

## **Executive Summary**

### **Danish Country report on measures to combat discrimination**

#### **by Niels-Erik Hansen**

#### **1. Introduction**

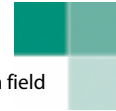
Since Denmark after World War II established a welfare state, elderly people and disabled amongst other groups, have been able to secure a more decent standard of life. General pension scheme and other programmes targeting social weak groups in the Danish society has become an integrated part of the Scandinavian welfare model. It was acknowledged that disadvantaged groups in society should be compensated by the state or local municipality in order to create equal opportunities, however very little focus was on equal rights and non-discrimination.

In the 1960ties and 1970ties, equal rights for women and men however, came in focus. Legislation in order to prohibit sex discrimination in the labour market was enacted, and this legislation was enforced with the support of the traditionally strong Danish labour unions.

In the same period it was discussed whether similar legislation on discrimination in the labour market due to race, religion or other grounds should be enacted. In response the social partners in the labour market rejected such legislation with the argument that Denmark has a tradition for collective agreements in the labour market instead of legislation. According to this so-called Danish model the social partners would make agreements prohibiting racial or religious discrimination if this was going to be a problem in the labour market. As no such collective agreements were enacted, victims of discrimination due to race, ethnicity, sexual orientation, and religion were not protected until 1996, when legislation was finally enacted in these fields. Those in need of such protection were amongst other those migrant workers, who were invited by Danish companies due to lack of Danish manpower in the 1960ties. In connection to the Oil crises and the collapsing economy in many Western countries in the 1970ties, however, unemployment became a major affecting amongst other the newly arrived migrant workers from countries like Turkey, Yugoslavia and Pakistan. At that time the great majority of the Danish population were members of the Evangelical-Lutheran Church, however minority religions existed.

With new groups of migrant workers and in the 1980ties groups of refugees from the South America, Middle East, Africa etc. this picture changed. Registration of a person's ethnicity, religion or belief has been prohibited since World War II, so it is difficult to provide figures on the numbers of members of each of the minority communities. It is however, estimated that the second largest religious group is Islam, with about 150,000 members out of a total of about 5 million people living in Denmark today. The number of foreign nationals (migrants/refugees etc.) living in Denmark on a permanent basis is about 5% of the total population. Next to the group of foreign nationals another group of Danish citizens have a foreign background, while having been born in another country, or having been born in Denmark by parents born in other countries than Denmark. This group is referred to as descendants. Foreign citizens and their descendants may often be referred to as ethnic minority groups, while e.g. the group of German speaking Danish citizens is formally recognized as a National minority group. The group of Roma in Denmark has also tried to be recognized by the Danish State as a National minority group, but so-far without success.

In order to highlight the major problem areas of today it can be mentioned that by the end of 2001 Denmark witnessed a significant increase in racially motivated attacks mostly directed at Muslims, or persons originating from the Middle East. The number of racially motivated incidents reported to the Police in 2001 was more than 100. This compares with 18 and 16 for the two previous years. In 2002 the level of registered racist motivated attacks decreased compared to 2001, but continued to be higher than the years before 2001, however, the victims were not only Muslims, but also



Jews. With regards to anti-Semitic attacks, ranging from spitting on people wearing a calotte to an arson attack on a synagogue in Copenhagen, such attacks are not only results of neo-Nazi activities in Denmark but also likely to be the result of the conflict in the Middle East, between Israelis and Palestinians.

## 2. Main legislation

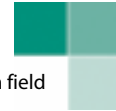
It is stated in section 70 of the Danish Constitution that no one can be deprived of any civil or political rights on grounds of faith or origin. Furthermore, it is stated in section 71 that no Danish citizen can be deprived of personal liberty on grounds of political opinion, faith or origin. Apart from these general provisions, there are no specific anti-discrimination provisions in the Danish Constitution. A proposed Constitutional amendment made in 1953 for a more specific provision to secure the rights and freedom of the individuals, without discrimination on the basis of race, colour, sex, language, political or other beliefs, national or social origin, financial circumstances, birth or other social position, was rejected by a majority of the members in the Commission, that suggested amendments to the Danish Constitution in 1953. In other words, belief is not directly covered by the protection in the Danish Constitution. Discrimination on grounds of race or ethnic origin may to some extent be covered by the prohibition against discrimination on grounds of "origin".

Since 1971 criminal legislation has prohibited racial discrimination in relation to goods and services, housing, transportation, etc. The labour market area however was not covered by this Act. Since 1987 this act also prohibited discrimination due to sexual orientation (in the non employment areas).

In order to transpose the Non employment aspects of the Race Equality Directive a new civil Act on the prohibition of unequal treatment due to ethnic origin was enacted in 2003. This included a ban on direct and indirect discrimination due to race or ethnic origin in housing, education, social advantage etc. All parties in the Danish parliament supported this Act, with the far right Wing Danish Peoples Party as the only exemption.

Since 1996 the Act on the Prohibition of Differential Treatment on the Labour Market has covered direct and indirect discrimination on grounds of race, colour, national or ethnic origin, sexual orientation or religion. So far the numbers of court cases are limited and it is still much too early to assess the scope of the legislation, for example the interpretation of the terms "indirect discrimination" and "bona fide occupational qualifications". There is an explicit ban upon registration of ethnic origin or religion, denying alleged victims of discrimination the opportunity to provide statistical evidence of consistent and widespread discrimination, and, perhaps more damagingly, preventing employers who are concerned with eradicating discrimination from monitoring the effects of any positive initiatives which they might undertake.

In order to transpose all aspects of the prohibition against discrimination in the labour market arising from both EU Directives (the Framework and the Race Equality Directive) a proposal for amendments of the Act on the Prohibition of Differential Treatment on the Labour Market was presented by the Ministry of Labour on September 23, 2002. The proposal included amongst other a new prohibition against discrimination in the labour market on the ground of "belief". Bill No. L 152 including these amendments was, thus, presented by the Government on 29, January, 2003. The first reading of that Bill took place in the Danish Parliament on 21, February, 2003. Because the Danish Peoples Party – that forms the majority in the Parliament in coalition with the Government – did not support the Bill, the support of the opposition was necessary. In order to vote in favour the Social Democratic Party (and other opposition parties) asked for an independent body according to article 13 of the Race Equality directive, with the mandate to receive individual complaints about discrimination in the labour market. As this was rejected by the Government the Bill was not approved before the deadline for the transposition of the Race Equality Directive.



In the Parliament's next session 2003/2004, the Danish Ministry of Labour forwarded Bill No. L 40, including the same amendments of the Act on the Prohibition of Differential treatment on the labour market as with Bill No. L. 152.

The first reading of the Bill took place in November 3, 2003, together with an alternative proposal from the Social Democratic party. According to this proposal (Proposal for Bill no. 39) the burden of proof, discriminatory instruction and victimisation should be implemented in order to transpose the EU directive. However, the proposal also includes the establishment of a Commission with the mandate to receive individual complaints from victims of discrimination in the labour market field. The proposal includes victims of discrimination due to race and ethnicity, as well as religion and belief and sexual orientation etc.

On March 30, 2004 the Danish Parliament approved Bill No. 40, including the mandate to the Complaints Committee (hosted by the Danish Institute for Human Rights) to assist victims of discrimination in the labour market, due to race and ethnicity. The Complaints Committee, however, did not get the mandate to assist victims of discrimination due to other protected grounds like age, disability, sexual orientation, religion or belief. This compromise between the Government and the opposition has finally entered into force in April 2004, 1 ½ year after the first Bill was presented by the Ministry in September 2002, and 4 months after the deadline for the transposition of the Framework Directive.

Further more the Danish Government forwarded a proposal for a Bill on the prohibition of discrimination due to age and disability on September 23, 2004 to a number of relevant organisations for comments. When this Bill was presented to the Danish parliament later in 2004 all parties supported the Bill in a final vote on December 22. On December 28, 2004 the new Act amending the Act on the prohibition Differential Treatment in the labour market entered into force, including the new protected grounds age and disability.

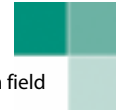
In 2006 the Government proposed a Bill in order to allow employers to discrimination youngster under the age of 18, if this is part of a collective agreement. The Danish Parliament, adopted the new wording of the Act prohibiting differential treatment in the Labour market as Act No 240 on March 27, 2006, which entered into force on April 1, 2006

Further more on 20 December 2006 the Danish Parliament amended this Act again. According to this amendment the age limit of 65 as set up. Section 5 a, subsection 4, is going to be change to an age limit of 70 years as from January 1, 2008.

### **3. Main principles and definitions**

In Danish constitutional theory there has been some discussion as to whether a general principle of equality is among the unwritten principles of constitutional law. However, such a constitutional principle of equality and non-discrimination cannot with any certainty be said to exist. Other Danish legislation - like the Constitution - does not contain any general principle of equality or a general prohibition against racial or religious discrimination. On the other hand, the so-called Maxim of Equality may include a prohibition against religious discrimination i.e. in connection with employment in the public sector. The Danish Parliament's Ombudsman has stated that public employers are obliged to make a fair assessment of all jobseekers and to choose the applicant with the best qualifications, thus eliminating the possibility of giving preference to applicants of a certain religious background or discriminating against members of specific religious communities.

The Act on the Prohibition of Differential Treatment on the Labour Market from 1996 prohibits both direct and indirect discrimination (in the public and the private sector). The definition of "indirect discrimination" has thus been assessed by the Danish Courts in Court cases brought by



victims of discrimination with the assistance of the Documentation and Advisory Centre on Racial discrimination (DACoRD).

On 10 August 2000, the Danish High Court ruled on a case involving the dismissal of a Muslim woman, who was rejected employment by the department store “Magasin” for the sole reason that she was wearing a headscarf. High Court ruled that: “The High Court does not find that the defendant – whose clothing guidelines admit of certain amplitude – has demonstrated conditions at the company such that the dismissal of the plaintiff can be regarded as objectively justified. Pursuant to section 7 of the Act, cf. sections 2 and 3, the plaintiff is entitled to damages...”.

The test whether the requirement is “objectively justified” has also been invoked in other Court cases after the High Court decision in year 2000, for example in a High Court decision of March 2001.

When the 1996 Act was amended in 2004 victimisation and instruction to discriminate was also included as forms of illegal discrimination. Also harassment was directly made part of the legislation in order to fully transpose the employment aspects of the Race Equality directive. Likewise the non-employment aspects are partly transposed by the Act on Equal Ethnic Treatment from 2003.

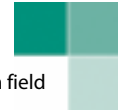
There is no general provision of special or positive measures in Danish law. The general presumption in Danish public law is against positive measures giving preferential treatment to disadvantaged groups. There is a right to take special measures; however, this right does not apply to employers who want to improve employment opportunities for persons with for instance a different ethnic or religious background. The protection of the principle of prohibition of discrimination is considered by the authorities to be best ensured if it is only by means of legislation or other public measures to improve the employment opportunities for persons of a different ethnic origin. According to the Act, such special measures thus require legal authority and are primarily to be taken by the minister in the course of public projects. The Act makes it very difficult e.g. for private companies to take special measures to integrate minorities into the labour market.

For some position employers may have some bone fide requirement if whose establishments have the aim of promoting a certain political or religious points of view (by way of example a Church that wants to hire a priest can exclude all applicants of another faith, because religion in this case is a bone fide occupational requirement). Other employers (other than those established with the aim of certain religious points of view) can also deviate from the anti-discrimination rules if it is of decisive importance for the performance of the work that the employees are, for instance, of a particular ethnic origin or religion. It is a requirement in cases where it is a matter of objective occupational and relevant requirements related to the nature of the work in question or the conditions under which the work in question is performed. This means that a private employer cannot give preferential treatment to one group with a view to contributing to the integration of such minorities into the labour market, or in order to make the workplace reflect the surrounding society.

Reasonable accommodation in relation to disabilities is prescribed by law. Discrimination by association is prohibited.

#### **4. Material scope**

In connection to the Framework Directive - and those parts of the Race Equality Directive prohibiting unequal treatment in the labour market - some amendments of the existing Act on the Prohibition of Differential Treatment on the Labour Market (from 1996) have been approved by the Danish Parliament on, 30, March 2004 and December 22, 2004. First of all, the material scope of the



Act is extended with a new prohibition against discrimination in the labour market on the grounds of age, belief and disability in order to transpose the requirements of the Framework Directive. This prohibition covers both the private and the public labour market. Further more amendments are made in order to change the rules about the burden of proof, and in order to prohibit discriminatory instruction and victimisation. The principle of shared burden of proof applies in all cases of discrimination in the labour market, including cases concerning harassment due to religion or belief and cases concerning unlawful instructions to treat unequally.

Likewise the non-employment aspects are partly transposed by the Act on Equal Ethnic Treatment from 2003. This Act covers education, goods and services etc. both only with regards to race and ethnicity.

### **5. Enforcing the law**

First of all enforcement of the law is the mandate of the Danish Courts. Next to that however, The Institute for Human Rights has established a Complaints committee in order to receive individual complaints from victims of discrimination in all areas of life covered by the Race Equality Directive. The Committee has no competence when it comes to discrimination due to the other protected grounds by the labour market directive (Age and religion etc.).

When it comes to discrimination due to sexual orientation, religion or belief and age and disability, the Government argues that victims of discrimination in the employment area must ask for the assistance of the trade unions. The case law according to the 1996 Act clearly shows, however, that the major problems occur for students, trainees, newly arrived refugees and others who are on their way into the labour market and consequently still not member of a trade union. Case law also shows, that most of these cases relates to discrimination due to religion. Thus the victims have to ask for free legal advice from the Documentation and Advisory Centre on Racial discrimination (DACoRD). DACoRD also provides free legal aid in connection with discrimination due to race or religion in other areas than the labour market. However, the number of opening hours is strongly reduced due to the cut back in public funding since the beginning of 2002.

Other organisations in the area of disabilities and sexual orientation may also provide assistance in cases due to discrimination on these grounds. It is, however, in no way been recognized by the Danish government that such organisations may be granted the right to start or support complaints from victims of discrimination.

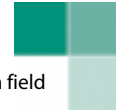
The enforcement of the Race Equality Directive and the Framework Directive's prohibition against discrimination will thus primarily be the task of the Danish Courts. In court situation testing and statistical data are used and admissible as evidence. So far the shift of the burden of proof and the protection against harassment has not shown to be effectively implemented by the Danish courts.

### **6. Equality Bodies**

The Institute for International Studies and Human rights was set up in 2002. The Institute for Human Rights got the mandate to make reports and recommendations on ethnic equality. Further more a new Complaints Committee, which is a free of charge administrative body within the Danish Human Rights Institute, has been assigned to make "statements" relating to the non-employment aspects of the Race Directive since July 1, 2003. On March 30, 2004 the Danish Parliament approved Bill No. 40, including the mandate to the Complaints Committee to make statements about discrimination in the labour market, due to race and ethnicity. Please note that the Committee does not assist victims as it is a neutral body making decisions.

So far the only one case has gone to court after being examined by the Complaints Committee beforehand. On 1 September 2004 the Committee issued a statement that a petition against a technical school was covered by the Ethnic Discrimination Act but not by the Labour Market





Discrimination Act. The Complaints Committee consequently decided that this was up to the Danish Courts to decide as it was a matter of proof. Similar reasons were given to reject the complainant's argument that he suffered from victimisation. The Committee recommended free legal aid for a court case. This is in fact the only thing the Committee can do, as they have no mandate to award compensation etc.

In a letter dated 5 July 2005 the Complaints Committee informed the Ministry for Integration that in the period from July 2003 until July 2005 they received a total of 142 cases. Out of these 142 complaints the Committee only established one opinion stating that the legislation was violated. Consequently only one case was recommended free legal aid in order to go to court. By the end of 2005 one more case was recommend free legal aid, bringing the total number up to two. At this time the Complaints committee had been operating for 2 1/2 years. The Annual report from the Complaints Committee for 2006 is not made public by the Cut-off date of this report however; the Committee has received some 98 complaints during the year 2006. Since 2002 no public sponsored body has assisted victims of race discrimination as prescribed in Article 13 of the Race Equality Directive.