]. The dialogue of the Austrian government with anti-racism NGOs is rather sporadic. Most of the cases of ethnic discrimination have been taken to court by NGOs rather than by special interest groups (Chamber of Labour, Austrian Trade Union Confederation). These organisations rather focus on gender than on ethnic discrimination. The government often refers to ZARA’s work in its reports to CERD, ECRI, etc. However, it does neither fund the support of victims of discrimination nor the monitoring work nor the publication of the Racism Report (except for € 1,500,- by the Federal Ministry of European and International Affairs for the translation of the publication). We ask the **government to reconsider the institutionalisation of a regular and systematic dialogue** and to **provide competent NGOs with adequate resources** to support victims of discrimination.

4.3 Implementation of International Human Rights Obligations

4.3.1 Equal Treatment and Non-Discrimination

- [14]. Equal treatment is associated with gender equality; discrimination on the ground of ethnic belonging is not a priority issue on the political agenda. Discrimination is a cross-cutting issue that

⁴ See: http://www.bmi.gv.at/cms/bmi_verfassungsschutz/ (29.06.2010).

⁵ ECRI (2010) ECRI Report on Austria (fourth monitoring cycle), Strasbourg, <http://www.coe.int/t/dghl/monitoring/ecri/Country-by-country/Austria/AUT-CbC-IV-2010-002-ENG.pdf> (29.06.2010)

is relevant when drafting legislation, conceptualising, implementing and evaluating measures. Currently there are no (inter-ministerial) structures in place guaranteeing a focus on ethnic discrimination. We therefore ask the Austrian **government to establish a Ministry for Equal Treatment.**

4.3.2 Right to Work

- [15]. The Aliens' Employment Act restricts the right to work for third country nationals and partly for nationals of the new EU Member States. The Act is constantly changed and difficult to understand. In addition to these legislative barriers Muslims, people of darker skin colour or with a "foreign sounding" name face discrimination when applying for a job. The rights awareness among employers is rather low. Some of them legitimise discrimination by their employees or their customers who do not want to work together with or be served by "blacks" or "women with headscarves".⁶ We urge the **government to take measures to raise awareness among employers and to offer incentives to implement diversity management or positive action measures.**

4.3.3 Right to Housing

- [16]. People affected by discriminatory housing advertisements have to rely on Art III of the Introductory Provisions to the Code of Administrative Procedures. The Austrian Ombudsman Board looked into the enforcement of these legal provisions and revealed a frightening practice of ignorance on the part of the competent public authorities and insufficient protection afforded by law. We call on the Austrian **government to award the same kind of protection to housing advertisements as provided for job advertisements by the ETA.**

4.3.4 Right to education

- [17]. A recent OECD report points to the most important challenges faced by the educational system.⁷ The current educational system reproduces social and educational inequalities, a drawback that especially impacts on the social as well as educational mobility of migrants. We ask the **government to take the following measures:**

- **Collect data** to overcome the severe lack in the systematic collection of data that will facilitate **inclusive and anti-discriminatory educational policy decisions,**
- Provide for **teacher training** that enables the educators to **cope with** a high level of linguistic and cultural **diversity in the classrooms** and encourages them to embrace the issue of diversity,
- **Embed the didactic principle of intercultural learning** in a more **sustainable way and in accordance with the principle of non-discrimination** in all subjects of instruction.

4.3.5 Right to vote

- [18]. In June 2004, the Constitutional Court declared the right to vote in elections at the district level for third country nationals unconstitutional after the City of Vienna had passed legislation on voting rights for third country nationals at the district level. The Court reasoned that such legislation would violate the constitutional principle of homogeneity. It seems that the political participation of third country nationals even at the level of communities and municipalities is far beyond reach due to the judgment by the Constitutional Court. We call on the **government to change the Constitution enable third country nationals to vote** at least at district level.

⁶ See: Racism Reports by ZARA, <http://www.zara.or.at/index.php/beratung/rassismus-report> (29.06.2010) and Klagsverband (2010) Annual Report 2009, p. 5, <http://www.klagsverband.at/dev/wp-content/uploads/2008/05/annualreport2009.pdf> (29.06.2010)

⁷ OECD (2009) OECD Thematic Review on Migrant Education Country Background Report for Austria, drafted by Barbara Herzog-Punzenberger and Angelika Wroblewski <http://www.oecd.org/dataoecd/8/26/42485003.pdf> (29.06.2010)