

Report of the Federal Commission against Racism FCR

on the second Universal Periodic Review of Switzerland

The FCR is an extra-parliamentary commission established by the Swiss government (Federal Council) following its ratification of the International Convention on the Elimination of All Forms of Racial Discrimination ICERD in 1995. The remit of the Federal Commission against Racism FCR is «to concern itself with racial discrimination, to work towards promoting better understanding between persons of different race, colour, origin, religion, national or ethnic background, and to combat all forms of direct or indirect racial discrimination, attaching particular importance to effective prevention» (Mandate of the Federal Council of 23 August 1995).

The Commission has 15 members, made up of representatives of the established Swiss churches, minority religious communities, other minority groups, social partners and cantons, as well as experts. Administratively it comes under the umbrella of the Federal Department of Home Affairs FDHA, has a secretariat with 2.9 positions and an annual meeting and project budget of CHF 200,000.

The FCR is a specialized national human rights institution recognized by the United Nations, the Council of Europe and the OSCE. It has been accorded status C by the International Coordinating Committee for National Human Rights Institutions ICC. It is thus authorized to state an independent opinion on the UPR process and to submit its views to the UN Human Rights Council. The FCR is fulfilling this duty with the present report.

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1 General

The FCR will comment on the situation with regard to recommendations which fall directly within the scope of its mandate and a) have been accepted by Switzerland, b) have not been accepted by Switzerland and c) which have not yet been mentioned in a UPR recommendation to Switzerland.

2 UPR recommendations on racism, xenophobia and discrimination

2.1 General

The FCR welcomes the fact that Switzerland has wholly or partially accepted around two-thirds of more than thirty recommendations, including a large number of recommendations on issues of equality and non-discrimination. This shows that the Swiss authorities are aware that there is a definite need for our country to take action in this area. The FCR recognizes the increased efforts Switzerland is making towards achieving a coherent internal human rights policy, the implementation of which is largely a matter for the 26 Swiss cantons. This makes the inclusion of the cantons in the follow-up process all the more important.

2.2 Recommendation 56.1: Combating xenophobia (Algeria)

Brief assessment of the current situation by the FCR

The text of the recommendation indicates that Switzerland has already begun to take action to counter xenophobia. This is indeed the case and Switzerland is entitled to point to campaigns and preventive measures in a number of areas. Nevertheless, in the opinion of the FCR, some quite fundamental political considerations require to be addressed here.

As things stand today, immigrants to Switzerland who live and work here, people who visit Switzerland as tourists or who seek asylum here, and people of a different skin colour are not accorded adequate protection from xenophobia and racism in certain areas of life. The two phenomena of xenophobia and racism are intertwined, because aggressive comments and behaviour towards such people often only arise from their assumed foreignness. As a consequence, xenophobic actions, subtle acts of exclusion and discrimination or unequal treatment affect both residents and foreign nationals.

Article 261^{bis} of the Swiss Criminal Code, which Switzerland introduced on 1 January 1995 as a precondition of ratifying ICERD, makes it a criminal offence¹ to publicly commit a racist act in a manner that violates human dignity. However, it only covers xenophobia to a limited extent. For instance, asylum-seekers are not considered to be an ethnic group. Verbally abusing or excluding asylum-seekers is therefore not categorized as racist behaviour, even though the intention and motivation behind such acts may well be racist in nature². Derogatory and disparaging comments towards certain groups are considered not relevant by the courts. For instance, one judge in a cantonal court ruled that denying access to members of "Balkan nations" was not punishable under Article 261^{bis} of the Criminal Code, because "Balkan nations" was not an ethnicity³. More subtle mechanisms – such as exclusion because of a "foreign-sounding" surname – are widely tolerated and impede equal opportunities in the housing and labour market. In addition, in Switzerland it is currently possible for politicians to make xenophobic statements to a large extent without fear of criminal sanctions. When Article 261^{bis} of the Criminal Code is applied, frequently only a single perpetrator – a rowdy man outside a bar or a graffiti-daubing youth – is punished with a fine. No action is taken, however, against political parties who publish xenophobic or racist advertisements in a newspaper.

Recommendation of the FCR

The FCR advocates wider application of the existing Article 261^{bis} of the Criminal Code to actors in the political arena as well. Protection for victims of racial discrimination should be extended. This requires the judicial authorities to take awareness-raising measures.

The structural xenophobia which has become acceptable under the influence of right-wing populism must likewise be identified and countered with a variety of measures. The FCR welcomes the fact that the new

integration measures in the legislation pertaining to aliens enhances protection against discrimination, and that the measures taken in this regard are to be evaluated using existing monitoring mechanisms. The Confederation must require appropriate implementation by the cantons here. However, the FCR recommends that the Confederation does not simply act to ensure protection from discrimination in its policy on aliens, but also strengthens this protection for all Swiss residents. (see Rec. 57.18 below).

2.3 Rec. 56.5: Prevention of violence against foreigners (Nigeria)

Brief assessment of the current situation by the FCR

Acts of violence are a criminal offence in Switzerland and do not go unpunished. However, excessive use of force by the police with latent racist or xenophobic motivation is a different issue.

In the opinion of the FCR, there is a correlation between the lax attitude of the political establishment in Switzerland to xenophobic policies and statements on the one hand and racially motivated acts by private individuals and by officers of law enforcement agencies on the other hand. The different value judgements applied to different sections of the population, e.g. dividing them into desirable and undesirable or criminal and "good" foreigners, or labels such as "bogus asylum-seekers" and the like, form a constant backdrop to public discourse about issues of xenophobia and racism.

The FCR recognizes that greater efforts are now being made in cantonal and communal police forces with respect to human rights education, but these are still in their infancy. These efforts must be translated into human rights mainstreaming within law enforcement agencies.

Openness and transparency also necessitate complaint mechanisms that allow the actions of law enforcement agencies to be held up to scrutiny. In many cases the investigation and complaints procedures in Swiss cantons are not sufficiently separated. In particular, the practice of police officers immediately responding with a countercharge to an accusation by a private individual should cease. By issuing a countercharge, the state wields its position of power to an undue extent to the disadvantage of the complainant, usually a private individual, and consequently prevents open debate about racist incidents.

Recommendation of the FCR

In its bulletin TANGRAM No. 26/2010⁴, the FCR calls on law enforcement agencies at all levels to see themselves more as defenders of human rights who protect people against discrimination than is the case at present. The FCR's recommendations include the following concrete suggestions⁵:

- Laws governing the duties of law enforcement agencies should explicitly stipulate the obligation for equal treatment and non-discrimination with the framework of respect for human rights.
- A new perception of law enforcement agencies as defenders against racism should be cultivated and communicated.
- Particular attention should be paid to the implementation of knowledge about human rights and the prohibition of discrimination in practice.

The FCR also recommends establishing independent complaints bodies in all cantons and cities, either parliamentary ombudsman offices or other lower-level complaints bodies that are independent of the police authorities.

- Racial profiling as a method should be discontinued and explicitly prohibited.
- Law enforcement agencies should actively communicate their complaints management procedures.
- Independent statutory bodies for investigating complaints about the actions of law enforcement agencies should be accessible to all.⁶

2.4 Rec. 57.6: Combating racial discrimination (Egypt)

Brief assessment of the current situation by the FCR

The FCR considers Article 261^{bis} of the Swiss Criminal Code against racial discrimination to be adequate in many respects. However, since 2000 it has been lobbying for the addition of an Article 261^{ter} to provide better protection against right-wing extremist activities, the wearing of insignia and the possession of extremist right-wing materials. Strengthening the criminal law in order to extend protection against right-wing extremism was categorically rejected by the Swiss government in 2010.

Article 261^{bis} of the Criminal Code is currently used even more hesitantly than in the first years following its introduction. Case law is focused on the punishment of right-wing extremism, anti-Semitic acts, the denial of genocide, and on the punishment of racism linked to violence, as well as racist comments and verbal abuse. When it comes to refusal of service under Article 261^{bis} paragraph 5, or to punishing politically motivated racial discrimination, the practice of courts is significantly more cautious. Nor is criminal law applied to institutional racial discrimination resulting from political measures or the decisions of agencies which can disadvantage individuals or entire groups⁷. Current legislation does not offer those affected any effective protection against discrimination. In particular, in regulatory and private law there is no prohibition of racial discrimination that provides protection when people are seeking accommodation or jobs.

Recommendation of the FCR

The FCR recommends raising the awareness of the judicial authorities with respect to protecting the victims of racism, and attaching greater importance to protection against discrimination from a human rights standpoint. The FCR recommends a federal law for the implementation of better protection against ill-treatment by the police together with the establishment of the necessary independent complaint investigation mechanisms in all cantons.

2.5 Rec. 57.19: Equal opportunities on the labour market (Netherlands)

Brief assessment of the current situation by the FCR

The FCR notes the lack of protection against discrimination under civil law. Existing norms are widely dispersed, are not coherent and are not easily understood⁸. As studies have shown, exclusion mechanisms exist on the labour market that make it more difficult for young applicants from an immigrant background to gain apprenticeship places.

Women may be the victims of multiple discrimination. The FCR has illustrated this problem in its bulletin TANGRAM No. 23/2009 and in its 2010 position paper "Banning headscarves in state schools? Example of a debate directed against a minority".⁹

Recommendation of the FCR

The protection against unequal treatment with respect to access to the labour market is inadequate. The FCR recommends strengthening this protection, which includes the important areas of both housing of accommodation and work the access to which often ist interrelated. The FCR is in favour of a comprehensive anti-discrimination law (see also Rec. 57.18 below).

3 Recommendations on protection against discrimination rejected by Switzerland

3.1 *Para 15: Guarantee the justiciability of economic, social and cultural rights (Egypt)*

Brief assessment ...

Article 2, paragraph 2 of Covenant I specifies the prohibition of discrimination with respect to economic, social and cultural rights.

Recommendation of the FCR

To implement the rights defined in Covenant I, the Optional Protocol envisages an individual complaints procedure. The FCR recommends the ratification of this supplementary protocol by Switzerland. It has already made a statement to this effect in its report to the *Committee for Economic, Social and Cultural Rights* CESCR in November 2009.

3.2 *Rec. 57.7: specific law prohibiting incitement to racial and religious hatred (Egypt)*

Brief assessment ...

This recommendation has already been implemented to a large extent in Article 261^{bis} of the Criminal Code. For FCR's comments on this article in the criminal code and its current application by the cantonal courts, see Recommendation 57.6 above.

Recommendation of the FCR

The FCR does not see any need for action with respect to Recommendation 57.7 beyond the above.

3.3 *Rec. 57.11: Minorities in the police, inquiries into cases of police brutality (Canada)*

Brief assessment ...

The second part of this recommendation has already been addressed in this report under Rec. 56.5 above.

Recommendation of the FCR

In its list of measures published in 2010, the FCR recommends that the police and security agencies should reflect the current composition of the Swiss population as far as possible: "When recruiting, attention should be paid to a diversified representation of different sections of the population in law enforcement agencies."¹⁰

3.4 *Rec. 57.15: To withdraw reservation to article 4 ICERD (Cuba)*

Brief assessment ...

The FCR is aware of the need to reconcile the two fundamental rights of freedom of expression and protection against discrimination. The international human rights organizations and the European Court of Human Rights also give consideration to the necessity to strike a balance between these two competing rights. Nevertheless, the international organizations call on Switzerland not to interpret freedom of expression too widely in the political arena. Protection against discrimination is often neglected in the direct democratic process and racist political propaganda often goes unchallenged. The FCR is of the opinion that this leaves Switzerland open to the suspicion that it wishes to tolerate racist views.

Recommendation of the FCR

The FCR recommends that Switzerland should withdraw its two reservations to ICERD, specifically its reservation regarding Article 4: "Switzerland reserves the right to take the necessary legislative measures

to implement Article 4 with due regard to freedom of expression and freedom of association, which are enshrined inter alia in the Universal Declaration of Human Rights."¹¹

3.5 *Rec. 57.18: legislation to provide protection against all forms of discrimination (Netherlands)*

Brief assessment ...

As the FCR showed in its study on legislation against racial discrimination published in 2010¹², there are significant gaps in the legislation relating to protection against discrimination. In particular, protection against discrimination is underdeveloped in civil law. The constitutional mandate arising from Article 8, paragraph 2 of the Swiss Federal Constitution should be defined by statutory provisions in more detail and thus implement the stipulated prohibition of discrimination in practice. Relying on criminal repression alone is not conducive to the preventive eradication of racial discrimination in all areas of life as a goal for society as a whole.

Recommendation of the FCR

The federal authorities and Parliament should draft a coherent proposal for protection against discrimination without delay. Legislation similar to that adopted in neighbouring countries in the European Union is desirable (EU Directives 2000/43 and 2000/78).

4 Concerns of the FCR not covered by the UPR recommendations

4.1 *No mention of increasing protection for and actively supporting the Swiss Yenish/Travellers/Roma/Sinti minorities*

Brief assessment ...

Since the 1990s, Switzerland has made great progress in recognizing the situation of the Yenish/Travellers community. For instance, Switzerland recognized the Yenish/Travellers as a cultural national minority as defined by the Council of Europe's Framework Convention for the Protection of National Minorities¹³. In October 2006 the Federal Council also published a comprehensive analysis of the situation of the Swiss Yenish/Travellers/Roma/Sinti¹⁴. However, to date implementation measures have not advanced very far¹⁵.

Recommendation of the FCR

The FCR recommends eliminating the institutional obstacles that make the cultural lifestyle of the Yenish/Travellers/Roma/Sinti more difficult. Positive measures should be taken to provide sufficient space for permanent and transit sites, to ensure the equal education of the children of Travellers' families, and to preserve the cultural and linguistic characteristics of the Yenish/Travellers/Roma/Sinti.

4.2 *Increasing non-equal treatment of EU citizens and nationals of other countries in Switzerland*

Brief assessment ...

The FCR is of the opinion that the preferential treatment of EU citizens in Switzerland has led to the undue discrimination of all other foreign nationals in many areas.¹⁶ This applies to integration measures for example, and to the right to marriage and family.

Recommendation of the FCR

The FCR recommends that the Swiss Centre of Expertise in Human Rights SCHR should conduct a study and produce a report on this question to serve as the basis for further measures.

Appendix

Endnotes to the Report of the Federal Commission against Racism FCR on the second Universal Periodic Review of Switzerland

¹ For English translation see http://www.admin.ch/ch/e/rs/311_0/a261bis.html

² See CERD, General Recommendation 30: Discrimination against Non Citizens, 1.10.2004.
[http://www.unhchr.ch/tbs/doc.nsf/\(Symbol\)/e3980a673769e229c1256f8d0057cd3d?Opendocument](http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/e3980a673769e229c1256f8d0057cd3d?Opendocument)

³ See FCR database, verdict 2006-9, at:
http://www.ekr.admin.ch/dienstleistungen/00169/00273/index.html?webgrab_path=aHR0cDovL3d3dy5lZGktZWtyLmFkbWluLmNoL3BocC94ZGV0YWlscy5waHA%2FaWQ9MjAwNi05&lang=de (in German only)

⁴ TANGRAM 26, Bulletin of FCR, December 2010. Available in French/German/Italian; for French version see:
<http://www.ekr.admin.ch/dokumentation/00138/index.html?lang=fr>

⁵ Ibid. pp. 123-134.

⁶ Ibid.

⁷ For English translation see http://www.admin.ch/ch/e/rs/311_0/a261bis.html

⁸ Federal Department of Home Affairs, Service for Combating Racism (ed.). Rechtsratgeber Rassistische Diskriminierung. 2nd edition, Berne 2009.

⁹ Federal Commission against Racism FCR. Position paper: "Ein Kopftuchverbot an öffentlichen Schulen? Beispiel einer gegen eine Minderheit gerichteten Debatte". Berne 2010.
<http://www.ekr.admin.ch/dokumentation/00143/index.html?lang=de>

¹⁰ TANGRAM 26, Bulletin of FCR, December 2010, pp. 123-134. For French version see:
<http://www.ekr.admin.ch/dokumentation/00138/index.html?lang=fr>

¹¹ Swiss Federal Council. "Botschaft über den Beitritt der Schweiz zum Internationalen Übereinkommen von 1965 zur Beseitigung jeder Form von Rassendiskriminierung und über die entsprechende Strafrechtsrevision" (*Dispatch on Switzerland's accession to the International Convention of 1965 on the Elimination of All Forms of Racial Discrimination and on the corresponding revision of the criminal law*) of 2 March 1992, 92.029, p. 64. BBl 1992 III 269.

¹² Federal Commission against Racism FCR. Recht gegen rassistische Diskriminierung. Analyse und Empfehlungen. Berne 2010. For short French version see: <http://www.ekr.admin.ch/shop/00007/00073/index.html?lang=fr>

¹³ See also Switzerland's third report on the implementation of the Framework Convention of the Council of Europe for the Protection of National Minorities, January 2012. For French version see:
<http://www.news.admin.ch/NSBSubscriber/message/attachments/25536.pdf>

¹⁴ Report of the Federal Council on the situation of Travellers in Switzerland, 18 October 2006. For French version see: <http://www.seco.admin.ch/aktuell/00277/01164/01980/index.html?lang=fr&msg-id=7746>

¹⁵ Media release of the Federal Commission against Racism and the Stiftung Zukunft für Schweizer Fahrende (*Foundation for the Future of Swiss Travellers*) dated 2 November 2006: "Fahrende in der Schweiz werden diskriminiert – Bund und Kantone haben noch kaum wirksame Gegenmassnahmen getroffen" (*Discrimination against Travellers in Switzerland – Confederation and cantons have yet to take effective action*). For French version see: <http://www.ekr.admin.ch/dokumentation/00144/00252/index.html?lang=fr>

¹⁶ See statement of the FCR (in French): Commission fédérale contre le racisme CFR. Positon de la CFR sur le système binaire d'admission de la politique des étrangères en Suisse. Berne, 2 mai 2003.
<http://www.ekr.admin.ch/dokumentation/00143/index.html?lang=fr>