Studies on Human Rights

Struggle against Discrimination

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2004

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Published in 2004
by the United Nations Educational, Scientific and Cultural Organization
7, place de Fontenoy, 75352 Paris 07 SP, France

Composed and printed in the workshops of UNESCO

Printed in France

SHS-2004/WS/23 cld/d 18179

Preface

At the dawn of this new millennium and new century, the world is still deeply marked by the innumerable human rights violations scarring the landscape in so many regions. The situation is clearly not getting any better. Lack of democracy, terrorism, violence, discrimination, increasing poverty, along with the negative effect of some aspects of globalization – all these have engendered human rights violations which require that the actors involved readjust and adopt a changed approach in their efforts to right the wrongs.

New challenges have been added to the old ones, particularly through the adverse effects of globalization, cyberspace and the fight against terrorism, making the space for action and analysis more complex. Against this complexity, a different, better way of meeting the challenges is to propose rigorous, punctilious analyses that can open up avenues for new strategies on the ground. Hence, Human Rights research is now of increasing importance, a fact of which UNESCO is well aware. Our new series, *Studies on Human Rights*, will regularly publish a selection of research findings.

The first issue of the series explores some of the central themes linked to racism, xenophobia and discrimination. Three years after the Durban World Conference on Racism, in which UNESCO played an active part, these phenomena remain at the centre not only of current affairs but also of the overall Human Rights debate.

Some research focuses on yet greater specification of the concept of racism – we often tend to exaggerate its scope, to the extent of lumping

together all types of intolerance, such as xenophobia. Xenophobia often creates discrimination, and victimization can become confused with racism. Kinhide Mushakoji, who chose to analyse the phenomenon of xenophobia from the standpoint of his own relationship with racism and racial discrimination, puts forward some very useful ideas.

The interest of this issue lies not only in the fact that it introduces much needed clarification on these concepts, but also that it presents two case studies, analysed by two different researchers, bringing concrete elements to the reality of xenophobia in certain parts of the world. Ray Jureidini takes us inside the complexity of Arab societies where, given the current context, xenophobia takes on unusual proportions. Takashi Mijayima studied the phenomenon in Japan where it has to be viewed in a particular historical context. The author also identifies new challenges appearing on the horizon, within Japanese society.

Other countries are faced with very different challenges in their search for solutions to the problem of discrimination. The United States, India and Brazil are three countries that, each in their own way, have experimented for some years with affirmative action policy. This is often the solution advocated, particularly by the actual victims of discrimination, and yet it remains controversial. In a comparative study, Thomas D. Boston analyses the way in which the work of conceptualization and application of this system is carried out in the three countries.

Another aspect of discrimination tackled in this first issue of *Studies on Human Rights* is a field that scientists have virtually abandoned in recent times. In the eighteenth and nineteenth centuries, craniology and other studies on biological determinism were all the rage, and managed to erect lasting, supposedly scientific mindsets on, for example, the biological relation of Blacks with the ape. At the beginning of the twentieth century, other sorcerers' apprentices turned eugenics into a science with devastating effect during the Nazi period. And even now, as described by Dialo Diop, genetics and the life sciences can add to the emergence of new forms of discrimination and inequality.

In another field of applied science – the new information and communication technologies – we are witnessing racist trends. The role of these technologies in education as in capacity-building and individual independence is clearly apparent. And yet cyberspace lends itself more

and more to the spreading of racist and xenophobic ideas at an alarming rate. The legal issues raised by such hatemongering on the web are crucial. For Annie Khalil, these issues underline the urgent need for appropriate steps to be taken to encourage more international cooperation in this domain.

We have here, in this first issue, a wide variety of different contributions providing us with a wealth of information. Through their diverse thinking, the authors will certainly help us to understand today's different expressions of racism. At the same time, the roads marked out will, I feel sure, enable us to move on with what is at the centre of UNESCO's concerns – the struggle for dignity and human rights.

Pierre Sané
Assistant Director-General for Social and Human Sciences

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Introduction

From the earliest years of its existence, UNESCO has demonstrated its commitment to the fight against discrimination by initially waging the combat on the scientific front. It was able to mobilize the scientific community, calling upon eminent specialists to draft scientific texts refuting racist theories. A series of historic statements was thus produced, helping to demonstrate the absurdity of racial prejudice: *Statement on Race* (1950), *Statement on the Nature of Race and Race Differences* (1951), *Statement on the Biological Aspects of Race* (1964). The pinnacle of UNESCO's efforts was the Declaration on Race and Racial Prejudice adopted by the UNESCO General Conference at its 20th session in 1978.

Following the phase of consolidation of scientific evidence and ethical principles refuting racism and other forms of discrimination, UNESCO then turned to the drawing up of international instruments defining universal principles, concepts and criteria in support of the combat against these threats to social peace and stability. Several standard-setting instruments relating to the problem of racism and discrimination in UNESCO's fields of competence were thus adopted.

A new phase of UNESCO's work was launched after the 3rd World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance held in Durban, South Africa, in August-September 2001. The Programme of Action which was adopted invited UNESCO to give new impetus to its combat against these scourges. The areas identified by Durban were the Slave route project and research on slavery and the slave route; development of cultural and education programmes

aimed at countering racism and racial discrimination, preparation of teaching materials and tools for promoting human rights and the struggle against racism and other forms of discrimination; preservation of cultural diversity; promotion of dialogue among civilizations; development of research on cultural traditions relating to human rights; implementation of the Declaration and Programme of Action on a Culture of Peace and Non-Violence for the Children of the World.

Following Durban's request, UNESCO's Member States decided that an integrated strategy to fight racism and discrimination should be prepared. This was done on the basis of wide consultation with different actors in different regions. The document was adopted in October 2003 by UNESCO's General Conference.

The objectives were defined as follows:

- revitalize UNESCO's efforts in the combat against racism, discrimination, xenophobia and intolerance in its fields of competence;
- reinforce cooperation with other United Nations agencies, in particular with the Office of the United Nations High Commissioner for Human Rights, the International Labour Organization (ILO), UNAIDS and the United Nations Research Institute for Social Development (UNRISD), and with international intergovernmental organizations and regional organizations (European Union, African Union, Organization of American States, Association of South-East Asian Nations, etc.).

The specific objectives were the following:

- deepen knowledge about the development of forms of discrimination inherited from the past, notably those linked to the period of slavery and colonization and those affecting indigenous peoples and cultural and religious minorities;
- pursue research on new forms of discrimination, in particular those linked to globalization and to scientific and technological progress;
- reinforce the institutional capacities of the different actors involved to promote research, education and communication

in the combat against racism and other forms of discrimination;

- broaden reflection on the phenomenon of xenophobia, particularly in the context of multi-ethnic and multicultural societies aspiring to a democratic citizenship where diversity is respected;
- contribute to the formulation and implementation of national policies and plans of action to combat racism and discrimination at the appropriate levels;
- collect, compare and disseminate good practices in the combat against racism, discrimination, including discrimination against individuals with HIV/AIDS, xenophobia and intolerance.

Because of the priority of issues linked to the fight against racism and discrimination, UNESCO's Social and Human Sciences Sector has decided to devote the very first issue of *Studies on Human Rights* to this theme.

The authors belonging to different cultures with diverse scientific and practical experience share with the readers their opinions on such issues as xenophobia, affirmative action, genetics and racism in cyberspace. All these subjects are of utmost importance in the fight against racism and discrimination in modern societies.

Abstracts

THE PHENOMENON OF XENOPHOBIA IN RELATION TO RACISM AND RACIAL DISCRIMINATION

Kinhide Mushakoji

In the United Nations literature, xenophobia always appears in connection with racism and racial discrimination. While this association underlines the interconnectedness of these phenomena and efforts to resolve them, it has denied xenophobia its own distinct definition. This report draws attention to the need for an in-depth study of xenophobia, connected to, but independent from, racism.

Contemporary xenophobia is examined as a key concept in the international legal treatment of racism and racial discrimination. Power-related and political, xenophobia is historically constructed and its definitions and legality have evolved over time. Contemporary postmodern xenophobia has inherited many of its perceptions about "abject others" from pre-modern xenophobia, based on notions of "civilization"; and on modern xenophobia, rooted in Colonialism and Nazism. Yet contemporary forms of xenophobia are also products of globalization. South to North migratory trends subject migrants and trafficked persons to structural abjection by relegating them to unskilled and unprofitable jobs and denying them legal status. Unlike their pre-modern and modern forms, contemporary postmodern forms of xenophobia are not only social and political, but also structural and institutional, despite supposed commitment by most "civilized" Western States to equality between different cultures and religions and to the universality of human rights. Under this paradox, xenophobia has become "subtle xenophobia" in which earlier forms of xenophobia are adapted to complex contemporary socio-political situations and conscious affective discourse is no longer permitted or necessary to the unconscious abjection underlying its structural and institutional manifestations.

These ambiguous manifestations of xenophobia make the task of designing truly effective legal and institutional measures against it, and against all racism, extremely difficult. Attempts to eliminate racism case by case do not exclude other minorities from becoming targets, as they fail to address the sense of superiority at the root of this abjection. The international community needs to address the

problem of xenophobia with the clear goal of eliminating the abjection of "radical others" – strangers with whom one cannot identify him or herself in any broader identity group – rather than assuming that each group of "radical others" can be "integrated" into the community of "selves" to become acceptable "others". To combat the complex problems of xenophobia, the international community must take the necessary steps to build a culture where others, especially "radical others", are accepted as equal partners in an exchange of free speech, punishing those who transmit xenophobic propaganda, while attempting to develop a culture of tolerance and dialogue across cultures. The interactions between "us" and the "radical others" provide the building blocks for a "dialogue of civilizations" – the goal of the 2001 United Nations Year of Dialogue Among Civilizations.

Xenophobia in Arab Societies

Ray Jureidini

This report discusses the nature, history and roots of contemporary xenophobic phenomena in the Arab world. It focuses in particular on attitudes towards foreign migrants in the Arab countries of the Gulf Cooperation Council (GCC) States, Jordan and Lebanon.

International Conventions addressing the rights of migrants, while ambitious in their attempts, have had a relatively limited impact on the concrete situation of foreign workers in the Middle East. The unwillingness of States to ratify international instruments that protect migrants is evidence of a greater concern for the needs of States over the universalistic applications of human rights standards. As a result, in the Arab world we find widespread violations of human rights standards against migrant workers, and particularly against foreign female domestic employees because of their relative isolation from the public sphere. The rise of nationalism, ethnocentrism, racism and xenophobia has become widespread and the first to feel the brunt of these sentiments are migrants who lack citizenship rights and the protection of national laws and law enforcement agencies.

The roots of the vulnerability of temporary foreign contract workers are examined in detail. These range from the migrants' motivations for leaving their home countries in the first place, to the fact that migrants are vulnerable to discrimination by the host country because they are excluded from citizenship rights, exempt from protection by local labour laws and prohibited from organizing or joining labour unions. Also, because of their status as non-nationals, migrants are vulnerable to the xenophobic tendencies of nationals who are politically privileged and who are able to exploit or make scapegoats of migrants. Without the transposition of international conventions into local laws that clearly articulate the rights of migrants, regardless of their citizenship or legal status, human rights violations are likely to continue. Recommendations for reforms to be applied at both State and international level to mitigate these problems conclude the discussion of migrant vulnerability.

Xenophobia in Japan: Historical Context and New Challenges

Takashi Miyajima

While Japan has not experienced a widespread xenophobic outbreak in the past ten years, its history is marred by periods of intense racism and ethnocentricism. This report chronicles the history of xenophobia in Japan, beginning with a discussion of notions of "stranger" inherited from Chinese culture, through to the "Korean massacre" in the 1920s and manifestations of xenophobia that persist today. For long periods of time, the Japanese had little contact with foreigners and remained largely inward-looking as a nation. These characteristics perpetuated xenophobic attitudes in Japanese society. Various crises affecting Japanese society throughout history have shown the vital role that the mass media and the education system play in inciting xenophobic reactions within an insular society.

In addressing current manifestations of xenophobia in Japan, this report focuses on the situation of "*Zainichi* Koreans" in Japanese society. This term refers to those Koreans (and their descendants) who entered Japan during Japan's colonial rule of Korea and who possessed Japanese nationality until 1951. The "*Zainichi* Koreans" have been discriminated against in both the workplace and in society as a whole. This report attempts to account for the reasons for this type of discrimination and the xenophobic sentiment underlying it by examining several alternative hypotheses.

Despite some lingering suspicions about "strangers" among certain elements of Japanese society, the increase in the number of foreigners entering the country has changed Japanese perceptions. Important recent changes in Japanese attitudes, especially with regard to the younger generation, have been demonstrated by political reforms to enhance the role of foreign residents within society. For example, a system enabling political participation for foreign residents was established and attempts to extend the franchise, at least at the local level, have also been undertaken.

Recent reforms and, more importantly, a widespread change in Japanese attitudes towards foreigners, have allowed the country to overcome its isolationist legacy. Japan seems set to face new challenges and deal with the growing numbers of foreigners arriving in the country.

The Conceptualization and Implementation of Affirmative Action in the United States, India and Brazil

Thomas D. Boston and Usha Nair-Reichert

Written by two professors of economics at the Georgia Institute of Technology, this article provides a brief survey of the implementation of affirmative action in three major countries — the United States, India and Brazil — each with its own history

of racial discrepancy. In each country, positive discrimination policies have been developed in the education, business and government sectors. In each instance, they have been met with hostility and constitutional constraint, leading governments to limit policies, in the fear that they create more racial tension than they eliminate. It is not the role of this paper to propose solutions, but to outline the ongoing battle between implementation of and opposition to affirmative action policies.

The first section, dedicated to the United States, focuses on the legislative history of legally sanctioned racial separation, beginning with the landmark case, Brown v. Board of Education, which, in 1954, outlawed racial segregation in elementary schools. This legislative history includes not only actions in favour of racial equality, but those which limit affirmative action programmes to the point of making them virtually obsolete. The 1970s and 1980s gave birth to the implementation of various plans, created to promote minority and women-owned businesses only to have them legally challenged by majority businesses claiming unfair discrimination. These cases led to the practice of the "strict scrutiny standards", requiring enterprises to give concrete evidence of racial discrimination in order to qualify for participation in an affirmative action programme.

Though positive discrimination in the education arena has met with challenges as within the business arena, race-based preference is a widespread policy within institutions of higher learning. Universities defend these practices by underlining diversity as key in enhancing students' learning environment and the complexity of their thought processes.

Unlike the United States and Brazil, affirmative action in India is not race-based, but has been implemented to compensate for the caste system, which divides society into a strict hierarchy. This second section, divided into six subsections, discusses the following: untouchability in India, affirmative action research, positive discrimination policies in business and in education, the pros and cons of these policies and finally, key findings and recommendations. The third subsection also includes a summary of the constitutional safeguards for "Other Backward Classes" (former untouchables who converted from Hinduism to another religion) and Scheduled Castes and Tribes (untouchables and tribes outside the caste system) set out in the Indian Constitution. Two "Backward Class" commissions, created by the Government, put into place various aid programmes and reservations for unfavoured classes at all levels of education and business. In an effort to limit the extent of these affirmative action policies, resulting Indian legislation speaks of "skimming off the creamy layer", or preventing the most well off members of these lower classes from benefiting from positive discrimination reservations.

Affirmative action policy in Brazil is similar in function to that of India in that it is based on the creation of reservations in education, government and business for the underprivileged Afro-Brazilian population. Though Brazil has a long history of universal access to education, it is only very recently (2001) that the Government has begun to adopt quota systems in higher education and civil service positions. As in India, opponents of these reservations have lobbied for the practice of "skimming off the creamy layer", or preventing middle or upper class Afro-Brazilians from benefiting from reservations.

Dialo Diop

It is commonly held that social inequalities first made their appearance when the primitive communities of hunters and gatherers split up after having mastered the domestication of plants and animals, the surpluses gained from agriculture and the raising of animals leading to unequal distribution of wealth between the two different types of producers. With the development of crafts and the invention of writing, the struggle for the distribution of wealth was accompanied by competition to acquire knowledge. Following the development of the State, the two struggles combined in the confrontation to conquer political power, which had become the source of, and the privileged means of access to, tangible and intangible social goods.

Only after the decline of pharaonic African antiquity, did the first signs appear of an attempt at doctrinal justification of the existence of inequalities of legal status between human beings. Such discriminatory realization was originally based on ad hoc mythologies, rapidly replaced by the religious dogmas associated with the Semite monotheisms (Judaism, Christianity and Islam) which, over the centuries, gave way to modern scientific discourse. In this way, myths, religions and the sciences have successively served as justificatory theories for the maintenance or even aggravation of segregation between individuals and social groups, often accompanied by all sorts of persecutions.

However, it was in European modernity that the systematic theoretical approach towards the three fundamental inequalities – between the sexes, races and classes – reached its doctrinal paroxysm. It is possible to situate and to date the first classification of human races with scientific pretensions to 1758 and the publication of *Systema naturae* by the Swedish naturalist, Carl Linné, inventor of the term *Homo sapiens*. In his taxonomy, the human races were divided into four varieties defined principally by their geographic origins and secondarily by three characteristics: skin colour, temperament and general attitudes. According to these criteria, human diversity could be divided into four distinct races: in the order given, Americanus (red skinned, choleric and straight), Europeus (white, sanguine and energetic), Asiaticus (yellow, melancholic and rigid) and Afer or Africanus (black, phlegmatic and relaxed).

When speaking about the beginnings of this apparently scientific racist discourse, the pre-Darwinian creationist period is normally distinguished from that which followed the publication of the principal work of the British naturalist Charles Darwin, *The Origin of Species* (1859). For Darwin's novel theory of evolution – that the fight for life is based on natural selection by the survival of the fittest – revolutionized the whole of biology. During the post-Darwinian period, both mono- and polygenists were happy to accept the theory of evolution, which provided a rational basis for their common racism.

This report underlines two essential facts: first, that the ad hoc theses of scientific racism were not limited to the closed circle of scholarship, but were popularized through the press and through the so-called colonial or universal exhibitions, and second, that this ideological discourse, which was dominant for so long in the West and perfectly representative of what Kuhn calls the "normal science" of the period was, however, criticized by a marginal scientific counter-current.

Annie Khalil

The advent of the Internet as a global network connecting individuals through their personal computers has opened up a revolution in communication as significant as that resulting from the invention of the printing press. The Internet also poses many new legal challenges and questions concerning its governance and regulation. Should the Internet be regulated? Who will have jurisdiction? These are just some of the questions to be addressed.

In fact, the impact of the Internet can be considered as a double-edged sword. On the one hand, it opens up tremendous new possibilities for communication, for advancing the cause of democracy and human rights. However, the internet also has its "dark side" including not only pornography but also hate propaganda which has already become pervasive. There already exist a large number of websites, mailing lists, and discussion groups available over the Internet which purvey all manner of racist and xenophobic literature. Neo-Nazis, Ku Klux Klan, white supremacist, anti-Semitic organisations are among the many groups spreading the "virus of hate".

There exist no specific laws on cyber-racism but many countries do prohibit racist speech by whatever medium. Thus, government approaches to combating hate speech may be divided into two general categories of either seeking to regulate the publication of information either on the web or by email or by regulating the flow of information through Internet Service Providers (ISPs). Some governments have also been more aggressive than others. The United States, for example, is constrained by the limits of the First Amendment to the US Constitution protecting free speech although prosecutors have been able to rely on other legislative provisions. European governments, as well as Canada, Australia and Singapore, on the other hand, have taken a much more proactive approach in making ISPs responsible for the content that they host and in prosecuting individuals who publish offensive information.

There also exists a range of other non-legislative approaches to combating online hate. These include the hotline approach which provides members of the public with a channel for complaints, the adoption of codes of conduct by ISPs as well as filtering techniques and ratings systems. Each of these approaches has its limits.

Given the global reach of the Internet, a broader approach coordinating local and international responses seems necessary. Regulation of hate speech and racist propaganda was in fact one of the main topics discussed at the World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance (WCAR) held in Durban, South Africa in 2001. In 2001-2002, the Council of Europe approved a Cybercrime Convention and Protocol outlawing hate speech on the Internet. The United Nations High Commissioner for Human Rights has also taken various initiatives to promote the implementation of the International Convention on the Elimination of All Forms of Racial Discrimination.

The Phenomenon of Xenophobia in Relation to Racism and Racial Discrimination

Kinhide Mushakoji

Etymologically, xenophobia is the "phobia", fear, of "*xeno*", foreigners. According to the International Encyclopaedia of Social Sciences, xenophobia is an "irrational, persistent fear of particular objects or places"[1] and also denotes "factors of fear or dread". Xenophobia is furthermore "a fear or avoidance of strangers or foreigners".[2] Our task in this report is not to analyse xenophobia as a "phobia" or psychiatric object, but rather as a key concept in the international legal treatment of racism and racial discrimination. If xenophobia were merely the symptom of a deranged mind, it would be treated as a mental illness, rather than as a reason for penalization.

Xenophobic ideas are transmissible, and are often spread deliberately. Xenophobia does not only affect individuals; it is often a group phenomenon. As we will see below, in real-life situations xenophobia can affect such large numbers of people that it can hardly be considered as "abnormal". Xenophobia can be considered to be a collective social phenomenon shared by certain sectors of society.

In light of this, xenophobia contrasts with exoticism, which is a relatively harmless attitude vis-à-vis others. While exoticism can become the basis for undesirable intellectual tendencies such as "orientalism", it does not, in itself, violate the rights of others. In contrast, xenophobia engenders racism and racial discrimination. In this regard, Hermann Kurthen provides an apt definition: "The term xenophobia signifies unduly fearful, hostile, or contemptuous attitudes toward strangers or foreigners".[3]

As Floya Anthias and Nira Yuval-Davis point out, defined in this way, xenophobia becomes racism "when power relations are involved".[4]

Our interest focuses on this particular kind of xenophobia, which is not only psychosocial but also power-related and political. This introduction leads to an examination of xenophobia in a psycho-social context, with an emphasis on the political environment in which it flourishes, rather than exclusively on its psychological and psychiatric aspects. Given its political nature, it follows that xenophobia itself is a historically constructed concept.

The historical development of xenophobia

Xenophobia creates unequal relationships of "abjection" between oneself and others. Both a perception and an attitude, this abjection is socially and politically constructed and hence highly dependent on the political context in which it emerges. We can identify three historical states in the development of xenophobia: pre-modern, modern and postmodern.

We must begin by asking whether the pre-modern abjection of others can be considered xenophobia. The pre-modern abjection of others was based on notions of culture: civilized people versus barbarians, believers versus non-believers; and on political and economic status: free people versus slaves or outcasts, conquerors versus conquered peoples.

If the concept of xenophobia is socially constructed, i.e. it is a state of mind considered abnormal by the society in which it is found, then it cannot be defined objectively, but only in relation to societal norms. In this way, in pre-modern "civilized" societies such as Ancient Greece and Ancient China, distinctions made between civilized and barbarian people or slaves and free people were generally accepted. In the modern world, the abjection of slaves is socially unacceptable, yet the distinction made between "civilized" and "uncivilized" people is commonly accepted, even by certain Heads of State who, having recognized the universality of human rights, identify themselves with the "civilized" camp, and

condemn as uncivilized other nations or national leaders who have failed to do so.

Julia Kristeva begins her historical analysis of "foreigner" by the example of Judaism.[5] The classic opposition between believers and non-believers is reversed in the medieval abjection of the Jewish people, who were treated as "deicidal". The historical roots of contemporary anti-Semitism are evident, and need no further development. Suffice it here to say that the injustice of this practice of abjection was only recently officially recognized by the Roman Catholic Church. This is another example of how history begins to acknowledge the xenophobic nature of certain abjection that it previously considered normal.

Unlike anti-Semitism, the international community does not yet appear ready to condemn abjection based on notions of civilization. In his speeches following the 9/11 events, for example, President George Bush makes mention of civilization, but without designating who is uncivilized other than the terrorists themselves. However, his reference was misappropriated by commentators on the War on Terrorism, whose subsequent use of the word "civilization" implied a racist and xenophobic abjection of Islam. Their commentaries should properly have been considered Islamophobia, which classifies Islam among the enemies of human rights and civilization, and its people predisposed to terrorist acts.

This misuse of the concept of civilization, however, may be a consequence of the historical notion of civilization established by international law, a body of law which was developed and practised by "civilized countries" and which excluded "uncivilized" ones. Japan in the mid-eighteenth century was among the "uncivilized" nations forced to sign unfair treaties ensuring that nationals of the so-called civilized States would be protected from their "uncivilized" judiciary institutions. The use of this definition of civilization by international law was practised until 1945, and recognized as abnormal and xenophobic only after that date.

In all cases of contemporary xenophobia, we must recognize the importance of history and power relations in the evolving definitions of normality/abnormality, and the progressive transfer of xenophobic abjection to the abnormal (and illegal) side of the divide. This is why we must not ignore the importance of the two original forms of

abjection, as they are at the root of many types of discrimination, racism and xenophobia.

Pre-modern original xenophobia remains hidden behind modern forms of xenophobia. In discrimination of descent, such as is experienced by the dalits, the Buraku peoples, the descendants of the former slaves in Mauritania, and African descendants in general, the contemporary experience of racial discrimination can be traced back historically to the abjection of slaves by free peoples in pre-modern societies.

It must be emphasized that in many types of racism, the abjection of others is formulated through conscious or unconscious reference to "civilization". This is observable in international discourse that identifies enemies of the "civilized" world, and in the domestic abjection of so-called "primitive" indigenous peoples or nomadic peoples like the Sinti and Roma. All these cases of racism originate from pre-modern original forms of abjection. They constitute a major part of the racism and xenophobia discussed at the 2001 Durban World Conference against Racism (WCAR).

It is not necessary to address these particular cases of racism in this text on xenophobia. Nevertheless, we must take them into full account, in light of the fact that they contribute to a legacy which, consciously or unconsciously, conditions contemporary forms of xenophobia.

The modern abjection of others is related to colonialism and Nazism, two political-economic and sociocultural contexts that under particular geo-historical conditions generated large-scale manifestations of xenophobia. Colonialism, which developed in the core of the modern world system, took various forms – from the British "White Man's burden" to the French "civilizing mission"– but always opposed the superior "self" of the colonizer to the abject "other" of the colonized peoples. From the colonizer's perspective, exploiting and excluding from the West the non-white "others" was justified in the name of development and modernization, advances they considered to be in the better interest of the "others" themselves. In the post-colonial age, discrimination in the name of civilization is no longer acceptable.

Colonial attitudes, which previously had been accepted by the "civilized" world, became politically incorrect. They came to be considered racist and xenophobic, and were transferred over to the illegal side

of the normal/abnormal divide. In Europe, the suggestion that migrants from former colonies should not be permitted to settle in the metropolis, for example, is now considered racist and xenophobic. A clearer example of racism and xenophobia originating from colonial abjection can be found in the apartheid regime of South Africa. While the abjection of blacks by whites has been overcome legally, xenophobic attitudes are still very much alive, and have given rise to a new form of insecurity, resulting from a reactionary anti-colonial abjection of whites.

Nazism was also, in a sense, a colonialist abjection of others manifested by a people politically dissatisfied by their late-coming colonial status. It developed at the periphery of the modern West, out of a need to identify scapegoats for Germany's defeat in the First World War (which was a war to redistribute colonies). The Jewish people were chosen as the objects of this abjection.

This type of abjection of "inferior" races developed among the "have-nots" of the modern world system, including Italy and Japan. The have-nots attempted to compensate for their sense of inferiority by combining an aversion of the abject others with a claim to exceptional superiority, in spite of their political and economic inferiority vis-à-vis the core States of the modern industrial world system. The example of German Nazism, which combined anti-Semitism with a claim for the superiority of the Aryan race, is well known. Other similar examples include Fascism in Italy and Japan. In Italy, claims to superiority were associated with the glorious past of the Roman Empire, and in Japan with the myth of the "Divine Nation" and an Emperor of divine descent. Even after the defeat of Nazi Germany and Fascist Italy and Japan, anti-Semitism continued to be broadly practised in Eastern and Western Europe.

Postmodern xenophobia inherited many of its perceptions about "abject others" from its pre-modern and modern forms. Yet this new xenophobia is also a product of a new phenomenon: globalization.

The roots of postmodern xenophobia lie primarily in South to North migratory trends. Migrant workers, especially those deemed "illegal", often become abject others in their host countries. These xenophobic tendencies are especially evident in North America in attitudes against migrant workers from Central America and the Caribbean, in Western Europe against workers from Eastern Europe and Africa, and

in Japan with respect to migrants originating from East and South-East Asia. The same trends also exist at the regional and subregional level, where there is migration towards relatively better off developing countries. (To take the case of South-East Asia, migration occurs from the Philippines and Indonesia to Malaysia, and from Myanmar to Thailand. There are also potential sources of xenophobic reactions of the undocumented migrants.)

All of the above examples pose a common problem to the international community. The contemporary form of globalization intensifies gaps between the rich and poor within developing countries, and further entrenches disparity between developing and developed countries. As the Durban WCAR stressed, this massive migration towards richer countries has become the source of much racism and xenophobia. It subjects migrants and trafficked persons from the poorer countries to structural abjection, by relegating them to unskilled and unprofitable jobs; and to institutional discrimination, through restrictive and selective immigration policies that define them as "illegal".

Contemporary postmodern forms of xenophobia, in this sense then, are not only based on social and political abjection like their premodern and modern forms. They are also structural and institutional, and need to be recognized as such and treated accordingly by the international community. Structural and institutional abjection give rise to new forms of racism and xenophobia that need to be combated with new approaches.

Among the different xenophobic reactions to migrant workers, one particular form has been aggravated by the War on Terrorism, namely the treatment of migrant workers from Arab and Islamic countries by their host societies in North America and Europe. Some States have adopted a technique of "profiling", which classifies as potential terrorists all people with a certain ethnic origin and/or a religious affiliation to Islam. This is an example of institutional racism and xenophobia, which although subtle, is very real.

The Durban documents (the conclusion of an international debate that took place before the 9/11 events) refer to this phenomenon as Islamophobia, and describe it as a reaction to the increasing migration of Muslim workers, particularly into Europe and North America. The

report suggests that their massive migration was perceived as problematic because of the cultural elements – until then alien to the modern West – that they were introducing into their host countries. Islamophobia[6] was devoid of an explicit myth until the War on Terrorism developed a myth about the predisposition of the uncivilized Muslim people to terrorist activities.

In general, the States and the civil societies of the "civilized" West, with the exception of a few neo-Nazi elements within their domestic societies, proclaim their firm belief in equality among different cultures and religions, and in the universality of human rights. This is why the question of xenophobia becomes so complex.

Xenophobia in the discourse of the United Nations

In the United Nations human rights literature, the concept of "xenophobia" always appears in conjunction with other concepts, such as racism and racial discrimination. The debates of the Commission on Human Rights, and of the Sub-Commission of CERD (the Commission for the Elimination of Racial Discrimination) systematically mention xenophobia alongside racism. A typical example of this usage is found in the title of the World Conference against Racism, Racial Discrimination, Xenophobia, and Related Intolerance. This usage suggests that "xenophobia" becomes an object of concern to the United Nations Human Rights bodies when it is connected with racism as defined by the "International Convention on the Elimination of All Forms of Racial Discrimination". This is likely because xenophobia, in its psychosocial, social and political sense, is closely related to specific groups of "others". We have already discussed in the previous section of this paper how the abject others have been historically constructed.

The Convention does not mention "xenophobia" specifically. It deals only with racial discrimination and racism, as it states in Article 1:

> "In this Convention, the term 'racial discrimination' shall mean any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition,

> enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life."

The Convention does, however, include "preference" among the different forms of racism, which can be interpreted as preference for one's own race, colour, etc. This "preference" may be associated with "xenophobia" where it means preference for oneself over the feared or hated others. We will later discuss the nature of this association, and make it clear that, on the one hand "xenophobia" is strongly linked with "racism" as defined by the ICERD,[7] and that on the other, it is not just a form of racism to be treated like another. For the time being we will stress the fact that "xenophobia" is always paired with "racism", which indicates that the official human rights texts of the United Nations treat xenophobia not as a form of racism, but as something which occurs simultaneously with racism in different types of "discrimination" described in the above Article of ICERD.

In fact, Article 1 of ICERD enumerates the different power relations under which the fear of strangers or foreigners can transform into racial discrimination. "Race, colour, descent, or national or ethnic origin" denote power relations for which imbalances between the majority and the minority populations risk leading to xenophobia, and where mere attitudes can become active racial discrimination.

THE PHENOMENOLOGICAL STRUCTURE OF XENOPHOBIA

The fact that "xenophobia" is never considered independently from "racism" is unfortunate, because consequently the former concept never receives its own, distinct definition. It does, however, suggest recognition of the importance of "xenophobia" in the struggle against racism.

Because of their close interconnections, the relationship between "xenophobia" and "racism" has not been satisfactorily established in the United Nations literature. This is why this report aims to draw to UNESCO's attention the need for an in-depth study of xenophobia, as

connected to, but independent from, racism and racial discrimination, in order to cover the components currently ignored.

In order to begin this process of reflection, we propose the following phenomenological understanding of the two concepts, as an operational framework for further discussion. As is widely recognized in phenomenology, any cognitive act has two aspects, a "noesis" and a "noema", i.e. a subject and an object of cognition. Racism and xenophobia, as abjection of others, are based on cognitive acts by someone about some other persons or groups they perceive as "abject". From the perspective of the object of cognition, this discrimination is racism. Xenophobia identifies the same discriminatory act from the perspective of the subject(s) who discriminate(s). This is why the practice commonly employed by the United Nations of mentioning racism and xenophobia together, is well taken. Phenomenologically, racism and xenophobia refer to the same act; however, the abjection when experienced by the object is racism, while when experienced by the subject, it is xenophobia.

In certain cases, the connection between racism and xenophobia is clear. Such is the case for "anti-Semitism",[8] the racial discrimination against the Jewish people by Hitler and Nazi Germany. In this instance, xenophobia was manifest in the myth of Aryan supremacy, which proclaimed the racial "superiority" of the Aryan people, and declared *ipso facto* the "inferiority" of the Jewish people. This example highlights the fact that xenophobia and racism are not in a cause and effect relation, but are rather two corollary versions of the same proposition.

It is not because the Aryan race is superior that the Jewish people are inferior, or vice versa. Neither is it because of the myth of Aryan supremacy that the Jewish people were treated as "inferior". The supremacy myth was not invented out of thin air to discriminate against the Jewish people, nor was anti-Semitism constructed as a logical consequence of the myth of Aryan supremacy. Prior to the rise of Nazism, there was a long intellectual tradition in Germany claiming the superiority of the German culture. German jurists were divided between the *Romanisten* and the *Germanisten*, the latter stressing the importance of the German tradition in law. Nietzche and Wagner, whose thoughts and music hailed the pre-Christian German traditions, were ready to be appropriated by the Nazi ideologues. As we have seen, the Nazi propaganda of abjection

towards the Jewish people exploited a diffuse sense of superiority of the Christians over the Jewish people, which had existed since the Middle Ages. The two pre-existing prejudicial beliefs were combined by the Nazi ideologues, who constructed a single proposition about the relationship between German superiority and Jewish inferiority. From the side of the subject, the Nazi ideologues were xenophobic in treating the Jewish people as abject, while seen from the side of the Jewish people, the object of abjection; it was a typical case of racism, i.e. anti-Semitism.[9]

The relationship between xenophobia and racism is not always so easy to determine, however, because in most cases of anti-Semitism, the xenophobic sentiment of the discriminating party is not made explicit. The literature frequently relates xenophobia and anti-Semitism, even when the myth of Aryan supremacy is not mentioned. This illustrates that even without reference to "racial superiority", "xenophobia" is inseparable from racism, in this case from anti-Semitism. In fact, one characteristic of the contemporary forms of racism and xenophobia is the diffuseness of their discourse.

This may be the reason why the aforementioned text of the Durban Declaration refers to "the more subtle and ambiguous contemporary forms and manifestations, as well as other ideologies and practices". Nowadays, xenophobia takes both a subtler and more covert form.

As Iris Marion Young points out, xenophobia is an abjection that is based either on discursive or practical consciousness.[10] A privileged group first develops a xenophobic discourse regarding the "abject" others, then any legitimization of this discourse becomes unnecessary, and a practical consciousness prevails. It is important to recognize the existence of these two types of xenophobia, overt and covert, because any effort to combat xenophobia must not content itself with combating only clearly formulated xenophobic myths; it must also identify and condemn practical xenophobia, which simply takes a relationship of superiority/inferiority for granted.

In a phenomenological sense, such efforts necessarily imply turning everybody other than oneself into a "stranger", as Julia Kristeva suggests the European Enlightenment tried to do.[11] Contemporary civil society, which has adopted the concept of human rights, is an "alliance of singularity" where "strangeness" (*l'étrangeté*) is generalized. As each

"self" becomes a "stranger" to the "other", the notion of the "stranger" disappears, to the point where abjection of strangers implies the negation of civil society itself. In this way, according to the Enlightenment, a society is created where xenophobia cannot exist. Each "self" composing the civil society is equal to all the other selves.

However, as Kristeva herself points out, this ideal formula does not prevent the emergence of the counter-current of Romanticism. The wisdom of the Enlightenment did not prevent the development of new nationalisms, or of Fascism itself. This leads us to suggest the adoption of a distinction made by Jean Baudrillard and François L'Yvonnet, between the "other" who can be treated as another self, and the "radical other" whose strangeness does not permit such assimilation.[12] Such a "radical other" can be either the object of curiosity, as in the case for exoticism, or of abjection, as in the case for xenophobia. To adopt a formal and legal declaration that a "radical other" should be treated equally as an "other" would not solve the complex historical and psychosocial problems that lie at the root of the phobia of strangers as "radical others". We will come back to this phenomenological question in our discussion of the double approach taken by the United Nations human rights regime in their struggle against racism, which combines condemnation and education. It is crucial to condemn any abjection, whether towards "others" of the same culture, as in the case of gender discrimination, or "radical others" belonging to different cultures, such as indigenous peoples. But this does not solve the possible phobia of difference, making as its target the "radical others" while the normal "others" are accepted as indispensable complements of oneself.[13] This distinction between the accepted "others" and the abject "radical others" becomes a major cause of different forms of racism towards the migrants from other cultures and religions. With or without declared abjection, there is always the danger that a sense of radical difference turns into abjection of the radical others, i.e. to xenophobia.

The only way to prevent any abjection of the "radical others" as "radical others", is to promote "diversity" within and between the groups of "selves" who are equally "other" to one another. This means creating a world where each identity group is perceived and accepted as a "radical other" by the others.

In general terms, it is necessary to understand that with respect to any specific target group, in addition to "racism" as the "noema" aspect, all cases of racial discrimination also comprise a "noesis" aspect, based on a sense of superiority. This noesis aspect is a form of xenophobia — that is, a sense of abjection, or a fear or dread of others in terms of race, colour, descent, national or ethnic origin, which is either consciously or unconsciously formulated.

However, this analysis is insufficient to understand how the United Nations studies xenophobia. As the Durban documents point out, the contemporary forms of racism, racial discrimination, xenophobia and related intolerance all have historical roots. The Durban World Conference against Racism identified slavery and colonialism as the two principal causes of contemporary xenophobia. Paragraph 13 of the Durban Programme of Action states:

> We acknowledge that slavery and the slave trade (...) were appalling tragedies in the history of humanity, (...) and are among the major sources and manifestations of racism, racial discrimination, xenophobia and related intolerance.(...)

Paragraph 14 states:

> We recognize that colonialism has led to racism, racial discrimination, xenophobia and related intolerance, and that Africans and people of African descent, and people of Asian descent and indigenous peoples were victims of colonialism and continue to be victims of its consequences.

It is necessary to study the complex processes that led to the contemporary forms of xenophobia through the different constructions of abject others. As we have already seen, the abjection of others that developed in the modern era of colonialism gave rise to an ambiguous xenophobic attitude vis-à-vis the colonized peoples. The colonizing ego entertains two seemingly opposite effects, one of aversion, the other of domination.

Joel Kovel distinguishes three ideal types of racism: dominative, aversive, and meta-racism.[14] According to him, these three types coexist in contemporary American society. However they also correspond roughly to stages in the history of white racism. In the nineteenth century, dominative racism was the predominant form in the South, whereas aversive racism existed among the Northern liberal bourgeoisie who claimed to be

free of racism. After the abolition of slavery, which formally outlawed the domination of white people over black people, aversive racism became predominant. Nowadays, however, Kovel argues that a new meta-racism has emerged. Practically all traces of commitment to racial superiority have been removed, and only the grinding processes of a white-dominated economy and society accounts for the continued misery of many people of colour.

Iris Young points out the similarity of Kovel's above analysis to her own; that is, a shift from a racism based on discursive discourse to practical consciousness and basic security. Now that the discursive consciousness of the society proclaims all races equal, it is politically incorrect to dominate or to avert them. This creates a situation of basic insecurity for the privileged groups who feel threatened by the different minorities. Young points out that this trend does not apply exclusively to racism, but also to sexism, classism, etc. Under such circumstances racism, be it dominative or aversive, is formally removed from the public discourse, thereby integrating all the abject peoples into civil society. This is where Kovel's meta-racism begins to play a complex role. Xenophobia (to apply their analysis to a concept they do not address) becomes homophobia, that is, the fear of being treated in the same way as abject others.[15]

Since the three types of racism refer to relationships between the privileged self and the abject others, we may use the same categories to define three classic types of xenophobia: dominative, aversive and subtle xenophobia, the latter corresponding to meta-racism. The third type combines the first two and applies it in a subtle way, adapting it to complex contemporary socio-political situations in which conscious affective discourse is no longer permitted or necessary to the unconscious abjection underlying the structural and institutional manifestation of xenophobia. As we will see later, the contemporary forms of xenophobia tend to take the third form, which despite lacking overt formulations of superiority myth, still result in the same abjection towards others. The overt and affirmative xenophobia of some "extremist groups", such as that of the Heider phenomenon in Austria and Le Pen in France, erupts in different societies as if exceptional and pathological cases. In reality they are overt manifestations of the covert and subtle xenophobic sentiments hidden behind the façade of political correctness.

Racists are different from the formally non-racist citizen, not in their abjection of others, but in their audacity to say what the politically correct citizen feels but dares not utter. These ambiguous feelings hiding in civil society make the task of designing truly effective legal and institutional measures against xenophobia, and against all racism, extremely difficult.

In addition to lacking a clear discursive manifestation, the subtle contemporary forms of xenophobia tend to be more complex than in the past. Xenophobia is not only highly dependent upon the historical context within which it has evolved, but also extremely sensitive to the official contemporary "worldwide" acceptance of the dignity of the human individual.

To understand this development, we must understand that identity formation in modern societies was constructed in order to explain the relationship of the two modern identities; that is, the individual identity, and the national identity. The modern individual identity was constructed to make everybody free and equal. This identity was developed in Western Europe and North America. As we have discussed elsewhere, Julia Kristeva points out that this construction was made possible by the Enlightenment project, which declared everybody mutual strangers. This, however, did not resolve the question of the "radical others" with whom one cannot identify in any broader identity group, especially in colonial and post-colonial situations.

The "radical others" are so different from other "others" that they remain the object of either curiosity or abjection. For Baudrillard and L'Yvonnet, the Japanese are a typical case of "radical others" for the Europeans. When abjection prevails over curiosity, the presence of "radical others" can often lead to xenophobia. "Radical others" for Europeans, and for Westerners in general, are historically determined by the process of the globalization of Western civilization, closely associated with colonialism.[16]

We can find a rich literature on the treatment of "radical others", not only as exoticized objects of curiosity, but also as objects of abjection. A crucial characteristic of this form of abjection is that it is hidden behind a façade of political correctness that supposedly assimilates these "others" amongst the civilized "others". How could we deny the

equality before the law of the non-Western "radical others" without being accused of being politically incorrect toward them? This is why xenophobia becomes less discursive and loses the legitimization provided by a clearly formulated myth.

Discursive xenophobia backed by myths has developed in countries on the fringe of the "democratic" core of the West. As we have seen, Nazism in Germany and Fascism in Italy and Japan, regimes on the periphery of the modern West and latecomers to colonial competition, built explicit myths to legitimize their expansionism and their collective xenophobia. It is important to note that such xenophobia developed neither in the core Western democracies, nor in the socialist or communist periphery. One theory explaining this posits that different categories of "radical others" were integrated, theoretically and institutionally, into a civil society in which everybody was "other" to each other, without distinction of race, nationality, etc.

One should note, however, that in spite of the theoretical and institutional condemnation of xenophobia by Western democracies, a general abjection of foreigners from developing countries, especially "illegal" migrant workers, persists, in spite of institutional efforts to combat racism. This xenophobia – undeclared, practical and subtle, continues, even today, to prevail in Europe and North America, as well as in Japan. In addition to these subtle forms of xenophobia, a number of relatively small but virulent xenophobic movements have always existed, representing the practical consciousness of some sectors of society that are not under the institutional control of the State.

This proves that the integration of different categories of others through anti-racist campaigns does not necessarily eliminate the underlying xenophobic sentiments which abject others through one's own sense of superiority. Unless this sentiment of superiority is eliminated, new potential "radical others" can always become the victims of new forms of racism.

The case of xenophobia in Japan provides a classic example of the problems that persist when the combat against racism fails to address the root question of xenophobia. The century-long fight to prohibit discriminatory treatment toward the Buraku people as abject "radical others" has successfully reduced Buraku discrimination.

However, it has not helped to improve the racist treatment experienced by Koreans abroad. Those who have acquired Japanese nationality have now been accepted as normal "others", equal to the Japanese. Yet this official renunciation of anti-Korean institutional racism has not abated the abjection of newly arrived "illegal" workers from parts of Asia other than the Korean peninsula.

Attempts to eliminate racism case by case, has not excluded other minorities from becoming targets of Japanese xenophobia. It fails to address the root cause of this abjection, which is a general sense of superiority among the Japanese people accompanied by the abjection of radical others (with the exception of Westerners, who have a special privileged status among the radical others). The Japanese people insist on being a homogeneous people, with a single State, a single language, and a single culture, different from that of the radical others. Unless, by eliminating xenophobia, all "radical others" cease to be potential objects of abjection, combating individual forms of racism will not lead to a world without racial discrimination. This is why the international community needs to address the problem of xenophobia with the clear goal of eliminating the abjection of "radical others", rather than assuming that each group of "radical other" can be "integrated" into the community of "selves" to become acceptable "others".

Unfortunately, the United Nations has not yet adopted this approach. However, there are positive signs that the international community is heading in this direction. In response to certain xenophobic propaganda activities, the international community's growing awareness of the need to address the potential dangers facing free speech, led to the formulation of Article 4 of ICERD, which will be discussed in the following section of this Report.

To combat the complex problems of xenophobia, the international community must take the necessary action, not only to condemn certain extremist movements, but also to build a culture where others, especially "radical others", are accepted as equal partners in an exchange of free speech. As we will soon discuss, this culture must be one of tolerance and dialogue among different cultures and civilizations. As we saw earlier, simply integrating "radical others" into civil society and treating them as "others", similar and formally equal to us, only serves

to intensify the homophobia of xenophobic people. This report, therefore, explores ways in which the elimination of xenophobia should play a key role in propaganda control and in human rights education, in the context of a "dialogue among civilizations".

XENOPHOBIA AND PROPAGANDA

Clearly, xenophobia cannot be combated without a clear condemnation of its propaganda. In addition to being a highly contagious social pathology, xenophobia also carries serious political implications. Xenophobia remains a major obstacle to the realization of a society wherein the rights of all citizens are guaranteed by a decision-making process based upon the free expression of the will of all people.

The elimination of all hate propaganda may seem unrealistic, because its operational definition is difficult. We will not pretend that it is an easy task. However, the efforts of several States that have ratified the ICERD and tried to develop an operational jurisdiction to implement Article 4, must be recognized for having set the foundations for the penalization of racist and xenophobic propaganda. Several cases in which people and organizations propagating anti-Semitism have been condemned by different European courts, are encouraging.

It is clear, nevertheless, that suppressing hate propaganda is a truly valid way to eradicate the causes of xenophobia. Beyond emergency measures to prevent the spread of these virulent ideas, it is essential to attack the root causes of xenophobia; specifically, the abjection of radical others.

The interpretation of Article 4 of ICERD becomes extremely important in relation to this point. Article 4 defines the signatories' obligation to combat racist and xenophobic propaganda through measures that are considered illegal by some States, and contradictory to the right of freedom of speech by certain legal experts.[17]

The above discussion of xenophobia leads us to defend the contrary argument that is to consider that the condemnation of xenophobic propaganda is a *sine qua non* for the effective contribution of freedom of speech to democratic governance.

Article 4 of ICERD, which does not refer clearly to xenophobia, must be interpreted in this context. This Article states the following:

> States Parties condemn all propaganda and all organizations which are based on ideas or theories of superiority of one race or group of persons of one colour or ethnic origin, or which attempt to justify or promote racial hatred and discrimination in any form, and undertake to adopt immediate and positive measures designed to eradicate all incitement to, or acts of, such discrimination …

The objective of Article 4 is to condemn all ideas or theories of superiority of one race or group of persons of one colour or ethnic origin. This is clearly related to the idea of "preference" as discussed in Article 1. (A "preference" is a positive evaluation of the self, which when translated into the "self" vs. "radical others" relationship, constructs its preference of one's own "self" in contradistinction to all the abject "radical others" who do not share one's own superiority, in the phenomenological relationship of xenophobia.)

The Article condemns "all propaganda and all organizations" that "attempt to justify or promote racial hatred and discrimination".[18] Here, propaganda, organizations, justification, and promotion are the key concepts, which again emphasizes the collective and social nature of "xenophobia" to be condemned by the signatories of ICERD. This Article further specifies that signatories of ICERD:

a) Shall declare an offence punishable by law all dissemination of ideas based on racial superiority or hatred (...);
b) Shall declare illegal and prohibit organizations, and also organized and all other propaganda activities (...);
c) Shall not permit public authorities or public institutions, national or local, to promote or incite racial discrimination.[19]

This insistence on the punishment of hate organizations and those who disseminate hate propaganda must be interpreted as an effort by the Convention to prevent the spread of xenophobia, a social pathology, which demolishes the capacity of civil society to engage in collective dialogue. As has been discussed, freedom of speech is only possible when all members of society are treated as free and equal.

Free speech presupposes that civil society is comprised of individuals who engage in equal dialogue with one another. Xenophobia, especially its subtler forms, creates a situation in which such dialogue becomes impossible. In this sense, xenophobia is a virus, which undermines open communication between citizens. Nevertheless, some States have abstained from the condemnation and punishment of xenophobic propaganda as defined in this Article 4 of ICERD, estimating such practices to be contrary to the principles of free speech.

However, once xenophobia is understood to be a virus that incapacitates the very freedoms civil societies purport to uphold, such objections are rendered invalid. The dilemma of how to treat those who deny freedom of speech has only one solution: punish those who transmit xenophobic propaganda, while attempting to develop a culture of tolerance and dialogue across cultures. This final idea is in fact the role of human rights education in combating xenophobia, and the subject of the following and final section of this report.

XENOPHOBIA AND HUMAN RIGHTS EDUCATION

We have already seen that abolishing distinctions between "us" and "radical others" by treating these parties equally and enforcing universal human rights is, while necessary, insufficient. Xenophobia will not disappear simply by formalizing equality. Nevertheless, this has been the traditional approach adopted by Western democracies in dealing with their non-Western "citizens". It is also the way in which former colonial authorities attempted to teach human rights to non-Western populations of their colonies. As a result, subtle forms of xenophobia are overlooked in many institutional efforts to guarantee the rights of migrant workers, and trafficked women and children.

This approach is indefensible, because it ignores the radical distinction between identities based upon different religions, cultures and historical memories which continue to reproduce "radical others". The difference between the self and the "radical other" must be maintained and respected, and not simply ignored or abolished.

This point is clearly made in the Durban Programme of Action, in its Paragraph 58, where it urges States to build international legislations and mechanisms "which encourage all citizens and institutions to take a stand against racism, racial discrimination, xenophobia and related intolerance, and to recognize, respect and maximize the benefits of diversity within and among all nations in working together to build a harmonious and productive future … in particular through public information and education programmes to raise awareness and understanding of the benefits of cultural diversity".

Societies cannot maximize the benefits of cultural diversity unless interaction between the diverse communities that comprise it is made to be a mutually enriching experience, rather than one of xenophobic rejection or, as is the case of exoticism and "orientalism", mere curiosity. Indeed, such a mutually enriching contact with the "radical others" is introduced by the supporters of reflexive modernity in their debate with postmodernists.

The search for a reflexive modernity, which appeared in the 1970s as a reaction to the increasing criticism of modernization, provides an interesting basis from which to develop a satisfactory approach to the postmodernist rejection of modern universalism, which is the foundation of human rights. Reflexive modernization, according to Kuniko Miyanaga, implies the search for reflexive dialectics of an identity based on both modernity and tradition. This need is shared by both non-Western and Western identity groups. For non-Western ones, their identity has to be constructed on their traditions (as thesis), in face of modern Western civilization (as antithesis). For the Western identity groups, Western civilization (as thesis) is confronting global contacts with non-Western cultures (as antithesis) and must develop a new identity providing a foundation to reflexive modernity.[20] Simply said, we may define the search for a reflexive identity as the building of one's own identity in confrontation, and in interaction with "radical others". This reflexive approach transforms the xenophobic relationship where the self abjects "radical others" into a new relationship where "radical others" are indispensable elements in building one's own identity.

This reflexive approach to overcoming xenophobia not only eliminates any egocentric attitude vis-à-vis the "radical others", but also

replaces it with an open attitude towards them, making them the dialectical antithesis indispensable to one's efforts to build his or her own reflexive identity. This means that we must first achieve tolerance, and then dialogue. The combination of xenophobia and related intolerance in the title of the 2001 World Conference against Racism is indicative of the need to be "tolerant" to "radical others". Xenophobia is inherently intolerant, yet, simply ignoring the differences between "us" and "them" is also a hidden manifestation of intolerance. Being tolerant implies only tolerating the existence of the "radical others" and not associating them in the mutual construction one another's identity. This becomes possible only when all parties realize that their identity requires a reflexive interaction with, and definition in relation to, "radical others", which develops through a dialogical interaction between the different identity groups, in full recognition of the value of one another's cultural and historical consciousness.

In this way, tolerance is a necessary, but insufficient condition for establishing a dialectical relationship between the "self" and the "radical others". A critical dialogue must be established, and enable both parties to reflect on the radical difference existing between them. This reflection must lead to the elaboration of a reflexive identity, that is not egocentric, but interactive with the "radical others". The interactions between "us" and the "radical others" provide the building blocks for a "dialogue of civilizations", as was the goal of the 2001 UN Year of Dialogue Among Civilizations. This is why the Durban Declaration welcomes this United Nations initiative, which underlines tolerance and respect for diversity and the need to seek common ground among and within civilizations in order to address common challenges to humanity that threaten shared values and universal human rights, and to fight against racism, racial discrimination, xenophobia and related intolerance, through partnership, cooperation and inclusion.

This – "inclusion" – is exactly what xenophobia opposes, and therefore the United Nations must become particularly cognizant of the urgent need to eliminate xenophobia, by focusing human rights education on healing the global phobia abjecting "radical others".

1. David L. Sills ed., *Encyclopedia of the Social Sciences*, MacMillan & Free Press, 1968, Vol. 12, p. 81.
2. Ibid.
3. Hermann Kurthen, Webner Bergmann, Rainer Erb eds., *Anti-Semitism and Xenophobia in Germany after Unification*, Oxford University Press,1997, p. 83.
4. Floya Anthias, Nira Yuval-Davis, *Racialized Boundaries*, Routledge, 1993, p. 12.
5. Julia Kristeva, *Étrangers à nous-mêmes*, Gallimard, 2001, pp.95-111.
6. Para. 150, Durban Programme of Action: "*Calls upon States*, in opposing all forms of racism, to recognize the need to counter anti-Semitism, anti-Arabism, and Islamophobia world-wide (...)".
7. We will use the abbreviation "ICERD" to represent the International Convention on the Elimination of All Forms of Racial Discrimination. Cf. for example, United Nations ed., *Human Rights: a Compilation of International Instruments*, Volume I (First Part), Universal Instruments, United Nations Publication, 1994, pp. 66.-79.
8. Cf. for example, Michael Brown ed., *Approaches to Anti-Semitism*, American Jewish Committee, pp. 10-23.
9. Cf. especially on the revisionist debate about the Neo-Nazi, Brigitte Bailer-Galanda, "'Revisionism' in Germany and Austria: the Evolution of a Doctrine", Hermann Kurthen, Werner Bergmann, Rainer Erb, eds., op.cit., pp.174-189.
10. Iris Marion Young, *Justice and the Practice of Difference*, Princeton University Press, 1990, pp. 141-143.
11. Cf. Julia Kristeva, *Étrangers à nous-mêmes*, Paris, Fayard, 1988, pp. 167-248.
12. Cf. Jean Baudrillard, Francois L'Yvonnet, Paris, 2001.
13. It is interesting to realize that the psychoanalytic theory of Jacques Lacan makes the "other" an important component of its analysis of the self. The "other" is assumed complementary to the self and not an entirely strange other. In this way Lacan ignores completely the existence of "radical others" who are not playing any role, even in the alienation of the self. See, for example, Jacques Lacan, *Les quatre concepts fondamenteaux de la psychanalise*, Éditions du Seuil, 1973, pp.227-240.
14. Cf. Joel Kovel, *White Racism: a Psycho-History,* (second edition), Columbia University Press, 1984.
15. Homophobia shows that treating others as equal abjected others as is required by human rights law, is in itself a cause of phobia, in fact a form of xenophobia.
16. Cf. for example Zia Sardar, Ashis Nandy, Merryl Wyn Davies, *Barbaric Others: a Manifesto on Western Racism*, Pluto Press, 1993.
17. When the International Convention on the Elimination of All Forms of Racial Discrimination was in the process of being adopted, Article 4 was regarded as central to the struggle against racial discrimination. At that

time, there was a widespread fear of the revival of authoritarian ideologies. The proscription of the dissemination of ideas of racial superiority, and of organized activity likely to incite persons to racial violence, was properly regarded as crucial. Since that time, the Committee has received evidence of organized violence based on ethnic origin and the political exploitation of ethnic difference. As a result, implementation of Article 4 is now of increased importance.

18. General Recommendation XV, Organized violence based on ethnic origin (Art. 4) (Forty-second session, 1993)
19. The above paragraphs of Article 4 were the object of abstention by several signatories of the ICERD including Japan, on the grounds that they contradict freedom of speech recognized in their Constitutions.
20. Cf. Kuniko Miyanaga, *Global-ka to Identity* (Globalization and Identity), Sekai-Shiso Sha, 2000, pp. 39-66.

Xenophobia in Arab Societies

Ray Jureidini

In the Declaration of the World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance, held in Durban in September 2001, paragraph 16 states: "We recognize that xenophobia against non-nationals, particularly migrants, refugees and asylum-seekers, constitutes one of the main sources of contemporary racism…". This report focuses primarily upon contemporary xenophobic phenomena as they affect the first category of non-nationals: migrants, with particular reference to the situations of foreign migrants in the Arab countries of the Gulf Cooperation Council (GCC) States, Jordan and Lebanon. The particular cases of refugees and asylum-seekers, deserve separate consideration and entail significant legal complexities; these are not addressed here. Because the status and treatment of foreign female domestic employees are seen as the most problematic in terms of xenophobic and racist practices in this part of the world, they are the focus of special attention. A number of countries have been excluded from the analysis owing to a lack of relevant information and research.

Introduction

The Preamble of the Declaration of the Plan of Action in the Report of the Asian Preparatory Meeting for the World Conference on Racism (Tehran, 19 to 21 February 2001) states that the "genuine acceptance of cultural diversity, as a permanent feature of our societies, is a cherished asset". I do not believe this sentiment can be said to be shared by

Arab societies in general. Even in the unique case of Lebanon, where there is a certain level of pride in the formal acceptance and political structure of religious diversity and political pluralism, ethnic tensions persist. While violent conflict has been absent for more than a decade, since the end of the civil war (1975-1990), tensions relating to long-standing ethnic difference remain simmering just below the surface. Exogamous marriage between different nationalities, different religions and even different sects within particular religions is frowned upon and relatively rare. These are xenophobic manifestations of a complex kind.

In the Declaration of the 2001 World Conference, paragraph 60 condemns intolerance against religious communities and their members and specifically criticizes limitations of the right to freely practise religion. In all Arab States, only the three monotheistic religions (Judaism, Christianity and Islam) are officially recognized. Other religions are relegated, both symbolically and practically, to a peripheral position within society. For example, despite the decade-long presence of over 100,000 Sri Lankan domestic employees in Lebanon, there is no official recognition of the Buddhist religion. Makeshift shrines are constructed within apartments which do double-duty as temples and many Sri Lankan workers attend services in Catholic churches but adapt traditional Christian practices to suit their own religions needs. For example, some members of the Sri Lankan community, while attending Sunday church services, will recite their own silent prayers as they face an altar of Christian figurines. This practice accords its participants a measure of spiritual succour. A churchwarden sitting at a trestle-table nearby sells candles and other paraphernalia to assist in the adapted rituals.

Few Arabs will deny that racist attitudes, particularly towards Asians and Africans, are widespread. Some will openly say: "we don't like Asians" (referring mainly to the Chinese and to members of the South-East Asian communities). When asked why these groups in particular are disliked, reference to their physical features is the most common response (certain facial features and body types are perceived as unattractive). However, it is unusual to hear comments such as "Asians are an inferior race compared to Arabs". On the contrary, these

communities are often acknowledged as possessing desirable traits, such as "being clever". Thus it is more appropriate to characterize such attitudes as xenophobic rather than racist.

In the Declaration of the Plan of Action, paragraph 18 calls for the transparent and accountable governance of all Member States. For Middle East Member States these standards have yet to be attained. Few governments in the world monitor and publish data on xenophobic and racist behaviour in any systematic way. Similarly, despite the role of international NGOs such as Amnesty International and Human Rights Watch, there is little in the way of systematic, in-depth examination and analysis of records and data from non-governmental sources. In many Western States anti-discrimination laws can operate to some extent to protect individuals" rights, even in the absence of comprehensive analysis of levels of xenophobia, racism and discrimination. However, in the Middle East, where a company can still place a job advertisement seeking "an attractive female with a good figure", no such safeguards exist. The paucity of information can be explained by the fear of prosecution under laws that forbid all criticism of the State, whether by private citizens or by journalists, academics or politicians. In addition, access to media and monitoring agencies is restricted. Owing to the lack of data and funding in order to conduct systematic, on-the-ground research in the field of human rights, this report has had to rely largely upon disparate newspaper reports and relatively isolated academic articles to illustrate the phenomenon of xenophobia in Arab States.

In addition, there is no evidence of any concerted effort in the Middle East to denounce and combat racism and/or xenophobia – either in the parliaments or in the courts. There have been sporadic reports in newspapers and on television programmes highlighting the issue, particularly the plight of foreign female domestic workers. These cases, however, are treated as topical news items and fodder for talk shows rather than as serious issues that need to be dealt with in an institutionalized way.

In the Declaration of the 2001 World Conference, paragraph 38 states: "We call upon all states to review, and where necessary, revise any immigration policies which are inconsistent with international human

rights instruments, with a view to eliminating all discriminatory policies and practices against migrants, including Asians and people of Asian descent".

This report shows that, in some Arab societies, efforts have been made to address these issues, mainly through reforms (such as those undertaken in Jordan and Bahrain) to the citizenship rights of non-nationals and children of non-nationals married to nationals. Limited measures have also been taken in Jordan, and to some extent in Lebanon, to protect the rights of migrant workers, particularly those of Asian descent. Other States, such as those in the Gulf region, are responding to these challenges by reducing the number of migrant workers allowed into the country.

Paragraph 46 of the 2001 Declaration states: "We recognize the positive economic, social and cultural contributions made by migrants to both countries of origin and destination".

This aim is not one that has been embraced by Arab States and acknowledgement of migrant workers' contribution to society remains limited. In fact, as will be discussed below, there is resentment that money earned by migrant workers is often repatriated to their countries of origin. Systematic public recognition of the positive contributions of migrants would go a long way towards reducing xenophobia and racism in Arab societies.

Paragraph 47 states: "We reaffirm the sovereign right of each state to formulate and apply its own legal framework and policies for migration, and further affirm that these policies should be consistent with applicable human rights instruments, norms and standards…".

As will be shown in this report, Arab States generally regard international human rights instruments as conflicting with their sovereign rights and have been reluctant to ratify most of the important United Nations and International Labour Organization conventions. With the possible exceptions of Tunisia, Bahrain, and to some extent Lebanon, Arab States do not formulate their policies, laws and regulations in accordance with such conventions.

Paragraph 49 states: "We highlight the importance of creating conditions conducive to greater harmony, tolerance and respect between migrants and the rest of society… We underline that family reunification

has a positive effect of integration and emphasize the need for states to facilitate family reunion".

Perhaps the major factor militating against greater possibilities for migrant family reunification in the Middle East is the type of migrant presence. Arab States are not immigrant countries like Britain, Australia or the United States. Migrants provide temporary, contract labour. As such, they are almost always accepted as individuals and no family reunion rights or schemes are in place. When their contracts expire it is expected that they will leave the country unless the contract is renewed. Their tenure is the responsibility of their employer who serves as their sponsor and who is also responsible for ensuring that they return home. There is a complete lack of desire for migrant communities to develop into permanent features of the social and cultural landscape. Nonetheless, such permanency has developed *de facto* in many countries simply because of the size of particular expatriate communities.

Paragraph 51 refers to migrants' right of access to social justice benefits, including employment benefits and other social services, such as education and health care.

As discussed above, entry into Arab States is conditional on employment. As there are no local labour laws which protect workers, few rights are granted. In particular, there are no rights to employment benefits, social services, education or health care. While most States stipulate that employers are obliged to provide insurance coverage for their employees, this does not necessarily include medical coverage or provision in the case of death. State education for non-nationals may be provided, but it is not a right. In reality, many migrant workers are forced to educate their children privately.

The Programme of Action of the 2001 Conference contains explicit goals to be achieved in combating racism and xenophobia.

Paragraph 25 "invites international and national non-government organizations to include monitoring and protection of the human rights of migrants in their programmes and activities and to sensitize governments and increase public awareness in all States about the need to prevent racist acts and manifestations of discrimination, xenophobia and related intolerance against migrants".

Paragraph 27 seeks to "promote education on the human rights of migrants…". Public awareness campaigns about the rights of migrants have simply not been developed in Arab countries. There is some evidence that ad hoc projects, developed by individual teachers, introduce students to issues concerning migrants, for example through discussions about human rights. There is no evidence, however, of explicit education policies on these themes.

Paragraph 30 (d) aims "to ensure that migrants, regardless of their immigration status, detained by public authorities are treated with humanity and in a fair manner, and receive effective legal protection… and interpreters particularly during interrogation...".

The action taken by Arab States on this issue leaves much to be desired. There are very few examples of cases where abusive employers or recruitment agencies have been subject to legal proceedings. Migrants are typically poor and lack access to legal representation. Even in those cases where they have been granted legal aid or the pro bono services of human rights lawyers, the cases are rarely resolved because of the length of the legal process. Migrants are rarely offered interpretation services during court proceedings, except occasionally by their embassy. While awaiting trial, migrant workers are usually incarcerated because of their irregular status or they opt to leave the country at the first opportunity in order to escape any further humiliation. Also, when migrant workers are maltreated or discriminated against they are often afraid to press charges. When migrant workers sign contracts they often do not fully comprehend the implications of what they are signing since the documents are seldom in a migrant's native language.

Paragraph 30 (e) encourages "…organizing specialized training courses for administrators, police officers, immigration officials and other interested groups" to ensure that migrants are treated fairly and in a non-discriminatory manner.

Some initiatives have been taken in this field in Lebanon. For example, the Caritas-Lebanon Migrants' Centre received a significant level of funding from the European Union in order to establish a migrant monitoring, education and legal services scheme for the region. A further US $330,000 was given by USAID to the Migrants' Centre and to the International Catholic Migration Commission in Lebanon

to establish a "safe house" for the protection of victims of human trafficking. In addition, the Lebanese Institute for Human Rights, an initiative of the Lebanese Bar Association, has implemented training programmes for lawyers and judges on international law and the human rights of migrants, refugees and asylum-seekers. Similar initiatives have been introduced by the Lebanese NGO Forum.

The Concept of "Xenophobia"

Xenophobia and Migrant Labour

Xenophobia may objectively be seen as an historically universal phenomenon that is said to stem from a fear (a pathological fear) of, or hostility towards, strangers. Originating from small, close-knit communities (*gemeinschaft*) with social closure based on likeness and shared values and beliefs to the exclusion of the "other", xenophobic attitudes and practices are no longer seen as acceptable in modern societal contexts where people of diverse ethnic or cultural origins (*gesellschaft*) must live together (see Ahmed, 2000; Turner, 1993; Said, 1978). Banton (1997: 44) distinguishes between racism and xenophobia where the latter refers to "any hostility based upon beliefs about inherited biological differences" particularly those supposedly characteristic of foreigners. However, racism and xenophobia are difficult to verify empirically unless there are clear indicators institutionalized in law or in administrative procedures (see Jureidini, 2000). As Banton (1997) points out, xenophobia has a psychological dimension: it is a 'phobia". The Oxford dictionary defines a phobia as a "(morbid) fear or aversion". This definition suggests an element of irrationality: xenophobia as a psychological abnormality, rather than a social or cultural phenomenon. The term xenophobia has come into common usage primarily with reference to attacks on immigrants and asylum-seekers.

Yet xenophobia directed at migrants is not always violent or openly hateful. In some ways it can be seen as an expression of a rational fear – for example, the fear of foreigners taking jobs away from nationals,

or the belief that large numbers of foreigners will erode the fundamental cultural and political character of the nation. It is here where Bustamante (2002) is particularly useful in locating the specific source of tension which underlies xenophobic manifestations: the difference in status between nationals and non-nationals and the typical privileges which nationals possess over those who do not formally "belong" to the nation-state (other than through an instrumental relationship guided by economic imperatives). The question that arises, therefore, is whether xenophobia against migrants has a rational basis in the modern context that is based upon possessive nationalistic concerns. Scapegoating, for example, where migrants are blamed (rather than the State or market forces) for the unemployment of nationals, or for a perceived threat to the cultural or genetic integrity of a nation is a form of displacement activity that is xenophobic.

With regard to the GCC countries, three types of indicators provide evidence of xenophobic attitudes towards foreign workers. First, the large number of temporary labour contracts (which exclude the possibility of gaining citizenship) instead of opportunities for permanent employment, demonstrates xenophobic sentiments inherent within these societies. Second, nationals receive preferential treatment within the workplace, whereas non-nationals are disadvantaged. Third, marriage laws restrict nationals from marrying foreigners, requiring government permission. Women are particularly disadvantaged because they cannot pass on citizenship to their foreign husbands or children, while men can.

The State and Migrant Vulnerability

Within the United Nations system there is increasing recognition that human rights violations against migrants are becoming more prevalent. These violations are difficult to counter, despite numerous international conventions, resolutions and documents that aim to harmonize standards. In a recent issue of the *International Migration Review* (Summer 2002), Jorge Bustamante reports on a study prepared

for the United Nations group of experts on the human rights of migrants established by the Commission on Human Rights. In his article, Bustamante offers a long overdue discussion and conceptualization of the "vulnerability" of migrants. Some aspects of this definition of migrant vulnerability are useful but Bustamante does not go far enough in identifying the specific structural and cultural features of the vulnerability of temporary migrant workers within the contexts of both home and receiving country.

Migrant vulnerability is defined as "a social condition of powerlessness ascribed to individuals with certain characteristics that are perceived to deviate from those ascribed to the prevailing definitions of a national. Vulnerability is a social condition associated with the outcomes of impunity for those who violate the human rights of those migrants labelled as deviants" (Bustamante, 2002: 340).

By way of summary, Bustamante (2002) argues that:

1. Neither international institutions (e.g. the U.N.), nor non-governmental organizations have been able to establish credible disincentives that will motivate States to condemn migrant human rights violations within their societies.
2. The degree of exploitation and abuse of migrants within any given society is conditioned by both structural and cultural factors. The structural factor is the differential status between nationals and non-nationals (or between citizens and non-citizens) and the privilege and/or discrimination that stem from this differential status. The cultural factor is the degree of ideological legitimacy a political culture grants to derogatory "stereotypes, prejudices, racism, xenophobia, ignorance and institutional discrimination" (Bustamante, 2002: 339).
3. Violations of the human rights of migrants in a society that does not sanction xenophobic behaviour can "result in various degrees of impunity… [which can be] understood as the absence of economic, social or political costs" (Bustamante, 2002: 339). To this list one might add "legal" impunity: that is, the absence of legal costs for perpetrators of xenophobic or racist behaviour. This impunity is one of the end results of social processes that stigmatize migrants as deviants.

4. Migrant vulnerability is a concept which must be considered within the framework of two different contexts: first, in the position and treatment of migrants in the receiving country and, second, in the relationship between migrants and their home State. The latter is essentially a domestic matter which concerns the relationship between individuals and their own nation-state. Migrant human rights become an international issue when one questions the treatment of non-nationals within a receiving country. Violations of the human rights of expatriate nationals have generally been left by the international community to respective nation-states. However, the disastrous cases of Kosovo, Somalia and East Timor have raised debate about the appropriate role of the international community in intervening in the internal matters of States, particularly where the potential for gross human rights violations is high.
5. Migrant vulnerability also has an economic dimension. Conditions of vulnerability are directly linked to the low cost labour which migrant workers provide. This low cost in turn creates a market demand for their services. If the vulnerability of migrant workers is reduced, this will lead to an increase in cost to recipient countries and will therefore reduce the demand for migrant workers.
6. Migrants do not have the rights of citizens, nor should they. However, non-nationals may be excluded without discriminatory intent by the State. It may be "a de facto abuse of power against those excluded by the distinction [between citizen and non-citizen]" (Bustamante, 2002: 345).
7. There is a "gap" between the level of concern declared for the human rights of migrants and the number of Member States of the United Nations who refuse to ratify the conventions to protect migrants (Bustamante, 2002: 348).

Thus, by definition, migrants are in an underprivileged position as non-nationals. This contradiction between the rights of States to discriminate by enforcing the distinction between citizen and non-citizen and the international human rights of non-nationals must be reconciled.

Furthermore,

> A basic principle of human rights is that entering a country different from his or her own, in violation of that country's immigration laws, does not deprive such an "irregular immigrant" of his human rights, nor does it erase the obligation of a UN member state to protect those individuals (Bustamante, 2002: 345).

By insisting on a general human rights approach, Bustamante provides a somewhat essentialist definition and ignores many of the specifics of powerlessness. The power differential is not only between nationals and non-nationals or citizens and non-citizens. It also stems from the status of certain occupational positions which are more prone to *de facto* abuse. Bales (1997), for example, argues that the new form of contract slavery is a function of economic vulnerability rather than of race, ethnicity or citizenship status.

> In the new slavery, race means little…The common denominator is poverty, not colour. Behind every as sertion of ethnic difference is the reality of economic disparity… Modern slaveholders are predators keenly aware of weakness … rapidly adapting an ancient practice to the new global economy… The question isn't "are they the right colour to be slaves?" but "Are they vulnerable enough to be enslaved?" The criteria of enslavement today do not concern colour, tribe or religion; they focus on weakness, gullibility and deprivation (Bales, 1997: 10-11).

The condition of vulnerability is fostered by the relative poverty of migrants as well as their powerlessness and ignorance. This condition is further exacerbated by the absence of both physical and legal protections. As noted in the Declaration of the 2001 World Conference, (paragraph 9) racism and xenophobia "may be aggravated by inequitable distribution of wealth, marginalization and social exclusion".

Bustamante also discusses the process by which migrant workers are labelled as "deviants" within Arab societies. If temporary migrant workers are smuggled into the receiving country, or if they enter legally but their residency papers and work permits are not renewed at the end of their term, they are vulnerable to arrest, imprisonment and/or deportation. This illegal status also makes them vulnerable to threats or acts of violence. On a mission (undertaken in January 2003) to investigate the mistreatment of maids, the Patriarch of the Ethiopian Orthodox Church, Abune Paulos, observed "[t]his is a very difficult

situation for young women who come from a poor family to work in a foreign country… Almost every woman who comes here to work to assist her poor family has problems, and those who don't, live in fear after hearing about their friends' misfortunes" (*Daily Star*, January 3, 2003).

The Kafala system of sponsorship (which is the standard in most countries) renders the foreign worker both legally and financially dependent on their local employer. In Arab States, Asian and African workers find it almost impossible to arrange their own papers without assistance from local nationals, particularly recruitment agencies. Yet the migrant is responsible for ensuring that the legal requirements are fulfilled. If, for example, an employer does not renew their papers, or if the employee leaves the employer ("runs away"), the worker automatically becomes an "illegal alien" and is subject to arrest. In these cases migrant workers become "criminals" without undergoing any kind of judicial process (Taran, 2000). Conversely, examples of Arab nationals being prosecuted for human rights violations against migrant workers are rare. Physical abuse, restriction of freedoms, withholding of passports, non-payment of wages and exploitation of migrant workers is not uncommon (Jureidini, 2002).

The case of two Sri Lankan women in Lebanon in 2000-2001 highlights some of these issues. These women were allegedly sent (illegally) to work as domestic maids in Syria for approximately 19 months. On their return to Lebanon they were robbed at gunpoint by their recruitment agent and his partner who had sent them to Syria in the first place. On filing a complaint to the police their papers were found to be irregular and they were placed in detention. Ten months later they were brought to court to present their case against the agent. They attended the court, however, as criminals rather than plaintiffs, handcuffed and escorted by police. In the end, criminal charges were never brought against the agent. While the two women were given some compensation (which according to them did not cover their losses) and were repatriated back to Sri Lanka, the agent was free to continue his business and has since been involved in other cases of abuse.

Bustamante's distinction between the vulnerability of migrants in their home country as opposed to their vulnerability in the host

country is overly formalistic: he assumes that international concern for migrants only becomes relevant once a worker has migrated. The two vulnerabilities are not distinct: the vulnerability of individuals and families who are economically needy or discriminated against in their home country contributes to the degree of vulnerability they will experience abroad. For example, migrants who lack sufficient funds to cover the initial costs of migration often take loans and are therefore susceptible to exploitation by recruitment agencies and loan sharks in their home country. These actors may continue to play a role in migrant vulnerability by threatening family members who remain in the home country. The indebted migrant worker is bound to pay off the debt regardless of conditions and treatment in the receiving country.

Temporary foreign contract workers are vulnerable in the receiving country in two contexts: the institutional one and the societal one. First, migrants are vulnerable to discrimination by the State because they are excluded from citizenship rights, exempt from protection by local labour laws and prohibited from organizing or joining labour unions. Second, because of their status as non-nationals, migrants are vulnerable to the xenophobic tendencies of nationals who are politically privileged and who are able to exploit migrants or use them as scapegoats. Without the transposition of international conventions into local laws that clearly articulate the rights of migrants, regardless of their citizenship or legal status, human rights violations are likely to continue. There also needs to be a socialization process that targets the population at large through various types of education programmes which promote attitudes of tolerance (see Mattila, 2001). For these types of deep-reaching legal and societal reforms to take place there must be, *a priori*, political and judicial will. These initiatives would also have to be supported by local trade unions, which traditionally have not been particularly sympathetic to the plight of migrant labourers.

Finally, the reluctance of so many States to ratify UN and ILO conventions for the protection of migrants is a major cause for concern. Governments are still the primary agents in the implementing of international human rights law and are the "guardians of the human rights of all individuals residing in their territories" (Mattila, 2001).

It is widely acknowledged that the most appropriate international convention which tackles the rights of temporary foreign workers, and foreign female domestic employees in particular, is the 1990 United Nations International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (see deBeijl, 1997; Doomerick, 1998; Young, 2000). This Convention is the most comprehensive instrument dealing with the conditions of migrant workers and it is the only one that explicitly addresses temporary contract migrants and includes provisions on migrants who are in an irregular situation legally speaking. However, in spite of the fact that it was passed in 1990 and has recently been the subject of a promotional campaign, this Convention has only just come into force with its ratification in East Timor making up the 20 countries required.

It has been suggested that the lack of support for the 1990 Convention by Western countries has been due to the fact that a) it is "too ambitious and detailed" in its coverage and thus "impractical and unrealizable"; and b) no migrant host country has been willing to adopt it, and so it has become irrelevant (Taran, 2000: 19). Indeed, the list of signatories to the Convention is significant: it is primarily countries from the developing world which send migrants abroad (such as Bangladesh, Ghana, Mexico, Morocco, Philippines, Sri Lanka and Turkey); absent from the list are migrant receiving countries and countries in the developed world.

Similar problems exist with regard to the implementation of International Labour Organization (ILO) instruments dealing with migrant labour (specifically, Convention No. 97, "Migration for Employment Convention", revised in 1949; and Convention No. 143, "Migrant Workers, Supplementary Provisions, Convention", 1975). An ILO working party reported in 1999 that government resistance to Convention 97 is based on the provision that requires States to treat nationals and non-national workers equally and an unwillingness on the part of States to guarantee residence rights to foreign migrants in cases of incapacity to work. This latter provision covers loss of employment and includes requirements for equality of opportunity, fair treatment and the right to occupational mobility. These stipulations were also cited as creating difficulties for State ratification and implementation (see Taran, 2000: 20-21).

Although many governments have based national laws and regulations on elements of ILO conventions, the ILO instruments themselves have proven insufficient in protecting the most common form of migrant worker: temporary foreign contract labour. Two provisions in Convention 143 are problematic. First, the preamble states: "the definition of the term 'discrimination' in the Discrimination (Employment and Occupation) Convention, 1958, does not necessarily include distinctions on the basis of nationality". While this contradicts the provisions for non-discrimination between nationals and non-nationals, it does acknowledge the reality and importance of State sovereignty. For example, a State cannot be held liable for discrimination against a non-citizen who applies for work and is unsuccessful; the right to employment only applies to citizens. While governments may be obliged to allow an unemployed foreigner to remain a resident of the State, it is not obliged to provide employment.

The second problematic component is that Article 11, Part 2, of the Convention excludes:

> Employees of organizations or undertakings operating within the territory of a country who have been admitted temporarily to that country at the request of their employer to undertake specific duties or assignments, for a limited and defined period of time, and who are required to leave that country on the completion of their duties or assignment.

This article was probably originally designed to exempt technical-managerial employees of multinational corporations from the Convention's provisions. However, in practice it also applies to unskilled domestic workers who migrate on the basis of fixed contracts with private sponsors in the receiving country (see ILO, 2000: 73). The current dilemma for foreign domestic workers in the Middle East is that there is no legal instrument, either local or international, which directly addresses the issue of their occupational status. Further, ILO insistence on minimum rates of remuneration are extraneous in countries where no minimum wage laws are in place for certain sectors. These types of stipulations are particularly absurd in fields of unskilled work such as construction, agriculture and domestic work where migrant labour typically undercuts local labour's wage demands.

Debates about the relativism versus the universalism of human rights, particularly in relation to Islam, have thrived since the drafting of the Universal Declaration of Human Rights in 1947 (if not before). At that time, the Government of Saudi Arabia refused to ratify the Declaration because of its objection to Articles 16 (on the freedom of choice of marriage partners) and 18 (on freedom of religion). The Saudi delegate to the UN argued that:

> The authors of the draft declaration had, for the most part, taken into consideration only the standards recognized by Western civilization and had ignored more ancient civilizations which were past the experimental stage, and the institutions of which, for example, marriage, had proved their wisdom through the centuries. It was not for the Committee to proclaim the superiority of one civilization over all others or to establish uniform standards for all the countries of the world (in Ignatieff, 2001).

Ignatieff (2001) suggests that this line of argument was:

> A defense of both the Islamic faith and patriarchal authority. The Saudi delegate in effect argued that the exchange and control of women is the very *raison d'être* of traditional cultures, and that the restriction in female choice of marriage is central to the maintenance of patriarchal property relations.

Ignatieff argues that attempts to reconcile Islam's notions of human rights principles with those of the West have been largely unsuccessful ("bland and unconvincing"). Studies highlighting human rights provisions within Islamic teaching, including analyses of women's rights through re-readings and textual analyses of the Koran, are beginning to proliferate (see Mernissi, 1993; Moussalli, 2001). This scholarly work in the field of human rights is part of an attempt in the Arab and Islamic world to mitigate the "Islamaphobia" sweeping the West (see Conway, 1997).

In a more deconstructionist tone, Franck (2001) points to a double standard when it comes to international condemnation of human rights violations. On the issue of stoning and other extremely oppressive practices against women in Afghanistan, Franck notes that the Taliban rejected foreign criticism and interference by insisting "that they not be

judged by the norms of others". By way of comparison, he suggests that Islamic countries are not alone in rebuffing external criticism. For example:

> Florida's government, after frying several prisoners in a faulty electric chair, has only reluctantly turned to other methods of execution to conform to the U.S. Constitution's prohibition of "cruel and unusual punishment". Yet when America's Western allies tell it that the U.S. system of capital punishment is barbaric, local politicians and courts reply that it is their way and no one else's business, which is precisely what the Taliban say. (Franck, 2001: 195)

The "double standard" theme has been taken up by those who see international human rights provisions as a programme of Westernization in the Arab world. This discourse is often used to express dissatisfaction with Israel's impunity when it comes to their treatment of the Palestinians. Transnational NGOs, such as Amnesty International and Human Rights Watch, have also been perceived as promoting Euro-American values in a way that is arrogant, non-consultative and biased against the Arab world. Having said this, however, there has been a softening of this view in recent years and these organizations are seen to be increasingly "international" (Al-Sayyid & Steiner, 1998).

At the World Conference on Human Rights in Vienna in 1993, there were seven human rights instruments that were identified as requiring universal application. In addition to the Universal Declaration of Human Rights, these were the International Convention on the Elimination of All Forms of Racial Discrimination, the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights, the International Convention on the Elimination of All Forms of Discrimination Against Women, the Convention Against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment, the Convention on the Rights of the Child, and the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families. The intention is that all countries should ratify these conventions and create national laws consistent with their requirements (Taran, 1998).

As Table 1 demonstrates, the record of adoption of these human rights instruments in the Gulf States is poor, with the exception of Kuwait. Few human rights organizations have developed in the Arab world since

the 1980s when initiatives were taken in Tunisia, Morocco, Palestine and, to some extent, Egypt (Sa'eid, in Al-Sayyid and Steiner, 1998). No Arab State has signed the Migrants' Rights Convention.

TABLE 1: ***GCC YEARS OF RATIFICATIONS OF PRINCIPAL INTERNATIONAL HUMAN RIGHTS TREATIES*** (AS OF 21 AUGUST 2002)

TREATY	BAHRAIN	KUWAIT	OMAN	QATAR	SAUDI ARABIA	UAE
CESCR	–	96	–	–	–	–
CCPR	–	96	–	–	–	–
CERD	90	68	–	76	97	74
CEDAW	02	94	–	–	00	–
CAT	98	96	–	00	97	–
CRC	92	91	96	95	96	96
MWC	–	–	–	–	–	–

CESCR The International Covenant on Economic, Social and Cultural Rights
CCPR The International Covenant on Civil and Political Rights
CERD The International Convention on the Elimination of All Forms of Racial Discrimination
CEDAW The Convention on the Elimination of All Forms of Discrimination Against Women
CAT The Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment
CRC The Convention on the Rights of the Child
MWC The International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families

SOURCE: OFFICE OF THE UNITED NATIONS HIGH COMMISSIONER FOR HUMAN RIGHTS

It has been argued elsewhere (Jureidini, 2002) that the following Articles from the Universal Declaration of Human Rights (adopted by the General Assembly in December 1948) are being violated in the Middle East in terms of the treatment of migrant workers by States.

> Article 5:
> No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.
>
> Article 13:
> 1. Everyone has the right to freedom of movement and residence within the borders of each State.
> 2. Everyone has the right to leave any country, including his own, and to return to his country.
>
> Article 23:
> 1. Everyone has the right to work, to free choice of employment, to just and favourable conditions of work and to protection against unemployment.

2. Everyone, without any discrimination, has the right to equal pay for equal work.
4. Everyone has the right to form and to join trade unions for the protection of his interests.

Article 24:
Everyone has the right to rest and leisure, including reasonable limitation of working hours and periodic holidays with pay.

The Cairo Declaration of Human Rights in Islam, which was adopted by the Organization of the Islamic Conference in 1990, seeks to eliminate discrimination against all individuals. The Agreement of the Council of Arab Economic Unity (1965) specifically addressed the issue of migration with provisions for freedom of movement within the region, employment and residence, but at that time these provisions were probably intended only for Arab nationals. In 1968, the Arab Labour Organization developed the Arab Labour Agreement, which was designed to facilitate labour movement in the region and gave priority to Arab workers. These same provisions were reiterated in the 1970s with the strengthening of measures to provide jobs for Arab workers and to remove non-Arab workers from the region. The reduction of non-Arab migrants from the Arab labour market was particularly evident throughout the 1980s as part of the Strategy for Joint Arab Economic Action and the Charter of National Economic Action. The Charter expressed preferences for Arab over non-Arab labour in order to "reduce dependence on foreign labour". In 1984 this doctrine was reiterated in the Arab Declaration of Principles on the Movement of Manpower calling for interregional cooperation (Pires, 2000). The 1990s, however, witnessed a considerable loosening of these principles. While there was a massive exodus of the foreign labour contingent from the Gulf States to Asia and Africa just prior to and during the Gulf War, there has been a gradual reintroduction of cheap foreign labour into most Arab countries since then (see Castles and Miller, 1998). Despite this growth of migrant labour in the region there has been little achieved in the way of regional or international human rights legislation covering Arab or non-Arab temporary migrant workers.

One of the distinguishing features of the mass migration phenomenon in the Gulf region was the explicit attempt to deflect the potential political and social encroachment by Arabs from other regions by diversifying the types of nationalities that were being introduced into society. Although of common cultural, religious and linguistic origins, non-national Arabs were considered a threat, "especially those who have lived in the region since the 1960s or were born there, since they may feel they should have a stake in their country of residence" (*Oxford Analytica*, 2001). Thus, the inclusion of East and West Asians was a political as well as an economic objective. For this reason it is possible to identify xenophobic attitudes towards both Arab and Asian foreign migrants in the Gulf States. In addition, no GCC country permits entry to the holder of an Israeli passport or of a passport with Israeli visa stamps.

The Preference for Nationals and the Asianization of low-skill occupations

Comprehensive figures which breakdown, by nationality, the occupations of migrants in all Arab States are simply not available. Nevertheless, some cursory data indicating the number of migrant workers within some industries are available. For example, in Oman in 1993 the vast majority of those employed within almost every sector (with the exception of mining and quarrying and the State sector) was migrant labour – in agriculture, 73%; manufacturing, 92%; construction 96%; restaurants and hotels, 93%; wholesale and retail, 87%; mining and quarrying, 42%. In terms of occupations, migrants comprise 49% of the work force: administrative and managerial workers, 44%; clerical and related workers, 30%; sales workers, 63%; service workers, 92% and production workers, transport and labourers, 64% (International Labour Organization, 2001).

The above figures indicate the predominance of migrants in the lower end sectors and a relatively equal proportion when compared with the number of Omani nationals in professional, managerial and

technical positions. The high proportion of nationals in clerical positions reflects their position of privilege within the public sector. Similar figures apply to other GCC countries. For example, Girgis (2002) was able to document the distribution of Arab and Asian foreign labour in Kuwait for the years 1989 and 2000. Table 3 illustrates the increasing number of Asians in the unskilled and services sectors. It may be noted that although Arabs outnumbered Asians in the population in 1989 in Kuwait (65.4 % and 33.5% respectively), by the year 2000, Asians had grown to more than half (52.8%) (see Girgis, 2002: 9). The much higher proportion of Asians in the labour force relative to their representation in the population is explained by "the presence of large Arab families with high dependency ratios" (Girgis, 2002: 12).

TABLE 2: ***KUWAIT: DISTRIBUTION OF ARAB AND ASIAN FOREIGN LABOUR, 1989 AND 2000***

	1989		2000	
OCCUPATION	% ARABS	% ASIANS	% ARABS	% ASIANS
TECHNICAL & SCIENTIFIC	73.4	22.3	57.6	35.8
MANAGERIAL	73.7	20.6	61.1	30.3
CLERICAL & GOVT.	78.0	21.3	65.2	33.4
SALES	56.4	43.1	51.4	48.2
SERVICES	20.3	79.2	8.7	91.0
AGRICULTURE	37.1	62.8	26.6	73.3
PRODUCTION	43.2	56.4	32.2	67.5
TOTAL	45.0	54.0	31.8	67.1

SOURCE: GIRGIS (2002)

Table 3 shows the breakdown of both Arab and Asian migrants in all industrial sectors. The number of Asian migrants has increased in all

areas. However, the lower skilled categories, particularly "services" which includes female domestic employees, are dominated by Asian migrants.

There follow some relatively disparate reports of manifestations of xenophobia within Arab States. These range from xenophobia at governmental level expressed through policies that attempt to "indigenize" the population and workforce, to manifestations at societal level, for example concerns expressed by nationals about the undue "influence" of foreigners on local culture and religion. It should be emphasized, however, that evidence of xenophobic attitudes and practices are not meant to be generalizations about Arab culture or people.

In **Kuwait**, in the year 2000, foreign workers included approximately 295,000 Indians, 274,000 Egyptians, 157,000 Bangladeshis, 101,000 Pakistanis and 100,000 Sri Lankans. More than 90 per cent of nationals are employed in the public sector where there are more benefits and the salaries are higher than in the private sector. About 300,000 foreign workers are employed as domestic help, about one third from India and another third from Sri Lanka (*Khaleej Times*, 30 May 2001). The number of foreign workers declined between July 1999 and June 2000 by about 51,000. As of 30 June 2000, the labour force totalled 1.2 million. This represents a decrease of 1.6 per cent on the previous year (ESCWA, 2000).

Measures have been taken to reduce the foreign presence in Kuwait, ostensibly to create jobs for Kuwaiti nationals. These measures include limiting access to free medical and education services and the introduction of a tax on foreign workers (Labour and Social Affairs Minister, Abdel Wahhab Al Wazzan, quoted in *AFP*, "Kuwait to Tax Foreign Workers", 23 December 1999).

The number of foreign workers in **Oman** increased by 34 per cent in 2000 compared with the previous year (*Bahrain Tribune*, 6 June 2001). Recent statements by the Ministry of Social Affairs, Labour and Vocational Training have called for "Omani citizens not to exaggerate their demands for foreign workers in the agricultural sector and for domestic helpers, as there are already many foreign workers in the country" (*Khaleej Times*, 12 March 2001). The largest proportion of the foreign population is composed of Indians and Pakistanis, many of whom are

more skilled than the Omani population and who are willing to work for lower wages. There are around 20,000 Filipinos and 35,000 Sri Lankans, the vast bulk of them working as domestic employees. In attempting to reduce the number of foreigners, the Government has targeted the many thousands whose legal status is "irregular". As with all the Arab countries, annual amnesties are given to those without valid documents as an enticement to leave the country without penalty. Because their passports are usually held by sponsors or agencies, this often means that the relevant embassies are required to provide their nationals with emergency certificates or *laissez passer* to facilitate their departure. Those who do not avail themselves of the amnesty (from fear or ignorance) then become vulnerable to police crackdowns that immediately follow (*Gulf News*, 3 May 2001 and 7 May 2001).

In **Bahrain** there are similar attempts to reduce the foreign labour presence in the country. Urging the private sector to hire more Bahraini nationals, the Minister for Labour and Social Affairs argued it was partly to reduce the remittances sent abroad. Around US $480 million were sent abroad from Bahrain in 1997 (*Bahrain Tribune*, 26 May 1999 and *Gulf News*, 23 April 1999). Other factors cited as reasons for reducing the number of foreign migrants include the "unfair competition" they represent for local labourers and the need to alleviate unemployment and poverty (*Bahrain Tribune*, February 12, 1999). It is estimated that approximately one per cent of foreign workers "run away" from their sponsors and agencies. To reduce the number of illegal foreign workers the transference rules were relaxed in order to allow foreign workers to change sponsors within the country. This allows them to leave abusive and exploitative employers without "running away" (*Gulf News*, 29 November 2000).

The Naim Philanthropic Fund in Bahrain began a programme in 1999 to give domestic employment jobs, currently held by foreign workers, to poor local women instead. The objective of this programme was two-fold: poverty alleviation and "prevent[ing] the negative social, cultural and religious influence these house helpers have on children" (*Gulf News*, 13 July 2000 and 7 February 1999). However, measures intended to protect foreign migrants were also introduced around the same time. By late 2000, the Minister of Labour and Social Affairs

had issued a statement to all embassies, overseas workers' organizations and governments to:

> Take action against abusive recruitment agencies and to educate workers on their rights…[including]…insurance against workplace injury, safety and security in the workplace through international safety standards, annual holiday, passage back home, repatriation and termination indemnity (*Bahrain Tribune*, 4 October 2000).

In June 2002, the Bahrain Government banned all expatriate wives from working; dependents of foreign migrants are now prohibited from undertaking any form of paid employment in the country (*Gulf News*, 9 June 2002). However, in a progressive move, the cabinet approved a decision to allow expatriate workers to change employers without a release letter from their original employer and without having to leave the country. This is tantamount to allowing foreign contract workers to enter directly into the local labour market. The new employer must have a labour permit and must compensate the previous employer for expenses incurred by bringing the migrant into the country in the first place (*Gulf News*, 9 June 2002).

The Government in **Saudi Arabia** has also introduced policies which advantage Saudi nationals in the job market in an attempt to reduce the country's dependence on foreign labour. For example, between 1994 and 1999, the number of jobs filled by nationals increased from 39.2 per cent to 44.2 per cent. This objective is a top priority in Saudi Arabia's five-year plan for 2000-2005 during which time around 200,000 jobs, currently held by foreign migrant workers, will be filled by nationals. In September 2000, the Government announced that all establishments, excluding relatively small ones (less than 20 employees) will be required to ensure that at least 25 per cent of their workforce is made up of Saudi nationals. Prior to this, 5 per cent was the minimum requirement (ESCWA, 2000).

In February 2003, the Supreme Economic Council of Saudi Arabia announced its decision to authorize foreign investment in key economic sectors. At the same time, the Ministry of the Interior announced a decision to reduce the number of foreign workers in the country by half, to no more than 20 per cent of the total population

(the current proportion is just over 40 per cent). Given that there are over 7 million foreign workers in the country, the policy is to repatriate some three and a half million. The arguments for this are based on xenophobic as well as economic reasons. Foreigners are blamed for limiting the number of employment opportunities for Saudi nationals. In 2002, for example, foreigners were banned from driving taxis. It was hoped that this policy would create some 20,000 jobs for Saudi nationals, particularly the young and unemployed (*Gulf News*, 1 November 2002). However, young Saudi nationals have not sought this type of employment and the ban has been ineffective. Migrant workers are also blamed for economic problems because the amount of funds remitted to their home countries is thought to be in the billions of dollars each year. This undermines the national economy. In addition, foreigners are also seen as a drain on public services.

As El-Affendi (2003) has argued, the positive effects of a cheap, expendable migrant workforce are simply not being appreciated. There is an official policy of paying Saudi nationals higher salaries than foreigners. This leads to nationals' income expectations being higher than employers are prepared to pay. In addition, because foreigners cannot invest in property and cannot legally establish their own businesses, expatriate workers are obliged to send their money home. This combination of factors means that Saudi nationals are more likely to play the entrepreneurial roles within the market. Trends indicate that Saudis remain salaried workers for limited periods and leave this workforce to establish their own businesses as soon as possible. In turn, business establishments employ cheap foreign labour to do the work that nationals are just not interested in doing.

Saudi Arabia has the added concern of millions of pilgrims who attend the annual hajj. These are the most frequent violators of visa limitations and include people who want to remain and work in Saudi Arabia or who use this as an opportunity to migrate to other Arab countries.

An Amnesty International report published on 1 May 2000 focused upon human rights violations against Asian workers in Saudi Arabia. It reported that such foreigners were "denied basic protection" by employers, the Government and trade unions. It correctly identified the unique vulnerability of live-in domestic workers because

of restrictions on their movements in terms of changing jobs and travel, confiscation of passports and the withholding of wages. One case cited in the report recounted the experience of a Filipina maid in Riyadh in 1992, who accompanied a married couple to a restaurant. The *mutawa'een* (religious police) accused the group of engaging in prostitution and arrested them all. The Filipina "was forced into signing a statement in Arabic which she thought was a release form… [and was]… sentenced to 25 days' imprisonment and 60 lashes which were carried out" (Amnesty International, 2000).

In Saudi Arabia, sexual assault, humiliation, physical abuse and the withholding of wages are among the major reasons accounting for why foreign housemaids "run away" from their employers. The head of the social services division of the King Fahd hospital (Talal Al-Nashiri) points out that there are on average two to three cases of mistreated foreign domestic workers admitted to hospital every week. Their ailments range from bruises and serious fractures (sometimes from falling from great heights out of the apartments of their employers), to suicide attempts and murder attempts (*Assafir*, 19 December 2002).

In the **United Arab Emirates** (UAE) Indians comprise over half the expatriate workforce (781,000), and Pakistanis (262,000) and other Asians (225,000) make up the majority of the rest. Some 70 per cent of the Indians come from the Kerala region. Those from other Arab countries number around 155,000 (ESCWA, 2000). With a total population of around 2.7 million as of the year 2000, about 85 per cent are foreigners (*Khaleej Times*, 10 February 2000). As in Kuwait, the Government of the UAE is also attempting to limit the inflow of foreign unskilled workers: one measure taken is the removal of indirect incentives such as free health care and education.

In October 1999, the UAE Government announced a ban on the hiring of unskilled Indian and Pakistani workers as an attempt at "restoring the demographic balance" within the country (*Gulf News*, 22 October 1999). However, within a month of the ban companies had begun hiring Nepalese labour "known for being cheap and reliable" (*Gulf News*, 1 September 1999). By July 2000 the number of Nepalese in the workforce had risen to over 15,000 (*Dawn*, 8 July 2000; see also Seedon, 2000). In August 2000 the Government announced the doubling of fees for

labour permits and shortly after that they introduced new visa requirements which stipulate that all foreign workers must have completed at least a secondary-level education (*Gulf News*, 28 August 2000; *Dawn*, 27 September 2000).

In January 2000 in the UAE, the Dubai Police reported that "60 per cent of family crimes and offences involve housemaids" (*Gulf News*, 15 January 2000). According to the study, the influence of housemaids, "many of whom do not understand local culture and traditions and are not Muslim" is creating language and behavioural problems among UAE children in elementary schools.

> One third of the cases referred to the local Public Prosecution Department were cases either filed by or against housemaids, an indication of the poor relations between housekeepers and their sponsors. Maids usually take out the ill-treatment that they get from their employers on the children (*Gulf News*, 15 January 2000).

"One solution", it was argued, "is to hire Muslim Arab housemaids because they understand the children's language and can contribute to their religious education", or that if mothers did not "delegate their responsibilities to housekeepers" many of the problems would not arise (*Gulf News*, 15 January 2000).

In the 2001 National Report on the Development of Education it was argued that along with population growth, globalization and demographic changes, non-Arab housemaids and babysitters were part of the "problems" with which the UAE national education system is struggling. The housemaids "affect kindergarten children's education, language, customs, behaviour and values" (*Gulf News*, 12 September 2001). Further, a study in Sharjah by the Department of Childhood Centres warned against "excessive dependence" on foreign housemaids.

> Children's dependence on the housemaid, along with her keenness to respond to all the family's demands to gain her employer's approval and keep her job, will only create children who are irresponsible, dependent and spoilt (*Gulf News*, 20 December 2001).

The study called for more reasonably priced nurseries so that working mothers would not be reliant upon foreign housemaids; also suggesting that non-Arab maids should be replaced by Arabs. These sentiments

were reiterated by a Sharjah Consultative Council member who suggested a programme of raising public awareness of the negative effects of housemaids on the whole family (*Gulf News*, 13 June 2002).

As in Bahrain, the UAE authorities have issued public statements showing some concern at Government level for the rights of foreign domestic workers. Following a number of cases filed by and against housemaids, Lt. Col. Saleh Karwa'a of the Immigration Department recognized the "lack of laws organizing the relationship between the housemaid and her sponsor… [and]…that recruiting agencies do not translate the employment contracts into the native language of the housemaids to enable them to understand their legal rights and responsibilities" (*Gulf News*, 4 December 1999). However, in spite of this show of concern he went on to warn that those who do not uphold their contractual responsibilities will face prosecution.

The difficult position of foreign domestic workers in the UAE is exemplified by the case of a Sri Lankan housekeeper who claimed she was sexually abused by her UAE employer and his two sons. She was jailed for tearing up the Koran in front of the family "to avenge herself from the 'six-month nightmare' she experienced with the family" (*Daily News*, 24 November 1999).

Finally, a recent report from the UAE Ministry of the Interior argued that there should be an

> Intensification and concentration on the deportation policy to rid the UAE of criminals, illegal residents and useless elements, including those who are harmful to our religion, tradition and social habits … We should also be after those who spend much of their time chasing indecent foreign women in hotels, markets and public places, distracted from their work and spending their money on their lusts (*Gulf News*, 7 November 2002).

With the goal of reducing the foreign population by some 300,000, the UAE issued a four-month amnesty which allowed illegal foreign residents to return to their countries without penalty from 1 January to 30 April 2003. This is only the second amnesty in the country; the first was in 1996 when some 200,000 people left.

Laws and customs pertaining to marriage and citizenship are not commonly featured in debates about xenophobia. Instead, these topics tend to be included within the discourse of patriarchal relations and the control of endogamous descent (see Joseph, 2000).

However, there is evidence of xenophobia found in religious institutions and in the laws and regulations pertaining to marriage and citizenship. It should be stressed, however, that restrictions and prohibitions of marriage to foreigners are bound up with both patriarchal attitudes towards women as well as endogamous citizenship concerns. In Saudi Arabia, for example, all unaccompanied women must be met at the airport by their local sponsors or husbands. Further, there are restrictions on women travelling alone or with men to whom they are not related by either blood or marriage. In all Arab States, marriage laws are invariably bound up with religious law and contain a gender bias: for example, a Muslim man may marry a Christian or Jewish woman without her having to convert. However, non-Muslim men must convert to Islam in order to marry Muslim women.

In almost all Arab States, children cannot inherit citizenship status from their mothers. That is, if a woman is married to a foreigner, their children cannot be granted citizenship of the mother's country of origin. This violates one of the basic principles of citizenship. These rules do not apply to men who marry foreign women (who automatically gain citizenship status upon marriage). Some of the variations on marriage and citizenship rights across Arab countries as well as recent reforms to these rules are summarized below.

In **Bahrain** the establishment of a Human Rights Committee within the Consultative Council in 1999, created the opportunity for a dialogue between human rights groups and other NGOs about citizenship rights and the treatment of migrant workers (*Bahrain Brief*, Volume 1, No. 2, March 2000, Gulf Centre for Strategic Studies). A Human Rights Report for Bahrain in July 2002 noted that during the previous year, the Government granted citizenship to all persons born in the country, including nearly all of the formerly stateless Shi'a of Iranian origin known as the *bidoon* which constitute approximately 3 per cent

of the population. Bahrain occasionally grants citizenship to Sunni residents who are mostly from Jordan, the Arabian Peninsula and Egypt. These changes may be seen as part of a response to general demands for reform on the rights of women in Bahrain – groups have called on the Government to repeal the requirement of a married woman to have her husband's permission to obtain a passport and to travel; and to be able to own or rent property in her own name (*The Wire*, Amnesty International, March 2002).

In **Jordan** the Government has allowed women married to foreigners to pass on citizenship to their children since November 2002, but they may not petition for citizenship for their non-Jordanian husbands (this decree is still subject to approval by the Lower House of the Parliament). Previously, only Jordanian men had these privileges. A child born out of wedlock to a woman of Jordanian nationality would be granted citizenship automatically whereas the offspring of a Jordanian woman married to a foreigner would not (*Jordan Times*, 6 November 2002). Non-Jordanian husbands may apply for citizenship only after fulfilling the requirement of 15 years' continuous residence.

In the **United Arab Emirates** reform of marriage laws seems to be moving in the opposite direction compared with those steps taken in Jordan and Bahrain. Legislation drafted in June 2002 by the ministries of Justice and Islamic Affairs, restricts marriage with foreign nationals, ostensibly to reduce rising rates of divorce, a trend attributed to non-endogamous marriages. This legislation also included suggestions for stricter regulation of foreign nationals gaining citizenship through marriage: currently one must reside in the country for two years after the marriage (*World Tribune.com*, 9 July 2002). In October 1996, a Christian Lebanese national was sentenced by the religious court in al-Ain to one year's imprisonment and 39 lashes for marrying a Muslim woman from the UAE. The court ruled that the marriage was void and immoral because he did not convert to Islam (*Catholic World News*, 15 November 1996).

In **Qatar**, as long as prior official permission is sought (in most cases it is granted), citizens may marry foreigners of any nationality. Qatari nationals may apply for residency or citizenship for their spouses (*Qatar Human Rights Record*, Arabic News.com, 10 March 2001).

In **Oman**, citizens must obtain permission from the Ministry of the Interior to marry foreigners, (excluding nationals of the GCC countries) but permission is not automatic. The lengthiness of this procedure and the number of rejections have resulted in secret marriages within the country. An Omani citizen who marries abroad may find his or her spouse denied entry into the country. Children from such a marriage may also be denied citizenship rights (*Oman Human Rights Record*, Arabic News.com, 12 March 2001).

In **Kuwait**, the law forbids marriage between Muslim women and non-Muslim men and requires men to obtain Government approval to marry foreign-born women (*Kuwait Human rights Report*, Arabic News.com, 14 March 2001).

In April 2002, **Saudi Arabia** announced new measures that require couples to seek permission for foreign marriages. It was argued that foreign marriages are the major cause of the large number of single women and it was also blamed for the rise in juvenile delinquency. There are no provisions for foreign residents to acquire citizenship. There are rare cases when it does occur, but this is usually after an influential person has intervened on the foreigner's behalf (*Saudi Arabia Human Rights Record*, Arabic News.com, 10 March 2001).

In **Lebanon**, despite many attempts to establish a system of civil marriage, marriage remains a prerogative of the respective religious sects within this pluralist country. Interreligious marriages performed abroad (usually in Cyprus) are recognized and in cases of divorce, the courts are obliged to abide by the laws and regulations of the country in which the marriage was registered. As in many of the other States discussed, females marrying foreign males cannot grant citizenship to their spouses, although males marrying foreigners may. The children of foreign women born out of wedlock are not granted citizenship. In such situations, birth certificates are not issued and the child is considered stateless.

In **Yemen**, a Muslim man may marry a Christian or Jewish woman, but Muslim women cannot marry outside Islam. Yemeni women do not have the right to confer citizenship on their foreign-born spouses, but if these couples have children born in Yemen, they have the right to citizenship. A Yemeni woman wishing to marry a foreigner must present

proof of her parents' approval and obtain permission from the Ministry of the Interior (*Yemeni Human Rights Report*, Arabic News.com, 3 September 2001).

Most recently, in **Egypt**, the new Egyptian Nationality Law passed in July 2004 allows the offspring of Egyptian women to be granted citizenship. With a 12-month period in which to apply, the reform could result in up to one million individuals (468,000 families) being granted Egyptian nationality. Significantly, thirty three per cent of those Egyptian women married to non-Egyptian men are married to Palestinians who are not to be excluded, even though the possibility had been canvassed (*Al-Ahram Weekly,* 1-7 July 2004).

Suggestions for Reform

When migrant workers without the proper labour permits are caught they often remain in detention for long periods of time – up to one year. There are no official published statistics detailing the reasons for detention or the average length of stay. In Lebanon the law stipulates that individuals incarcerated under a detention order can remain there for a maximum of 4 days. However, there are regular violations of the law on detention. The major reasons cited for prolonged detention are the difficulties in retrieving the passports of the workers, locating their original sponsors and having their papers replaced by their respective embassies. If they are released, it is argued, they are likely to flee and their cases will remain unresolved.

Amnesty periods have been established in a number of States to allow illegal migrants to come forward without penalty and to arrange for their deportation. Following the expiry of the amnesty period, however, there is usually an intensification of seeking out and apprehending undocumented workers. Measures taken recently in Jordan address many of the problems discussed in this report. It is hoped that these steps will serve as a model for other Arab States though, realistically, these developments will likely be piecemeal.

Contract Standardization in Jordan

Two years of discussions and negotiations in Amman between the United Nations Development Fund for Women (UNIFEM), the Jordanian Government and concerned NGOs has resulted in a "Special Working Contract for Non-Jordanian Domestic Workers". The standardization of this contract – to be signed by the employer and employee, the recruitment agency and ratified by the seals of the Jordanian Ministry of Labour as well as the relevant embassy of the employee – is designed to provide legal protection for foreign female domestic workers who were identified as a particularly vulnerable group. A memorandum between UNIFEM and the Jordanian Ministry of Labour in August 2001 marked the initiation of the project "Empowering Migrant Women Workers in Jordan" that included representatives of the countries from which the large majority of domestic migrant workers come: India, Indonesia, Nepal, Philippines and Sri Lanka (UNIFEM, Press Release, 21 January 2003).

The contract is marked by a number of particularly innovative provisions that seek to implement international standards. Only a few will be discussed in this report. First, the terms and conditions provide that the employer/sponsor takes full responsibility for the establishment and maintenance of the work permit and residency of the foreign employee. If these are not maintained, the employer bears the full legal liability. This is a particularly important condition, for as it currently stands in most countries, the migrant is responsible for ensuring that his/her papers are legally sound. If they have not been renewed and the worker is caught, it is he/she who is arrested and placed in detention until his/her situation has been resolved.

The tenth clause makes it clear that the employer "has no right to withhold the [employee's] passport or any other related personal documents". This is a major breakthrough: this practice has become the norm in all Arab countries and is a violation of an individual's rights. It is used as a method of ensuring that the maid will not "run away" without compensating the employer for his or her costs in procuring the employee from an agency. The contract also stipulates that wages must be paid on a monthly basis and that a receipt, signed by both parties, is required to verify payment. This provision should circumvent

the widespread practice of non-payment that is used to bind the worker to the employer: cases of the witholding of wages for up to six years have been discovered.

The eighth clause stipulates that one rest day per week shall be granted. However, a major limitation of the UNIFEM contract is contained in the latter half of this provision which states that the employee "shall not leave the residence without the permission of the employer". This leaves the door open for severe restrictions on the movement of the worker. If leisure time is to be granted, by all measures and definitions, it should be "free time". That is, what the employee does during that time should be unrestricted as long as it is within the law. One might assume that the decision to retain such a condition was the result of considerable argument and compromise on the part of the UNIFEM officials drafting the document.

Non-Compliance Sanctions

In November 2002, members of the U.S. State Department's Office to Monitor and Combat Trafficking in Persons visited Lebanon and announced that the country had been allocated along with 19 other countries into a "Tier Three" category in terms of the standards imposed by the U.S. Trafficking Victims Protection Act passed in October 2000 (*Daily Star*, 20 November 2002). This means that the State Department will impose cuts in (non-humanitarian) aid to Lebanon unless the Government takes serious measures to curb human trafficking. Sanctions with such heavy financial consequences can be very forceful in motivating governments to take action in relation to human rights abuses. Interestingly, in response to the U.S. threat, the Lebanese Minister of Labour (Mr Ali Qanso) shifted the blame for these issues on to the embassies of foreign nationals, "their shortcomings, their lack of organization" (*Daily Star*, 21 November 2002). For most officials in the Arab world the concept of trafficking is understood primarily as trafficking for the purposes of prostitution. This is a gross misunderstanding of the definition of human trafficking, which

includes the trafficking of foreign female domestic workers and their legal and administrative status as well as their treatment and conditions of employment. That the Lebanese Minister of Labour attempted to foist blame on to the governments of the countries of origin suggests an inability of the Lebanese Government to address the issue directly. However, his comments may also have been referring to accusations made against the Sri Lankan embassy, suggesting possible collaboration in the trafficking and sexual exploitation of Sri Lankan women.

Investigations of those allegations are currently being undertaken by the United Nations Commission for Human Rights. Also, government delegations from countries such as Ethiopia, the Philippines, and Sri Lanka have begun to visit Arab countries to look into abuses of their nationals. For example, following a ministerial visit from a Sri Lankan delegation in December 2002, the embassy advertised for law firms in Lebanon to "handle cases of physical/mental harassment by sponsors and agents, death and wage cases of Sri Lankan migrant workers in Lebanon". There is a general consensus among human rights activists that it is imperative that legal cases be brought before the courts in order to highlight the abuse that occurs within these countries. Such cases must be accompanied by media coverage.

The fact that temporary contract migrant workers are not covered adequately by international conventions or local labour laws in the receiving countries renders them particularly vulnerable to abuse by employers and sponsors. This is especially the case for those who work in relative isolation as live-in maids in private households. Currently, there are few mechanisms available to migrants who have been unjustly treated and there is a lack of judicial and political will to bring nationals who violate the human rights of migrants into the judicial process. The Special Rapporteur of the Commission of Human Rights has urged UN Member States to take specific measures related to migrant women, including:

- The regulation of recruitment agencies
- Legal, social and educational outreach to migrant women
- Training female police officers and protection from male officers
- Training embassy personnel

- Better enforcement of existing laws
- The involvement of trade unions
- The implementation of relevant UN resolutions and reporting mandates
- The enforcement of national labour standards for all workers that conform to international guidelines

(see APIM, "International Instruments and Rights of Migrant Workers": http://www.apim.apdip.net)

While certain governments of sending countries such as Egypt, India, Pakistan, Philippines and Sri Lanka, do occasionally intervene on behalf of their nationals in the Arab States, there is a tendency only to do so in extreme cases. There have been examples where sending countries have implemented sanctions against certain countries where abuses have been widespread (for example, Bangladesh and Egypt have banned women from migrating to the Gulf States to work as housemaids). However, countries with labour-exporting policies (particularly Ethiopia, Pakistan, the Philippines and Sri Lanka) are highly reliant upon remittances form overseas workers and consequently embassies in the host countries are generally reluctant to take serious action that might undermine labour market demand for their nationals.

I have previously suggested further reforms with specific regard to migrant domestic workers in Lebanon: these suggestions may be applied more generally to mitigate xenophobic practices against all migrants (see Jureidini, 2002). The following is taken from that publication.

First, three main categories of violations can be identified:

1) Violence or the threat of violence from employers, recruitment agencies, police and general security forces.
2) Denial of freedom in terms of withholding of passports, restriction of movement outside the residence of employment and limitations on outside communications.
3) Exploitative working conditions, including withholding of wages, long working hours, inadequate or no leisure time and insecure living quarters.

Measures in the Courts

Few cases concerning illegal practices in the employment of foreign domestic workers are brought to the courts. One of the major problems that these women face is that, if abused, physically or financially, they are either not prepared to press charges or cannot afford the legal representation. There are free legal aid provisions through, for example, the Lebanese Bar Association or the Migrant Centre, but an abused employee is usually eager to leave the country as soon as she is able to retrieve her passport or have a laissez-passer issued to travel. If, on the other hand, she wishes to stay in Lebanon, she will be more concerned with finding another employer than with pursuing the legal process: cutting her losses and hoping to earn enough money in a decent household so she can return home to her country with something to show for her period away.

Recommendation

It is of great importance to bring more cases of abuse to court in order to defend the rights of migrant workers. Therefore, as Wijers and Lap-Chew (1997: 209-10) suggest, more facilities should be made available to migrant workers who choose to pursue legal proceedings against an abusive employer. For example, competent translators during legal proceedings, access to free legal assistance and legal representation during criminal or other proceedings, access to legal possibilities of compensation and redress and provisions to enable women to press criminal charges and/or to take civil action against their offenders, such as temporary resident permits during criminal and/or civil proceedings and adequate protection for witnesses.

There are a sufficient number of human rights lawyers and activists in Lebanon who are concerned about these issues. Therefore, there is no reason why these cases should not be brought to court. Legal Aid for migrant workers should be organized in Lebanon, through the auspices of the Lebanese Bar Association, which is the most appropriate organization to coordinate such activities.

It is envisaged that such cases should tackle strategic issues such as the withholding of passports, withholding of wages, physical abuse and substandard employment conditions (including hours of work, poor living conditions, etc.). Such cases would establish legal precedent, but more importantly if sufficiently harsh penalties are meted out, these cases would serve as a warning to abusive employers. In addition, a high level of publicity would serve an educational function within society as a whole, particularly if the judges themselves were to make public statements on the subject. With a sufficient number of cases, the Government would also be more likely to support an education campaign to curb the abuse.

Investment in work permits

In Lebanon, there are two forms of human rights violations that have become part of the normative practices in the employment of foreign domestic workers. These are, first, the withholding of passports and other identity papers by the employer; and second, the restriction of movement. Justifications for both types of restrictions are based upon the following arguments:

Practices such as the withholding of passports are seen as legitimate because both the recruitment agencies and the sponsors/employers have an up-front financial stake in the employment process. The agency, it is argued, requires some assurances because within the first three months they are responsible for replacing the domestic worker if she "runs away". From the employer's perspective the withholding of the passport (at least until the contract period has expired or sufficient labour has been served to work off the money expended) safeguards this "investment". The withholding of wages is legitimated on the same grounds.

The second argument is that restrictions on the movement of domestic workers are required to ensure against employees becoming pregnant, getting diseases or meeting others who may use them to gain entry into homes in order to steal. They might also be tempted by enticements to "run away" and seek ways of earning more money in other ways

(prostitution or freelance domestic work). These justifications are partly based on sincere concern for a domestic worker's personal protection, but also on fears of added complications for the employer: the "poaching" of the employee who may be attracted by other opportunities.

Recommendation

If migrants were able to receive loans that covered all, or a substantial part, of the costs incurred between leaving the sending country and commencing work in a Lebanese household, many of the rationales for the withholding of passports and restriction of movement (and possibly withholding of wages) would be circumvented. While the size of the loans may be large by the standards of the sending countries such as Ethiopia, Nigeria, Philippines, Sri Lanka and Sudan, the monthly salaries of domestic workers would naturally increase if the initial costs were reduced or eliminated altogether.

It would be possible for the loan to be repaid in a relatively short time to an official bank that provides micro-finance loans in the home country, after which all earnings would be retained by the employee who would be free to withdraw his/her labour at will.

Agencies

As some embassies have pointed out to employment agencies, it is their responsibility to care for the migrant whose entry into the country they facilitated in the first place. It is up to the employment agencies to ensure that migrants are placed within decent working environments. Many agencies argue that it is not possible for them to follow up on all the individuals they have placed. However, they should be responsible for monitoring the conditions of domestic workers on a regular (monthly or quarterly) basis.

There are contracts in Lebanon that are signed between agencies and sponsors which make specific reference to the employer's responsibilities to household workers. However, the primary aim of the

document is not to ensure the welfare of the domestic worker but rather to itemize risk factors in order to safeguard the legal and business interests of the agency.

Recommendation

Only one agency in Lebanon has established standardized contractual relations between the sponsor/employer: the agency specifies that "the employer must pledge to protect the domestic worker as he would protect himself and give her medical care, shelter, food, and regular monthly wages to be paid directly". This is to be encouraged. The contract should also reserve the agency's right to investigate whether the employee is receiving her salary and is being treated appropriately. Details should be laid down regarding the employer's obligations in terms of the domestic worker's return ticket home, work and residency permits, responsibility to notify the authorities if she runs away, arrangements in case of the household worker's death and so on.

Recruitment agencies should be regulated in a more stringent manner. This would include strict professional training and legal accreditation. This should be done in close consultation with the embassies of the sending countries.

Contracts

Throughout this report, many examples of problems concerning contracts have been mentioned: for example, the absence of standardized contracts and migrants being coerced into signing contracts even though they do not understand the content because it was not explained or because the language was not comprehended, etc.

Recommendation

Contracts should be standardized across different States through a coordinated approach. This could be done under the aegis of the ILO,

through its local offices. The contract should cover issues such as appropriate standards of remuneration, working conditions, treatment and other aspects covered in this report concerning freedom of movement and ensuring that passports remain in the possession of the employee. Contracts drawn up in Arabic should not be signed by an employee who cannot read Arabic unless an authorized translator, in the presence of a notary or other designated official, has duly advised the employee of the conditions set out. A statement signed by the employee and the translator to the effect that the employee has understood, in her own language, the conditions of the contract should accompany the signing of the contract.

There are clauses within Lebanon's Codes and Obligations of Contracts (COC) which may be useful. For example, Article 233 of the COC provides for the annulment of a contract if it can be proven that it did not reflect the true will of either party, such as cases where a person has signed a contract in a language that he/she cannot read.

Bureau of Migrant Affairs

Young has suggested that the lack of a forum for policy-making and information-gathering on migrant workers in Lebanon has meant that issues that arise tend to be dealt with in an unsystematic fashion, primarily by "diverse ministries and bodies – most notably the labour ministry and the General Security, which is part of the interior ministry" (Young, 2000: 83).

Recommendation

The Ministry of Labour should establish some form of bureau for migrant affairs, liaising with embassies, NGOs as well as agencies and individual employers, to coordinate policies on migrant workers. The bureau should serve as an external consultancy to the G overnment. Such an arrangement would be more likely to have an arm's length approach in protecting migrants' interests and welfare, rather than the current administrative and legal focus of the Government's enforcement agencies.

Corporate Best Practice Policies

While cases of serious abuse are fairly limited in Lebanon, restrictions of movement, withholding of passports and attitudes of condescension towards migrants have become the norm among Lebanese employers. Therefore the following recommendation is made as an attempt to raise awareness.

Recommendation

All social, governmental and private institutions in Lebanon should implement "best practice" measures and inform their employees of the moral and legal obligations regarding the employment and treatment of foreign domestic employees. A good case example is the American University of Beirut (AUB). In August 1999, a severe case of abuse of a Sri Lankan domestic worker by an employee of the University was widely reported in the press (see Haddad, 1999). By February 2000, the AUB enacted its own "Rules and Procedures with Respect to Household Help". The rules require a staff member to register the household worker with the University, with copies of all relevant papers. In addition, they require that household employees retain possession of all their identity papers; staff must ensure that their employees are paid on time (at least monthly) and that they treat domestic employees with dignity and with respect for their rights "as an equal"; and with the threat that any deliberate injury, assault, ill treatment, irresponsible neglect, threats, sexual or physical abuse, or any harassment shall, in addition to disciplinary measures, give rise to legal proceedings by the AUB on behalf of the household employee against the responsible employer or household member.

Disciplinary measures include "verbal reprimand, written warning, termination of housing assignment and termination of employment".

The profession of domestic worker needs to be properly valued in order to change the attitude and approach of many employers. This process will most likely be a lengthy one because it targets behavioural changes.

Conclusion

The contemporary efforts towards the global liberalization of capital and goods markets does not seem to be paralleled when it comes to efforts to create international standards for human migration and international labour markets. One of the most energetic activities of governments is often a ferocious policing of borders to prevent illegal migration, and regulations to control and manage foreign nationals within their borders. Few countries acknowledge the need for human rights specifically targeted towards migrants and temporary migrant labour in particular. The unwillingness of States to ratify international instruments which articulate the human rights of migrants is testimony to a greater concern for the particularistic needs of States over universalistic principles. As a result, we find in the Arab world, widespread violations of human rights standards against migrant workers and perhaps most flagrantly against foreign female domestic employees because of their relative isolation from the public sphere. The rise of nationalism, ethnocentrism, racism and xenophobia has become widespread and the first to feel the brunt of these sentiments are migrants who lack citizenship rights and the protection of national laws and law enforcement agencies.

While some international organizations, such as the ILO and the IOM, are raising awareness of the problems being encountered, little in the way of addressing and making practical and enduring reforms in the Arab States has been forthcoming. Some recent, but still minor, path-breaking activities are currently under way in Jordan through the efforts of UNIFEM and in other States such as Kuwait and Lebanon owing to the activities of human rights NGOs. However, there is still a long way ahead before serious structural changes are put in place to reduce the vulnerability of migrants.

Xenophobia in Japan: Historical Context and New Challenges

Takashi Miyajima

The term xenophobia is defined as an "intense or irrational dislike or fear of people from other countries" (*The New Oxford Dictionary of English*), where the Greek "xenos" signifies "stranger", "foreigner" or "other". The *Commission Nationale Consultative des Droits de l'Homme* referred to xenophobes (people who are xenophobic) as "*Ceux qui ressentent un mal-vivre, qui éprouvent des difficultés de cohabitation, une peur diffuse face à des comportements différents ou exotiques dans leur vie quotidienne*".[1] The key concept in this definition is "*une peur diffuse*" (a diffuse fear). We use the term "xenophobia" (as opposed to the term "racism") to indicate an attitude, fear or ill feeling toward "strangers", which is widely dispersed throughout society. Furthermore, the targets of this reaction are not perceived as "individuals", but as members of a negatively stereotyped collectivity. Xenophobia also has a subjective dimension whereby the sense of fear and/or dislike arises from the dynamics of real or imagined contact with foreigners.

This does not mean, however, that xenophobic reactions do not take a violent or aggressive form. On the contrary, recent cases have highlighted the enduring presence of xenophobic attitudes and their potential for violent manifestation, even in advanced societies. For example, just after German Reunification in the early 1990s, groups of young Germans who feared unemployment and were, in a more general sense, anxious about the future of the country and their place in it, were involved in a series of violent attacks on refugees from non-European

countries. Japan has not experienced such xenophobic outbreaks in the past ten years, despite the rapid increase in the number of foreigners entering the country during this period. In the past, however, a tragic incident known today as the "Korean massacre" took place in Japan. This will be addressed later in this paper.

Aggressive and nationalistic forms of xenophobia tend to appear under the following conditions: (1) the existence of a sense of difference from and/or hostility towards certain minority groups which locals encounter in their daily lives; (2) the occurrence of one or more social, political or economic crises or natural disasters which threaten to erode the existing social order; and (3) political and social leaders who use certain minority groups as "scapegoats" for societal problems.

Bearing in mind these conditions as well as the historical and social context of Japan, I will discuss some key aspects of xenophobia in contemporary Japan.

Isolationist Policy and Historical Contexts

Historically, Japanese political culture has been heavily influenced by Chinese civilization. This consequently led to the adoption of the Chinese notion of "stranger": *i-teki*, where the two components of this term, *i* and *teki*, both signify the "uncivilized barbarians" who lived to the North of China and who were assumed always to have their sights set on the invasion of China. "Stranger" in this sense is comparable with the Greek notion of *barbaroi*, which reflected the Greek sense of superiority over other ethnic groups. When the Western powers called for Japan to give up its 200 year old isolationist policy and begin trading with them, the Tokugawa Shogunate and *Daimyo* (feudal lords) characterized them as *i* and refused their demands. Japanese knowledge of the outer world was limited and they did not recognize the positions of powerful countries such as Great Britain, France, the United States and Russia in the emerging world order.

When China was defeated in the Opium War (1840), however, the situation changed. Japanese political leaders feared that Japan would be colonized and became much more conscious about the acts and demands

of Western powers. However, despite this newfound awareness, the policy adopted by the Shogunate and some leading *Han* (feudal clans) was based on the idea of *joi* (the exclusion of "aliens"). One consequence of this policy was that when Western ships approached the Japanese shore, they were repelled by military force. It becomes clear within this historical context that xenophobia served as a form of self-defence. The military response was a natural one given the perceived threat of colonization, but at the same time it was an absurd gesture since it was not only militarily reckless, but also based upon a very limited knowledge of Westerners and an irrational fear of them. Following devastating counterattacks by the Western fleets, Japanese leaders recognized that the policy based on *joi* could no longer serve as the basis for Japan's approach to dealing with the Western powers. This realization brought about a drastic policy change in the era of the Meiji Restoration.

It is interesting to note that prior to the establishment of the isolationist Tokugawa policy, Japanese attitudes towards foreigners were notably more open and receptive. In the latter half of the sixteenth century, Portuguese and Spanish missionaries and merchants arriving on Japanese shores from Macao and Manila were called *Namban-jin* (Southern barbarians), yet another example of the borrowing of an ancient Chinese word. The Japanese were wary of these *Namban-jin*, but at the same time very curious about them: not only because these foreigners possessed guns, which had not yet been introduced to Japan, but also because the Japanese were in some ways attracted to their civilization and religion. Several influential *Daimyos* (feudal lords) who governed Western regions of Japan, such as Arima, Otomo and Ouchi, willingly made contact with missionaries and even went so far as to convert to Christianity. Here, we can see, the Japanese wariness toward foreigners was tempered by curiosity and an eagerness to know more about them. These attitudes were effectively altered by the isolationist policy that was firmly installed under the Tokugawa Shogunate in 1639. The Japanese became more inward-looking and the country sought to shield itself from developments in the outside world; apart from limited contact with the Dutch for trade-related exchanges at the ports of Nagasaki and Hirado, overseas travel and

contact with foreigners was prohibited. Two hundred years of isolation under the Tokugawa regime contributed to the emergence of the narrow, xenophobic mentality mentioned above.

While this isolationist ideology was quite widespread throughout Japanese society, it is noteworthy that there were always intellectuals eager to learn more about Western science and technology through the limited contact permitted with the Dutch at Nagasaki. Thus, in the eighteenth century, the discipline of *Rangaku* ("Dutch studies") was established, which became synonymous with the study of modern medicine, physics and chemistry. This scientific knowledge was acquired entirely through the medium of the Dutch language, and the Shogunate later founded the *Bansho shirabe-sho* (Institute of Foreign Research), which was chiefly based on *Rangaku*. The young intellectuals and bureaucrats of the Shogunate who studied and trained at this Institute became, in the words of an American historian, "extremely well-educated and knowledgeable about the West".[2] While constituting only a tiny minority among the Japanese, these scholars abandoned both the widespread notion of the "barbarian West" and their xenophobic fear of Westerners.

The eminent ethnologist Kunio Yanagita (1875-1962), characterized Japanese attitudes toward foreigners in the early modern era as follows: "Perhaps there is no nation as desirous as [the] Japanese to peer into the kitchens or even the bedrooms of Western people…. But it is as if to steal a curious look at every movement of these others in the dark. Such excessive vigilance became a Japanese habit".[3]

The term *gaiji* (literally, "people of the outer world"), is still used today in Japan in reference to foreigners. It carries with it connotations of both fear and curiosity and is a legacy of earlier Japanese notions of "foreigner".

From Westernization to Nationalism

The Meiji Restoration (1868) put an end to the feudal Shogunate regime and to the practice of *joi*, at least in terms of governmental policies. In order to modernize the country, it became an absolute necessity

for the new Meiji government to open its doors to Western civilization. Important policy shifts at the beginning of the Meiji Restoration included inviting engineers and scholars from Western countries to work and study in Japan, as well as sending Japanese students overseas. *Bunmei-kaika* (civilization and enlightenment) became the mantra of the times; it reflected the people's positive attitudes towards the opening of Japan to the outside world.

In the 1890s, however, the position of Japan in the international system drastically changed, particularly with regard to other Asian countries. The Sino-Japanese War (1894-95) marked an important turning point. Japan began its invasions of the Korean Peninsula, Taiwan and China, following incursions by Western powers of the sort that Japan had been greatly concerned about in the past. Japan had, moreover, adopted a new vision of international relations with Japan positioned at the top of a hierarchy in which all other Asian nations were seen as "backward", and wherein Japan was envisioned as a rival to the Western powers.

Stemming from such developments, various discourses exalted Japan's so-called "mission" to protect the "backward" Asian nations by helping them to firmly resist Western encroachment and domination. Even the most outstanding intellectuals, such as Yukichi Fukuzawa (1834-1901), altered their views and began to justify Japan's domination of Korea and China. "A sense of superiority over and contempt for Asia (other than Japan itself) came to be paired in Japanese perceptions thereafter".[4] The superiority complex thus seemed to be comprised in equal measure of conceit about Japan's seemingly successful development and a mixture of contempt and pity for the Koreans and Chinese. This combination of factors fostered a new sentiment of exclusion toward other nations which can correctly be identified as a manifestation of xenophobia.

The annexation of Taiwan (1885) and Korea (1910) brought about an increase in the number of workers entering Japan from these territories (see Table 1). They generally held unskilled, lower paying, unstable jobs. Significantly, this was the first time in modern history that Japan experienced a large influx of immigrants of non-Japanese origin.

TABLE 1: *POPULATIONS OF KOREANS AND CHINESE IN JAPAN*[5]

YEAR	INFLOW OF KOREANS	KOREAN RESIDENTS	CHINESE RESIDENTS
1918	17910	22411	12139
1919	20968	26605	12294
1920	27492	30189	14258
1921	38118	38651	15056
1922	70462	59722	16936
1923	97397	80415	12843
1924	122215	118152	16902
1925	131273	129870	20222
1926	91092	143798	22272
1927	138016	165286	23934
1928	166286	238102	25963
1929	153570	275206	29500
1930	95491	298091	30836
1931	93699	311247	19135

What was the reaction to this increasing flow of immigrants? The response was to separate and segregate them from the Japanese people. An example of this is the concentration of newcomers in the pejoratively named *Chosen buraku* (Korean village) and *Nankin machi* (Chinatown). Fukuzawa, the renowned Meiji intellectual mentioned above, immediately following the arrival of the first Chinese immigrants, wrote: "the authorities should supervise and control them severely because it is feared that they could unleash a harmful evil of opium in our country".[6] This kind of segregation was commonplace and attitudes of superiority towards immigrants led to a series of xenophobic incidents. As described below, xenophobic activity at this time was sparked not only by the arrival of immigrants, but was also catalysed by a natural disaster.

OUTBREAK OF A XENOPHOBIC MASSACRE

On 1 September 1923, there was a severe earthquake (7.9 on the Richter scale) in the region of Kanto, which includes the Tokyo metropolitan area. The earthquake and resulting fires almost completely destroyed Tokyo, Yokohama and Kawasaki city. There were 140,000 fatalities, forty times the amount of people killed in the disastrous Kobe earthquake

of 1995. Basic utilities were completely destroyed, and the hundreds of thousands of people left homeless under these extraordinary circumstances were deprived of access to accurate information about events occurring in their cities. The Ministry of Home Affairs and the Military Police (charged with maintaining public order), for their part, were at a loss for how to address the needs of the people, a situation which fed the growing discontent of the population.

Unsubstantiated rumours soon began to spread: "lawless Koreans are setting fire to houses one by one"; "Koreans are poisoning the wells in Tokyo one after another"; "Koreans with guns and other weapons are now marching on Tokyo". Accurate or not, the Ministry of Home Affairs and the Metropolitan Police Headquarters sent out a wire alerting police offices in Tokyo about this supposed attack. Although it was later confirmed that all of the rumours then circulating were completely groundless, in the meantime the press caught wind of them and began reporting the supposed "news" about the Korean revolt.

This course of events led to a tragic massacre. Those who "looked like Koreans" were immediately lynched and killed in the streets by ex-soldiers, members of Young Men's associations, vigilantes and other Japanese citizens calling themselves the *jikeidan* ("vigilance bodies"). Some members of the police forces also took part in the murders. The *jikeidan* eventually turned into terrible, uncontrolled lynch mobs that the Metropolitan Police then attempted to disband.[7] After a week of rampage, the Japanese army finally intervened in order to suppress the *jikeidan*, thus putting an end to the slaughter. Around 2,800 people had been slain; approximately 5 to 10 per cent of these are estimated to have been Chinese and Japanese people mistaken for Koreans.

Although these events transpired more than 80 years ago, understanding them helps shed light on some aspects of current manifestations of xenophobia in Japan.

First, the notion of "lawless Koreans" was a gross stereotype. Most members of the *jikeidan* had neither personal contact with nor accurate knowledge about Koreans living in Japan. Thus, the idea that the Koreans were a real and credible threat was simply a fabrication.

Second, despite the widespread belief that the Japanese were superior to the Koreans, the Japanese nonetheless feared them to a certain

degree. This can partially be explained by the fact that there was a general awareness of the exploitative conditions under which Koreans were working for their Japanese overlords, as well as of Japan's repressive occupation of the Korean Peninsula. The Japanese were afraid that Koreans in Japan might commit acts of revenge for these various transgressions.

Third, the Japanese Government and police did not take sufficient steps to protect minority groups; on the contrary, they played a role in exacerbating the situation by allowing the Koreans to be used as scapegoats in a situation of public crisis. This congruence of factors explains why it was so difficult to control the xenophobic actions of some Japanese, gripped by uncertainty and fear in the aftermath of the earthquake.

War and Xenophobia

Xenophobia was also evident (although on a larger scale) in Japan during the Second World War, and was propagated primarily by military authorities. Xenophobic propaganda about the enemy was omnipresent, in which the image of the "barbarian" played an important role. The catchphrase of the anti-English-speaking countries propaganda campaign, *Ki chiku Bei-Ei*, provides a typical example: *Bei-Ei* means the United States and the United Kingdom, *ki* means "cruel devil" and *chiku* means "beast". Propaganda of this sort was used to sway the minds of the Japanese masses who, ironically enough, had been so pro-American only a decade earlier that they gave a fervent welcome to Babe Ruth and other American baseball players!

Of course, the Japanese people as a whole did not uniformly accept this propaganda. Those who were highly educated did not take the slogan *Ki-chiku Bei-Ei* seriously. However, the majority of people, especially in the lower classes and the peasantry, accepted it because most of them had received only primary-level education based on *kyouiku-chokugo* (Imperial Education Prescript) which emphasized a traditional morality, largely based on the principle of loyalty to *Tenno* (the Emperor). Also, these classes had little access to information about the world beyond their own communities. They were therefore easily manipulated by their own community leaders: the various small landowners and

factory owners, primary school teachers, heads of police stations, proprietors of retail shops and so on who constituted what the political scientist Masao Maruyama described as the "pseudo" or "sub-intellectuals", referring to the lower-ranking yet principal supporters of the Japanese *Tenno* system and its fascistic ideology of ultra-nationalism.[8]

In addition to the lower classes and the peasantry, by the end of the war, there was also a large contingent of young, xenophobic Japanese whose only education was in the nationalistic and chauvinistic wartime system. Unlike the generation before them, they had experienced neither liberal education nor freedom of the press. Consequently, a large majority of this generation fully embraced the notion of *Ki-chiku Bei-Ei*. Many kamikaze pilots were conscripted from this age-group.

Not surprisingly, immediately after the defeat of Japan in 1945, the country was characterized by a generalized anomie – social instability resulting from a breakdown of standards and values. This was especially marked among the youth who had so thoroughly committed themselves to wartime anti-American ideology. After Japan's defeat, anti-American propaganda was swept aside and, with the appearance of American soldiers in the streets of Japanese cities, the image of *Ki-chiku Bei-Ei* was swiftly eradicated and replaced with images of "democratic" and "friendly" Americans. Of course, the United States occupation forces played a significant role in the manipulation of Japanese public opinion during that time, and Japanese people were quick to accept the new images of foreigners being offered to them.

Some Lessons

Some lessons can be drawn from the historical experiences outlined above. For long periods of time the Japanese had little contact with foreigners and remained largely inward-looking as a nation. These characteristics perpetuated xenophobic attitudes in Japanese society. Various crises affecting Japanese society throughout history have shown the vital role that mass media and education play in inciting xenophobic reactions within an insular society. As was shown by the incidents of 1923 and by the hostilities during the Second World War, people are more likely

to act based upon prejudicial fear if the authorities restrict their access to accurate information. Thus, one lesson that Japan has learned from its past is the importance of the freedom of the press, an ideal that has been emphasized in post-war Japan.

Education reform, above all concerning primary education, was also regarded as crucial in order to overcome ignorance and ethnocentric attitudes. The *Kyouiku choukugo* (Imperial Education Prescript) was abolished soon after the war. All forms of antagonistic nationalism were forbidden by the Japanese Constitution of 1947, which declares: "Aspiring sincerely to international peace based on justice and order, the Japanese people forever renounce war as a sovereign national right and the threat or use of force as a means for settling international disputes" (Article 9).

In order to overcome the stereotypic perceptions of foreign nations that were widespread in Japanese society it was necessary to greatly increase the amount of contact that the country had with other nations. However, the Cold War political climate, which intensified during the late 1940s/early 1950s, made it difficult for Japan to create and maintain friendly relations with nations that did not belong to the Western bloc. The situation was even more complex with regard to neighbouring nations; issues left over from the war, the historical legacy of Japan's colonization attempts, as well as ideological differences between neighbouring political regimes made it difficult to construct open and frank relationships. Thus, three neighbouring nations, the USSR, China and Korea (especially North Korea), all geographically and politically important, remained politically remote and unknown.

Structural Discrimination: "Zainichi Koreans"

The most predominant immigrant ethnic group in Japan since the Second World War has been the Koreans. In spite of the liberation of the Korean peninsula from Japanese colonial rule, about 600,000 Koreans chose to remain in Japan. In this section I will examine Japanese attitudes towards Koreans residing in Japan.

The term "*Zainichi* Koreans" refers to those Koreans (and their descendants) who entered Japan during Japan's colonial rule of Korea and who possessed Japanese nationality until 1951. The term *zainichi*, meaning "long-term resident of Japan", is used to distinguish these Koreans from the "new" Koreans who came to Japan after the war. The "*Zainichi* Koreans" numbered around 600,000 in the 1970s and 1980s, meaning that very few of them became citizens of Japan. Today, roughly 500,000 "*Zainichi* Koreans" remain in Japan: about two-thirds of them are estimated to be second- and third-generation Koreans who were born and raised in Japan. The majority of "*Zainichi* Koreans" have been granted permanent residence status.

In spite of this established status as residents, Koreans were discriminated against on the grounds that they were not Japanese nationals: they were excluded from the social security system (except for minimal public assistance) and were treated unequally with regard to employment opportunities and benefits. It was only in 1982 and 1986, respectively, that the National Medical Insurance and National Old Age Pension – available to the jobless and the self-employed – were made available to all foreign residents. Does this mean that the old sentiment of contempt for Koreans discussed above no longer exists? The situation of Korean residents has changed considerably from that of the first wave of immigrants who arrived in the 1920s. Their proficiency in the Japanese language and the level of education of the third generation are no different from those of ordinary ethnic Japanese. In this sense, it might be said that contemporary "*Zainichi* Koreans" constitute a sort of "invisible minority": they are not physically or culturally distinguishable from the Japanese. The historical emphasis on the stigmatization of Koreans as "backward" has been diminished.

However, Koreans have been treated less favourably in the mainstream labour market of Japan – they are largely excluded from employment with large Japanese companies and also from the public sector.[9] Koreans who seek this type of employment often resort to using a Japanese name in order to avoid discrimination.

An important example of this type of discrimination emerged in 1970. A young Korean who had been offered employment as a factory worker by Hitachi, one of the leading companies in Japan, was informed

two weeks later that his offer of employment would be cancelled because he had falsified his nationality on his curriculum vitae. He took Hitachi to court, demanding the recovery of his position, and finally won the case in 1974. This lawsuit was significant because it opened the door for many other cases of employment discrimination against Koreans to be reported and discussed openly in the courts and in the media.[10]

Why does this type of discrimination occur? There are few differences in language, religion or educational achievement between Japanese and "*Zainichi* Koreans", in particular second- and third-generation immigrants. Several explanations account for such discrimination and the xenophobic sentiment underlying it. For example, one might explain it in terms of historical legacy: these attitudes are remnants of the social and cultural prejudices of the Japanese against the descendants of colonial labourers. Certainly such a perception of *Zainichi* is to be found among the elder generation of Japanese who were educated before the war. However, this explanation is not entirely satisfactory because even ethnic Japanese who were not subject to this xenophobic socialization process tend to feel a certain "difference" between themselves and ethnic Koreans.

Another explanation that accounts for this discrimination can be found in so-called fatalist or essentialist views of difference rooted in notions of birth or blood ties, as B. Armstrong has argued. According to Armstrong, the very idea of the nation in Japan is based on a nationalistic Japanese identity, such that the criteria for membership in this imagined community are both "cultural and biological".[11]

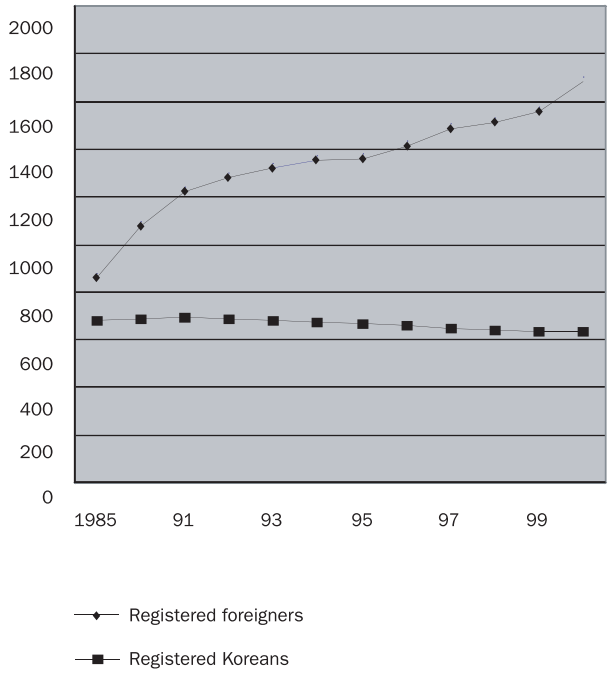
It might seem odd that such a view was still held in the 1970s by a modern, large-scale, multi-national company such as Hitachi. However, the fact that this was indeed the case reflects the norms of Japanese society at the time, particularly those relating to community membership.

The New Wave of Immigration

The second half of the 1980s marked a turning point in Japanese immigration trends: there was a sharp increase in the number of foreigners arriving from other Asian countries and even from some South American countries. This is not so surprising if one takes into account the relatively

high wages combined with the labour shortage in Japan, as well as the considerable wealth gap between Japan and the source countries. The revision of the Immigration Law in 1989 accelerated this trend, making it easier for companies to hire skilled foreign workers and trainees.

CHART 1: *POPULATIONS OF REGISTERED FOREIGNERS AND KOREANS (THOUSANDS)*



Although the Japanese economy slid into recession in the latter half of the 1990s, the number of foreigners in Japan has nonetheless continued to increase without interruption (see Chart 1). This might best be explained in terms of demographic changes in Japanese society: the population is ageing while the birth rate is decreasing and there is a considerable rise in the average level of education attained. As Chart 1 shows, Koreans are no longer the predominant group of registered foreigners in Japan. Moreover, what is noteworthy is that many of the non-Korean foreigners constitute what we might call "visible minorities" in the sense that they can be relatively easily distinguished from the Japanese because of their physical features, languages spoken, religions practised and so on.

Table 2 shows the number and the percentage of registered foreigners in 2001 (registration is required of foreigners staying more than 3 months).

TABLE 2: *NUMBERS OF REGISTERED FOREIGN RESIDENTS IN JAPAN (2001)*

COUNTRY	NUMBER	%
KOREA	632,405	35.6
(PERMANENT RESIDENTS)	(495,986)	(27.9)
CHINA	381,225	21.4
BRAZIL	265,962	15.0
PHILIPPINES	156,667	8.8
PERU	50,052	2.8
USA	46,244	2.6
THAILAND	31,685	1.8
INDONESIA	20,831	1.2
VIETNAM	19,140	1.1
UK	17,527	1.0
OTHER	156,724	8.8
TOTAL	1,778,462	100.0

A brief discussion of the characteristics of these main immigrant groups is useful in understanding what these figures signify.[12] Chinese men registered in Japan consist – for the most part – of students, trainees, engineers and skilled workers; many Chinese women stay in Japan because they are married to a Japanese. The Chinese immigrant community has tended to maintain their own culture and social networks. The great majority (about 85%) of Filipinos registered in Japan are women. They typically enter and stay in Japan either as "entertainers" (singers, dancers or hostesses in the leisure industry) or as spouses of Japanese. Registered foreigners from Brazil, Peru or Argentina, largely *Nikkeijin* (descendants of Japanese who had emigrated to those countries), typically come to Japan to work as labourers because of economic difficulties in their home countries. The revised immigration law grants them a special status: they are eligible for long-term residence without work restrictions (and with the possibility of a three-year extension). Eighty per cent of *Nikkeijin* are employed as low-level skilled workers in

manufacturing, for example in the automobile industry. Despite their physical similarities with the Japanese, they are sometimes marginalized in Japanese society because of their lack of fluency in the Japanese language and cultural differences.

XENOPHOBIA IN CONTEMPORARY JAPAN

With this increase in the number of foreigners entering the country, Japanese perceptions and attitudes have shown signs of change. One positive change is that the Japanese have developed differentiated perceptions of foreign individuals, which seems to be a consequence of their growing contact with various foreign residents. *Gaijin*, the stereotypic notion of outsiders, has been used less and less, especially by those members of Japanese society who have regular contact with foreigners: for example, volunteer workers at NGOs, schoolteachers, Japanese teachers, churchgoers, students, and so on.

Yet, there are still members of the population who react negatively when faced with the different cultures and behaviours associated with foreigners. No serious manifestations of xenophobia have occurred in the last 20 years, unlike what we have seen in the 1990s in Eastern Germany and the suburbs (*grandes banlieues*) of Paris. Structural factors, like the rising unemployment rate in Japan, do not seem to be causing a xenophobic backlash, as has occurred in many other countries. However, even if negative reactions toward foreigners do not take the form of direct physical aggression or verbal hostility, xenophobic attitudes can manifest themselves in other ways. The following section discusses some manifestations of xenophobia in Japan in the 1990s.

First, there have been several instances of rumours being spread in the suburbs of Tokyo (specifically in Toyohashi city where Brazilian workers are concentrated) that Japanese residents had been "attacked by *gaijin*". The term *Gaijin* in this context is a pejorative connotation of the foreigner that implies an incomprehensible stranger. Local boards of education in communities where the rumours were circulating even decided to escort pupils to school. But because no one had actually declared that they themselves had been victimized, the police could

discover no evidence that any such attacks had ever taken place. The rumours seem not to have been based in fact, but were driven by an anxiety or an imagined fear about the effects of an increase in the number of foreign residents. The real victims of these rumours were, of course, the foreign residents living in these communities who had then to deal with the suspicions and accusations of the community.

The second example is discrimination against foreigners when they try to rent houses or apartments. Until recently, many real estate agents have been reluctant to mediate between landlords and foreign clients. Consequently, for foreigners there is severe shortage of available housing. In their defence, real estate agents and landlords claim that differences in language and culture can cause major communication issues which are best avoided altogether by not renting to foreigners. However, it is obvious that such statements are reflections of xenophobic attitudes. By assuming that all foreigners do not know how to communicate in Japanese or are not familiar with Japanese customs, they do not take into account individual differences. In addition, landlords tend to refuse a priori contact with foreigners whom they imagine may be culturally different. Japan is a signatory country of the International Convention on the Elimination of all Forms of Racial Discrimination, and such discriminatory treatment of foreigners in search of housing should therefore not be tolerated.

Another example which illustrates that xenophobia still exists in Japan concerns the involvement of the authorities and the mass media in disseminating rumours similar to those mentioned above. Japanese police, who are proud of the relative "security" of the country, have been troubled by falling arrest rates for crimes committed and by the increase in the number of criminal acts committed by foreign nationals. The police thus began, in the latter half of the 1990s, a campaign against the "criminality" of foreigners. For example, in the suburbs of Tokyo, police circulated leaflets that urged, "Don't be caught off guard, there is a growing number of illegal and delinquent foreigners". It has never been empirically demonstrated that the crime rate among foreigners has in fact risen or is particularly high in Japan. It is true that the absolute number of arrests of criminal suspects of foreign origin in 2000 is roughly double that of 1990, but we have to bear in mind that the foreign population

(other than the *Zainichi*) doubled as well over that same period. Such an excessive campaign against the presumed "criminality of foreigners" can only serve to exacerbate xenophobic tendencies within Japanese society. The Assembly for Foreign Residents of Kawasaki City (discussed later) has protested against this sort of scare-mongering.

It is worth mentioning that older, more blatant types of xenophobia against Korean residents have occurred in Japan's more recent history as well. Following the bombing of a Korean Airlines plane in 1987, which killed numerous Japanese passengers, students attending a Korean school (that was said to be under the influence of North Korea) were threatened and in some cases physically attacked by activists who belonged to extremist right-wing groups. In this case, the threats and attacks were the product of an amalgam of inherited prejudices about Koreans and anti-communist sentiments.

The Evolution of Japanese Perceptions and the Appearance of New Foreign Actors

When discussing attitudes towards foreigners in Japan it is necessary to note a positive aspect of the evolution of Japanese society in the 1990s: its "internationalization". Paralleling the increase in the number of foreigners entering the country, the number of Japanese leaving the country on business or for tourism, study and other purposes also increased considerably. The total number of Japanese travelling abroad in 2000 amounted to about 18 million, 14% of the country's total population.

The number of Japanese residing in foreign countries also increased to about 850,000. It is natural, therefore, that Japanese perceptions of other nations have become more differentiated and less essentialist. More concrete, richly articulated images of foreigners have been formed, and these have partially replaced the more simplistic stereotypes of the past.

Of particular importance are the changing attitudes of the younger generations. For Japanese youth, who are free from old prejudices against Koreans as colonized people, "*Zainichi* Korean" youth now appear as equals in social networks. Evidence of this is that the number of Japanese-

Korean intermarriages has increased remarkably. The number in 1999 was 2.6 times as many as that of 1975 (see Table 3). In the 1990s the annual number of Japanese-Korean intermarriages was more than 80 per cent of the total annual number of Korean-Korean marriages recorded in Japan.

TABLE 3: *NUMBER OF INTERMARRIAGES BETWEEN JAPANESE AND KOREANS*[13]

YEAR	NUMBER	INDEX
1975	3548	100
1980	4109	116
1985	6178	174
1990	11661	329
1995	7364	208
1999	8297	234

This dramatic change can be explained by generational shifts. Most young "*Zainichi* Koreans" are third-generation descendants and have been educated in Japan and share many social and cultural experiences with Japanese of the same generation. The younger generations, socialized differently from their elders, have come to perceive their Korean friends as individuals rather than as members of a homogeneous group of "Koreans". Because they have been able to "individualize" in this manner, they can resist the pressures they might receive from their parents, who might look unfavourably upon Japanese-Korean marriage.

With this in mind, it can be argued that the emphasis on distinguishing each person as a distinct individual seems to have been an important first step in overcoming xenophobia in Japan: this entails the ability to not categorize foreign residents stereotypically and to not see them as merely members or representatives of some larger collectivity.

Another significant aspect of change in Japan concerns voting rights. In the 1990s, many NGOs whose purpose was to assist minorities were organized in Japan. Furthermore, awareness about minority rights in other countries, especially European countries and the United States, was expanding. It is above all activists among the "*Zainichi* Koreans" who have capitalized on this change in attitude. The granting

of voting rights to foreigners for local elections in Denmark, Holland, Sweden and other Western countries was of particular interest. "*Zainichi* Korean" groups have demanded that the Japanese Government allow settled foreigners to vote in local elections. This demand has received widespread support from other long-term foreign residents of Japan. According to a survey of "foreign citizens" living in Kawasaki conducted in 1992 by Kawasaki City, 80% of respondents residing in Japan for 10 or more years answered that it is necessary for them to be given the right to vote in mayoral and city-council elections[15] (see Table 4).

TABLE 4: *OPINIONS ON THE NECESSITY OF VOTING RIGHTS IN MAYORAL AND CITY-COUNCIL ELECTIONS* (1992)

LENGTH OF STAY	VERY NECESSARY	RATHER NECESSARY	TOTAL
LESS THAN 3 YEARS	8.3%	29.9%	38.2%
3 TO 10 YEARS	18.0	36.0	54.0
MORE THAN 10 YEARS	53.2	26.9	80.1
TOTAL	29.8	30.1	59.9

Attitudes among the wider population to this overwhelming desire for voting rights on behalf of foreign residents was unknown until an opinion poll was conducted by the *Asahi Shimbun* newspaper in 1994, which asked a sample of people with Japanese nationality whether they agreed or disagreed with "*Zainichi* Koreans" having the right to vote in local elections. 47 per cent said they "agreed", while 42 per cent "disagreed". More interesting was that in the Kinki region (including Osaka, Kobe and Kyoto), where many "*Zainichi* Koreans" live, the number of people in favour rose to 57 per cent (and the number against dropped to 31 per cent). Not surprisingly, younger respondents were also strongly in favour (more than 60 per cent). It is noteworthy that in a region where "foreigners" are concentrated, the opinion is more favourable for their political participation, whereas the inverse is true of certain European countries like France. From 1993 to 1995, many municipal and certain prefectural legislations (including that of Kyoto) adopted resolutions petitioning the central government to allow foreigners to vote in local elections.

At the beginning of the 1990s, an American anthropologist argued that the Japanese were still proud of their "uniqueness" and therefore reluctant to fully assimilate ethnic minorities through the granting of citizenship rights.[16] This observation still holds to a certain extent in contemporary Japan, but it overlooks important recent changes in Japanese attitudes, especially, as noted above, with regard to the younger generation.

New Challenges

The year 1996 marked a turning point in the politics concerning the integration of immigrants, at least at the local level: a system enabling political participation for foreign residents was established. This implied a shift in perspectives regarding the role of foreign minorities within Japanese society – that is, from viewing them as people in need of help to viewing them as active participants in social and political life. Two important developments precipitated this change.

In 1995, a "*Zainichi* Korean" took legal action against a local government for the denial of voting rights to permanent residents in local elections. Japan's Supreme Court dismissed the Korean's case, but also ruled: "Among foreign residents there are permanent residents with particularly close relations to local public authorities. To confer by legislation to such foreigners the right to vote in mayoral and community-council elections, in order to respect their will, would not be unconstitutional". This ruling set an important legal precedent and paved the way for legislation allowing for the local-level political participation of foreigners with permanent residency in Japan.

This decision also seems to have affected Japanese opinions of foreign residents. Demands for political participation by foreigners who have been long-term residents of communities and who may potentially become citizens are coming to be seen as legitimate. The expression "*gaikokujin shimin*" (foreign citizen), which had never before been heard, came to be used in many local-governmental bodies.

Another key development was, as briefly mentioned above, the establishment of numerous NGOs to assist immigrants in Japan with

language, accommodation, health, welfare and education issues. There is a great diversity among foreigners living in Japan, there are those who have been educated in Japan and are therefore linguistically competent and who have grasped social customs. At the other end of the spectrum are those who face a variety of cultural and social barriers. The activities of NGOs have been aimed at empowering the latter, providing them with the cultural resources which enable them to participate more fully in Japanese society.

In December 1996, Kawasaki City, a large, high-tech industrial city neighbouring Tokyo (population: 1,250,000), founded the Representative Assembly of Foreign Residents, which is comprised of 26 foreign-resident representatives, each serving a term of two years. This body was established as an initiative by the mayor and was supported by a vote from the municipal assembly, in consideration of the substantial number of foreigners in the community and the importance of including them within the political arena. The Assembly is a consultative institution which has the authority to decide its own agenda and to conduct investigations that are deemed necessary for deliberations. It is endowed with a specific legal status, bestowed in order to offset its anticipated weakness (according to U. Andersen, while the consultative institutions of foreigners have some legitimacy, they generally have no power – they only have influence where their arguments are strong and because of the size of their constituent groups).[17] Following Kawasaki's lead, several other local governments, in Tokyo, Kanagawa Prefecture, Shizuoka City, Hamamatsu City and Hiroshima City, have subsequently established similar assemblies.

In Kawasaki, since the establishment of the Assembly, the notion of "foreign citizen" or of "citizenship free from nationality" has been used by administrations and has achieved common currency on the Japanese street. A sign of the level of acceptance and legitimacy given to the Assembly can be seen by the fact that the first proposal it made, about the ending of discrimination in housing, effectively gave birth to the Kawasaki City Housing Ordinance in 2001.

Political advances have also been made at the national level: an initiative extending voting rights to foreigners was tabled in 2000. Four political parties cooperated to present a bill to the House of Commons

(still under deliberation today) entitled the "Bill for Voting Rights in Local Elections for Foreign Permanent Residents", which would confer the right to vote on foreign permanent residents across Japan in both municipal and prefectural elections. The bill is a relatively small step in terms of its effectiveness in achieving universal suffrage; the prescribed range of eligible voters would be limited, and foreign residents would not have the right to stand for election. However, presentation of this bill is a definite advance in the recognition of foreign residents as full, contributing members of Japanese society.

Conclusion

What these new challenges imply is a positive transformation in the attitudes of Japanese people toward foreign minorities. Despite this important change in public opinion, however, the present situation is still complex and we cannot be simple optimists.

Xenophobic reactions can be produced as a reaction to the supposed criminality and delinquency attributed to a growing population of foreign origin. As discussed above, the anti-criminality campaign against foreigners advanced by police authorities is one example of this. In a similar vein, the right-wing Governor of Tokyo created a stir when, at a public ceremony, he used the out-of-date, pejorative and contemptuous expression *Daisankoku–jin* (literally "third nationals") in reference to foreigners, as if they were all criminals. This statement sparked strong protests from foreign residents, with the support of various organizations and the mass media. Owing to the current political and social climate in Japan, characterized by anxiety and insecurity about domestic upheaval, it is possible that such statements by political leaders could again contribute to the phenomenon of using foreigners as scapegoats.

Another cause for concern is the anticipated increase in foreign pupils who do not succeed in Japanese schools, and the reactions of Japanese society to this problem. In France, for example, the general academic weakness of immigrant children and the delinquency associated with this phenomenon have been used by the extreme right in

promulgating the anti-immigrant agenda in that country. Will Japan, in the near future, face similar difficulties?

Certainly, the Japanese education system is not adequately prepared for dealing with foreign children who have only recently arrived in the country. Curricula are organized around Japanese culture and language (composed of many Chinese words and Chinese characters, called "*kanji*"), one of the reasons that foreign children – apart from those from East Asian countries where Chinese-based words and characters are commonly used – face high rates of scholastic failure. The rate of non-attendance by foreign students at secondary schools sometimes reaches more than 40 per cent.[18] This is common in certain urban communities in the Tokai Region, where there are dense populations of foreigners from Latin America. Some mass media have issued exaggerated warnings to the local education board and the police about this problem, while teachers and supportive associations have tried to help foreign students achieve a greater measure of success in their studies.

This discussion shows that there have been numerous positive developments in the integration of foreigners in Japanese society. We cannot, however, dismiss the possibility of the re-emergence of certain xenophobic tendencies in Japan in the future.

1. "Those who feel an intense or irrational dislike or fear, who have difficulty cohabiting with people from other countries, and who are afraid when confronted in their daily lives with different or exotic behaviour." *Lutte contre le racisme et la xénophobie*, La Documentation Française, 1991, p.6.
2. Passin, H., "Modernization and Japanese Intellectuals: Some Comparative Observations", in M. Jansen (ed.), *Changing Japanese Attitudes Towards Modernization*, Princeton Univ. Press, 1965, p.463.
3. Yanagita, K., *Meiji Taishou shi* (History of the Meiji and Taishou Eras), 1931.
4. Miyajima, T., *Gaikokujin Rodosha Mukaeire no Ronri* (Logic of Reception of Foreign Workers), Akashi Shoten, 1988, p.195.
5. Yamawaki, K, *Kindainihon to Gaikokujin Rodosha* (Modern Japan and Foreign Workers), Akashi shoten, 1994, p.115, 199.
6. Ibid. p.105.
7. Imai, S., *Nihon no Rekishi* (History of Japan), 23, Chuokoron sha, 1966, p.390
8. Maruyama, M., *Thought and Behavior in Modern Japanese Politics*, Oxford University Press, 1963, p.58.
9. Miyajima, T., "Immigration and the Redefinition of citizenship in Japan: "One People – One Nation in Question", Oommen,T.K.(ed.), *Citizenship and National Identity*, Sage Publications, 1997, p.135.
10. Tanaka, H., *Zainichi Gaikokujin* (Foreign Residents in Japan), Iwanami shoten, 1991, pp.123- 125.
11. Armstrong, B., "Racialization and Nationalist Ideology: the Case of Japan", *International Sociology* , 4(3):329-43.
12. See also Miyajima, 1997, Op.cit.
13. Ministry of Health, Labor and Welfare, *Jinkoudoutai Toukei* (Vital Statistics of Japan), Vol.1, pp.428-29.
14. See, for example, Fukuoka, Y., *Lives of Young Koreans in Japan*, Trans Pacific Press, Melbourne, 2000.
15. Kawasaki City, *Kawasaki shi Gaikokuseki Shimin Ishiki Jittai Chousa Houkokusho* (Report on the Survey of Foreign Citizens in Kawasaki City), 1993, p.101.
16. De Vos, G., *Social Cohesion and Alienation: Minorities in the United States and Japan*, Westview Press, 1992, p.184.
17. Andersen, U., "Consultative Institutions for Migrant Workers", Layton-Henry (ed.), *The Political Rights of Migrant Workers in Western Europe*, Sage Publications, 1990, p.113.
18. Miyajima, T., "Education and Participation: in Relating to the Education of Foreign Children in Crisis" (Paper presented to the International Symposium "New Citizenship and Participation in Japan and Europe", Rikkyo University.

The Conceptualization and Implementation of Affirmative Action in the United States, India and Brazil

Thomas D. Boston and Usha Nair-Reichert

This is a critical time for affirmative action policies. In the United States, the Supreme Court is currently hearing arguments regarding two cases, Gratz v. Bollinger and Grutter v. Bollinger. Both cases involve the constitutionality of admission policies to the University of Michigan, but the implications are wide-ranging. These admissions policies are grounded in the principle that a racially diverse student body adds significant value to the university experience and to society. Furthermore, the policies recognize that affirmative action must be taken to correct the historical disadvantages encountered by racial minorities and reverse their under-representation in higher education. While the case centres on affirmative action policies in higher education institutions, the decision may determine whether affirmative action principles can be used to desegregate elementary and secondary education, increase minority business contracting opportunities with governmental agencies and increase employment opportunities for historically disadvantaged racial minorities.

The Brazilian Government is currently grappling with similar issues. To correct its legacy of slavery and racial inequality, the new Government, which assumed power on 1 January 2003, has begun implementing quotas for persons of African descent in government jobs, contract awarding, and university admissions. The Justice Minister, Márcio Thomas Bastos recently stated, "This country has an enormous debt because of the iniquity that was slavery in Brazil".[1] Just as in

the United States, the Brazilian Supreme Court has been asked to rule on the constitutionality of racial quotas in university admissions.

Brazil differs from the United States in that the imperative for affirmative action is grounded in the principle of restitution for the centuries of slavery and benign racial neglect. In the United States, the affirmative action policies were originally implemented as racial quotas to rectify the country's legacy of racial oppression. Programmes were enacted with quotas in higher education, employment and government contracting. However, over the years, the opponents of affirmative action waged guerilla warfare on these programmes through the court system. Bit by bit, they were successful at getting key philosophical principles and fundamental remedies ruled unconstitutional. The opposition started by attacking the legality of strict racial quotas and getting U.S. Courts to ban such practices. The courts have now banned quotas but continue to allow preferential treatment based on race. More recently, opponents have been successful at getting Courts to apply the legal principle of "strict scrutiny" to racial preference programmes. According to this principle, each agency that enacts a remedial policy based on race must first prove that discrimination has occurred. The problem is that the Courts have not found the evidence that has been presented to be convincing. In this sense, strict scrutiny is "strict in theory and fatal in fact". Further, under strict scrutiny, the scope of the remedy must be limited to the parties that were immediately affected. Through the application of strict scrutiny, U.S. Courts have so narrowed the scope of affirmative action remedies that they have, in effect, outlawed all philosophical reasoning justified by a need to correct society's legacy of racial injustice. In fact, in the landmark case involving the University of Michigan that is now before the Supreme Court, the argument used to justify affirmative action in admissions is that it enhances the educational experience of students and creates a more enlightened and tolerant citizenry. This rationale has very little in common with the original justification for affirmative action in the United States. And yet, minorities are still under-represented in virtually all aspects of society.

Unlike Brazil, where there is a strong Government commitment, affirmative action policies in the United States are hanging on a very thin thread. This paper discusses the conceptualization and implementation

of affirmative action in the United States, India and Brazil. It reviews the historical background, constitutional issues and practices that have evolved in each country. Finally, it makes findings and recommendations regarding the best practices in applying the principles of affirmative action.

Affirmative Action in the United States

It is ironic that the U.S. Supreme Court will decide the fate of affirmative action. This very court, more than a century ago, set the nation on a course of legally sanctioned racial segregation by codifying in law the separation of the races in virtually all spheres of life. In the infamous 1896 U.S. Supreme Court decision in the case of Plessy v. Ferguson, the Court held that racially segregated railway cars were both constitutional and reasonable and did not violate the rights of Blacks. The majority opinion of the Court stated,

> Laws permitting, and even requiring, their separation in places where they are liable to be brought into contact do not necessarily imply the inferiority of either race to the other, and have been generally, if not universally, recognized as within the competency of the state legislatures in the exercise of their police power. The most common instance of this is connected with the establishment of separate schools for white and colored children, which has been held to be a valid exercise of the legislative power.
>
> Legislation is powerless to eradicate racial instincts or to abolish distinctions based upon physical differences, and the attempt to do so can only result in accentuating the difficulties of the present situation. If the civil and political rights of both races be equal, one cannot be inferior to the other civilly or politically. If one race be inferior to the other socially, the Constitution of the United States cannot put them upon the same plane.
> (Birnbaum and Taylor: 2000:166-67)

This legal decision led to decades of racial segregation, maintained and nurtured by racial violence, intimidation and even lynching. Ultimately the Court's ruling did considerable social, economic and psychological damage to Blacks. The racial disenfranchisement caused by Plessy v. Ferguson lasted for a full three-quarters of a century and was only undone by massive civil rights protests. But the remnants of past

discrimination are still present today. They can be seen in the continuing racial disparities in education, employment, income and business development.

This long period of legally sanctioned racial separation ended only when the U.S. Supreme Court finally decided to undo its own ruling. During the 1950s, the Court rendered several decisions that set the groundwork for the collapse of racial segregation. In 1954, the Court ruled racial segregation in elementary public education unconstitutional (Brown v. Board of Education, Topeka, Kansas). Next, it ruled that racial discrimination in access to public beaches (Mayor of Baltimore v. Dawson, 1955) and public buses (Gayle v. Browder, 1956) was unconstitutional. Then, it outlawed discrimination in access to public parks (New Orleans City Park Assn. v. Detiege, 1958). Finally, as incredulous as it sounds, the Supreme Court banned discrimination in access to state courtrooms (Johnson v. Virginia, 1963).

But it took mass marches, sit-ins, freedom rides and boycotts before the Government actually implemented the rights finally acknowledged by the Courts and guaranteed by the Constitution. The slow pace of change in the 1950s and 1960s led to rebellions that engulfed the inner cities of the country. Within this environment of growing racial discontent, the country adopted its first policies regarding affirmative action.

President Lyndon Johnson, the first to use the phrase "affirmative action", persuaded Congress to pass the 1964 the Civil Rights Act, authorizing the Attorney General to enforce the Fourteenth Amendment to the Constitution. This Amendment, almost 100 years old by then, was designed to prevent states from denying equal protection by the law. Adopted in 1868, the amendment was meant to protect the rights of freed slaves. Titles II and III of the 1964 Act forbade discrimination in public accommodation while Title IV authorized the Attorney General to implement the 1954 U.S. Supreme Court decision in Brown v. Board of Education,[2] which outlawed segregation in public education facilities.

In its broadest context, affirmative action refers to the set of policies and initiatives that are designed to eliminate or remedy the past and present effects of discrimination based on race, colour, religion, sex or national origin. During the 1960s, affirmative action policies emerged

simultaneously on several fronts, the groundwork having been laid in the 1950s, beginning with Brown v. Board of Education. Segregated school systems were mandated to use affirmative measures to desegregate and end the vestiges of State-sponsored racism. The mandates created two decades of massive desegregation efforts aimed at integrating schools. The first efforts were directed in the South, and the focus later centred on the urban areas of the North (Dale and Greely, 1995: 2).

Second, in 1965, the federal government attacked employment discrimination with Executive Order 11246.[3] This Order and its amendment obligated recipients of federal contracts in excess of US $50,000 to file written affirmative action plans, not to discriminate in employment and to undertake affirmative steps to recruit and upgrade minorities and women. The Labor Department was empowered to enforce the orders and to impose penalties for non-compliance.

Next, the momentum regarding the implementation of affirmative action in education and employment spilled over into the minority business arena. The Economic Opportunity Act of 1964, which directed the Small Business Administration (SBA) to assist small businesses owned by low-income individuals, was amended in 1967. The amendment provided the first statutory assistance to minority-owned small businesses. In March of 1969, President Nixon issued Executive Order 11458, which outlined arrangements for developing and coordinating a national programme for minority businesses.

To increase awards to minority businesses on federal contracts, section 8(a) of the Small Business Act was used. This section authorizes the SBA to enter into contracts with Federal agencies and, in turn, set aside these contracts for minority businesses on a competitive basis. The 8(a) provision became one of the primary means used by the federal government to increase the use of minorities in federal procurement.

The Public Works Employment Act of 1977[4] and the 1978 Omnibus Small Business Act[5] established percentage goals in procurement for minority firms for the first time. The Acts required at least 10% of all federal grants for local public works projects to be expended with minority businesses. It also directed the Secretary of Commerce, in cooperation with federal departments and agencies, to develop comprehensive minority enterprise programmes and institute specific goals for

minority firms in federal procurement. By the early 1980s, over 200 local governmental agencies followed the federal government's lead and implemented affirmative action programmes to increase the number of contracts signed with minority businesses.

Affirmative Action in the Minority Business Arena

The racially discriminatory forces that shaped the economic and social status of Blacks in the United States over the last century also shaped the character of black business development. For example, during the era of racial segregation, Black business owners were concentrated in small-scale personal service and retail establishments. This was primarily because racial barriers in society made it difficult for Blacks to execute lines of credit or raise the capital needed to undertake large-scale business ventures. In addition, where products or services were marketed outside the black community, owners sometimes faced the real threat of violence or sabotage of his or her business venture by jealous white citizens. Two famous examples of this occurred in the early 1900s in Atlanta, Georgia and Tulsa, Oklahoma. Rioting whites in these two cities aimed their animosities at Black business owners and destroyed large numbers of Black-owned establishments and killed hundreds of innocent citizens.

In the 1960s very few Blacks occupied the kinds of managerial, administrative and technical jobs in the corporate sector that equip employees with the experience needed to become successful entrepreneurs. For example, as recently as 1987, only 18.5% of Black business owners reported having prior managerial, executive and supervisory experience while 30.0% of non-minority male business owners reported having such experience. Similar figures for Hispanic business owners and other minorities were 18.8% and 26.6% respectively. Additionally, 48% of non-minority male business owners had close relatives who were also business owners or were self-employed while this was true for only 27.8% of black business owners (CBO, 1987:50, 58).

During the 1960s, Blacks were excluded from the nation's prestigious country clubs and business associations, places where networking and important deal-making occurred. They were educated

in inferior schools, confined mainly to racially segregated neighbourhoods, and they occupied a disproportionate share of the low-wage, low-skilled jobs. As a result, their access to capital, credit and business opportunities was lower compared with their white counterparts. This deficit directly affected the types of businesses they started and operated.

In 1972, at least 35% of all Black-owned businesses operated in just four industries. These were food stores (6.3%), eating and drinking places (7.6%), personal service establishments (18.5%) and auto repair and garages (2.9%). Businesses in these industries were primarily dependent on internal markets and small amounts of capitalization.

Between 1972 and 1982, as the racial barriers in society changed, significant changes occurred in the industrial composition of Black-owned businesses. While the number of all Black-owned businesses increased by 80.8%, the number of businesses in the four industries cited above increased by only 39.9%.

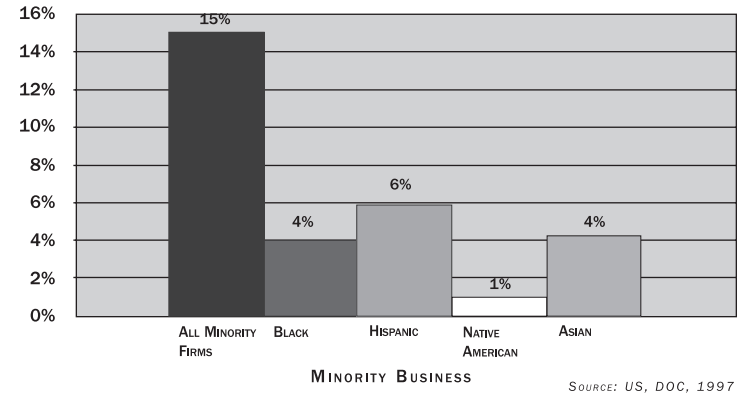
The changing character of Black-owned businesses mirrored changes in society. Specifically, desegregation and affirmative action policies in higher education allowed a significant increase in the proportion of Blacks attaining business and engineering degrees. For example, Bates (1997: 9) indicates that the number of Blacks receiving business degrees increased by 92.9% (from 9,489 to 18,304) and the number receiving engineering degrees by 161.3% (from 1,370 to 3,580). At the same time, major corporations initiated affirmative action policies to recruit more minorities into managerial and professional positions.

These changes led to a significant change in the characteristics of Black-owned businesses. The business owners were now younger, better educated and more experienced in business activities. They established successful operations in non-traditional industries such as computer sales and services, architectural and engineering services, management and public relations as well as consulting and a host of other business related services. In many cases, they were able to make these enterprises grow to a level that was formerly impossible. To do this, they relied mainly on contracting opportunities in the public sector created by affirmative action programmes involved in minority procurement.

As the industry composition of minority businesses changed over the last quarter-century, their growth rates accelerated. For example, between 1987 and 1997, the number of Hispanic-owned businesses posted the highest rate of increase at 184.0% (growing from 422,373 to 1,199,896 businesses). Businesses owned by Blacks increased by 94.0% (from 424,165 to 823,499). In total, minority businesses increased by 150.0% (1.2 million to 3.0 million) while businesses owned by non-minorities increased by only 52.0% (13.7 million to 20.8 million) during the same period. (US DOC, 1987 and 1997)

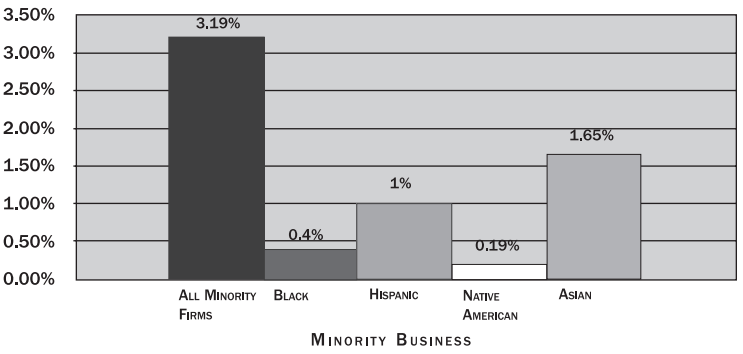
While minority businesses are enjoying growth rates that exceed those experienced by non-minority businesses, their overall share of business revenue is still very low. For example, minority businesses account for 15% of all U.S. businesses but receive only 3.2% of business revenue (see Figures 1 and 2).

FIGURE 1. MINORITY BUSINESS AS A PER CENT OF ALL U.S. BUSINESSES



SOURCE: US, DOC, 1997

FIGURE 2. MINORITY BUSINESS REVENUE AS A PER CENT OF ALL U.S. BUSINESS REVENUE



In 1997 (the latest Census Survey period), Black-owned businesses numbered 823,500 and generated $71.2 billion in revenue. Between 1992 and 1997, the number of these businesses increased by 26% as compared to a 7% increase for all US businesses. These firms comprised 4% of all non-farm businesses in the United States but generated only 0.9% of total business revenue and 0.6% of total employment. Annual revenue in Black-owned businesses average $86,500, as compared to $410,600 for all US firms.

Because racial discrimination persists in the private sector, many of the most successful Black-owned businesses are dependent upon public sector revenues to a much greater extent than are non-minority business owners. In 1987 Black-owned firms with revenues of $1,000,000 or more earned 12.8% of their gross revenue from the public sector, while non-minority male-owned businesses of a similar size earned only 6.1% of their revenue from such sources (CBO, 1987: 204). In addition, Black-owned firms with revenues between $500,000 and $999,999 earned 9.3% of their gross revenue from the public sector while non-minority, male-owned businesses earned only 5% of their revenue from public sources.

An important contributor to the growth and diversification of Black-owned businesses is the emergence of affirmative action programmes in Government contracting and procurement. These programmes created important points of market entry for Black entrepreneurs.

In 2000, the author analysed the characteristics of 5,131 minority businesses registered in the United States SBA 8(a) Programme; 40% of these firms were Black-owned, 25.3% were Hispanic-owned, 23.4% were Asian American-owned, 9.4% were owned by Native Americans and 0.7% by whites (Boston, 2000: 2). The 8(a) Programme is the federal government's primary affirmative action programme for minority contractors. We traced the value of 8(a) sales to total sales over time for firms entering the programme in 1992. Starting the year after the firm is certified, we found that in 1993, 8(a) sales were 14.4% of total sales. In 1994, they increased to 27.3%, in 1995, they reached 39.9% and in 1996, they reached 43%. The share of public sector revenue reached its highest level in 1997 when it constituted 44.8% of total sales. In 1998, it was 43.7%. The average annual sales for the 1992 cohort of Black-owned firms were $4,950,370 (Boston, 2000: 52, 59).

In 1995, the author conducted a survey of 316 minority and women-owned businesses located in the Atlanta metropolitan area. The survey revealed the mean per cent of revenue derived from the Government sector is 31.5%. The report found that Government affirmative action programmes are critically important to the success of minority firms. This is primarily because discriminatory barriers continue to be very prominent in the private sector.

A Case Study of Affirmative Action in Minority Businesses[6] in Atlanta

In 1975, the City of Atlanta became the first local governmental agency in the country to implement an Affirmative Action Plan for minority businesses, at the time known as the Minority and Women Business Enterprise (MWBE) Program. The MWBE Program originated out of a plan to create opportunities for minority and women-owned businesses during the construction of Hartsfield International Airport. Following the City's lead, in 1976, the Metropolitan Atlanta Rapid Transit Authority (MARTA) initiated a similar Disadvantaged Business Enterprise (DBE) Program during the design and development of the metropolitan area train system. That same year, Fulton County established an MWBE programme in its contracting and procurement activities. By the 1990s, similar minority and women preference programmes had been established in the Atlanta Public School System, the Atlanta Stadium Authority, the Georgia Department of Transportation and the Atlanta Olympic Games Authority. All of these programmes mandated that minority businesses be included in Government contracts when such businesses are determined to be available and qualified. While the goal varied from agency to agency, it was generally about 25%.

Atlanta's efforts to create opportunities for minority and women-owned businesses influenced the adoption of similar policies at other locations in the state of Georgia and across the nation. By the late 1980s, more than 200 local and state MWBE programmes were created across the country. Most of these programmes were patterned after or influenced by the programmes in Atlanta.

The presence of these affirmative action programmes caused growth in the number of minority businesses in the Atlanta metropolitan area to greatly exceed the normal growth rate of such businesses in the ten largest metropolitan areas of the country. For example, minority businesses in Atlanta increased by 263% during the 10-year period (1987-1997). Riverside-San Bernardino (an increase of 224%) and New York Primary Metropolitan Statistical Areas (PMSAs) (an increase of 200%) had the next fastest growth rates to Atlanta's (see Figure 3).

FIGURE 3. ***TEN METROPOLITAN AREAS WITH LARGEST NUMBER OF MINORITY FIRMS: 1997 AND 1987***

	1997		1987		
MSA (METROPOLITAN STATISTICAL AREA)	FIRMS (NUMBER)	RECEIPTS (MILLION DOLLARS)	FIRMS (NUMBER)	RECEIPTS ($1,000)	INCREASE IN NO. OF FIRMS, 1987-97 (%)
LOS ANGELES-LONG BEACH, CA PMSA	289,293	76,373	142,580	11,436,867	103
NEW YORK, NY PMSA	236,809	37,324	78,886	4,821,080	200
MIAMI, FL PMSA	138,848	31,723	55,712	4,192,444	149
WASHINGTON, DC-MD-VA-WV PMSA*	99,393	16,054	39,408	2,123,048	152
CHICAGO, IL PMSA	95,685	21,437	35,587	2,604,316	169
HOUSTON, TX PMSA	92,423	23,441	37,516	1,755,817	146
ORANGE COUNTY, CA PMSA	71,791	23,516	26,190	2,140,009	174
ATLANTA, GA MSA	58,776	9,887	16,209	1,183,738	263
RIVERSIDE-SAN BERNARDINO, CA PMSA	55,665	9,758	17,193	1,178,713	224
SAN FRANCISCO, CA PMSA	54,724	15,078	26,585	2,268,076	106

* IN 1997 WV WAS ADDED TO WASHINGTON PMSA

SOURCE: SURVEY OF MINORITY BUSINESS ENTERPRISES, U.S. DEPT OF COMMERCE, BUREAU OF THE CENSUS.

While Black-owned businesses comprise 10.6% of all urban areas, they receive only 0.8% of business revenue. Asian and Pacific Islanders own 4.4% of all metropolitan businesses but receive 1.3% of business revenue. Hispanics own 2.6% of metropolitan area businesses but receive only 0.4% of business revenue. Finally, women-owned businesses comprise 26.6% of all businesses but receive only 4.4% of all business revenue.

Over the last decade, Atlanta has experienced a very rapid growth in income and population. Research indicates that income and population growth have strong correlations to business formation. However, Atlanta's history also shows that the unique policies aimed at creating opportunities for minority and women-owned businesses have also had a powerful influence on their rapid growth. In Atlanta, business diversity has proven to be not just good social policy but a good economic policy as well. This was not always the case.

As surprising at it might seem, it was not until 1973 that the City of Atlanta awarded its first contract to a Black entrepreneur. The amount was for $13,000. For more than one and a quarter centuries, the City of Atlanta systematically discriminated against minority businesses. The City was chartered in 1847, and the presence of successful Black business owners can be traced at least to the beginning of the 1900s. By 1890, the 28,098 Blacks residing in the City constituted 43% of Atlanta's population. In 1970, the City's population was 495,000, 51% of which was Black. Yet, despite constituting the majority of the population by 1970, Black business owners did not receive any procurement awards from the City.

For an entire century, the State of Georgia and the City of Atlanta engaged in discriminatory practices that denied business opportunities to Blacks. One of the most infamous examples was the 1845 legislation passed by the Georgia General Assembly, which legally prohibited Blacks from making contracts. This state law imposed a maximum penalty of $200.00 on Whites for engaging in commerce with Blacks. To appreciate the magnitude of a $200.00 penalty imposed in 1845, its present value (assuming a 4% growth rate) would be greater than $75,000. The legislation reads as follows:

> An act to prohibit colored mechanics and masons, being slaves or free persons of color, being mechanics or masons, from making contracts for the erection of buildings, or for the repair of buildings, and declaring the white person or persons directly or indirectly contracting with or employing them, as well as the master, employer, manager, or agent for said slave, or guardian for said free person of color, authorizing or permitting the same, guilty of a misdemeanor.
>
> Section 1. Be it enacted by the Senate and the House of Representatives of the State of Georgia in General Assembly met, and it hereby enacted by the authority of the same, that from and after the first day of February next, each and every white person who shall hereafter contract or bargain with any slave mechanic, or mason, or free person of color, being a mechanic or mason, shall be liable to be indicted for a misdemeanor; and on conviction, to be fined, at the discretion of the court, not exceeding two hundred dollars.[7]

The Affirmative Action Program was enacted because Atlanta's first Black Mayor, Maynard Jackson, decreed that the City would no longer tolerate the racial exclusion of Blacks. For Black entrepreneurs in Atlanta, the emergence of minority business affirmative action programmes was a milestone. These opportunities provided by this programme created many of the city's most successful Black business owners.

While Metro Atlanta and the State of Georgia have made tremendous strides in incorporating women and minority businesses in public sector procurement activities, significant disparities remain. For example, even though minority and women-owned businesses comprise 44.6% of all firms in the Atlanta metropolitan area, these businesses receive only 7% of all metropolitan business revenue. This disparity in revenue highlights the continuing need for Affirmative Action Programmes.

According to the latest census (conducted in 1997, with results made available in 2001), there are 327,053 businesses in metropolitan Atlanta. Of these businesses, women own 58,776, or 18%, and minorities own 87,098, or 26.6%. Blacks own 34,592, or 10.6%, of all businesses; Hispanics own 8,543, or 2.6%, of all businesses; Native Americans own 2,227, or 0.7%, of all businesses; and Asian and Pacific Islanders own 14,337, or 4.4%, of all businesses. In total, minority business owners provide jobs for 72,912 workers, and women business owners employ 109,473 workers (see Figure 4).

FIGURE 4. *RECEIPTS AND EMPLOYMENT IN METROPOLITAN ATLANTA BUSINESSES WITH MINORITY AND WOMEN OWNERS, 1997*

GROUP	FIRMS (NUMBER)	FIRMS %	SALES AND RECEIPTS ($1,000)	SALES AND RECEIPTS %	EMPLOYEES
UNIVERSE (ALL FIRMS)	327,053	100.0	387,465,384	100.0	1,805,780
TOTAL MINORITIES	58,776	18.0	9,887,454	2.6	72,912
BLACK	34,592	10.6	2,959,189	0.8	27,430
HISPANIC	8,543	2.6	1,504,077	0.4	9,142
AMERICAN INDIAN AND ALASKA NATIVES	2,227	0.7	244,756	0.1	1,868
ASIAN AND PACIFIC ISLANDER	14,337	4.4	5,206,147	1.3	34,609
WOMEN	87,098	26.6	16,897,129	4.4	109,473

Minority and women business programmes have been an important contributor to the growth and diversification of minority firms. These programmes created important points of market entry for entrepreneurs who otherwise would have encountered market discrimination. While significant disparities still exist, without these programmes, minority business conditions would be even worse. These business owners would have continued to be relegated to personal service and retail establishments or other industries primarily serving the minority community. Figure 5 indicates the per cent of total revenue derived by minority businesses from Government contracting in Atlanta.

FIGURE 5. *PER CENT OF REVENUE FROM GOVERNMENT SECTOR FOR METROPOLITAN ATLANTA MINORITY BUSINESSES*

	Atlanta City Limits	Other Metro Locations	Total
	Mean Per cent	Mean Per cent	Mean Per cent
Business Services	41.3	23.5	31.5
Construction	55.2	54.1	54.5
Wholesale	37.1	27.9	30.6
Manufacturing	25.0	7.1	15.1
Transportation, Comm.	5.0	17.7	13.5
Retail	31.7	31.3	31.4
Finance, Insurance, Real Estate	27.7	2.5	22.1
Consumer Services	31.0	37.8	35.0
non-classified	22.0	37.0	27.6

Boston, 2001

These results indicate that government contracting constitutes a significant share of the revenue of a large sector of minority businesses. When one analyses this factor and the legal challenges encountered by affirmative action programmes, it is clear that the outcome of these challenges will significantly affect the continued growth and viability of minority and women-owned firms.

The Legal Challenge to Affirmative Action in Minority Contracting

The 1989 U.S. Supreme Court decision in the case of City of Richmond v. J.A. Croson Co. has significantly altered affirmative action policies in the United States. As a result of the decision, Government agencies are now required to prove that discrimination in contracting and procurement has been practised against minority vendors before they can establish affirmative action programmes. Further, the agency must demonstrate

that it has been involved either directly or indirectly in the discriminatory acts. Assuming that an agency is willing to implicate itself as a party to discriminatory practices, the more challenging aspect of the ruling is the requirement to prove discrimination. In reality, proving this to the court's satisfaction has become almost impossible.

The process is especially difficult because the judges who rendered the Croson decision as well as those who have rendered lower court decisions have not clearly specified the kinds of evidence needed to establish the burden of proof of discrimination — that is — the factual predicate. To establish this factual predicate, Government agencies have hired consultants to undertake research on discriminatory practices. This research is known as "disparity studies".

Given the ambiguity in the Croson decision regarding the appropriate method for conducting disparity studies, consultants have taken a shotgun approach to collecting information. Specifically, they have directed their energies to investigating even the most remote contracting practices in an attempt to identify and document discriminatory activities. This approach is often very costly and yet it has not insulated these agencies from persistent legal challenges. In fact, the mere threat of a legal challenge has caused some minority business affirmative action programmes to cease to operate. In general, state and local agencies have become quite pessimistic over their ability to operate minority business affirmative action programmes. Unfortunately, this view is reinforced by the overwhelming number of legal decisions against affirmative action programmes and by the opinion of two Justices on the Supreme Court, Justices Thomas and Scalia. These justices have indicated their desire to dismantle all preferences based on race, no matter what the evidence of discrimination might prove.

In legal cases, a primary tactic used by the opponents of affirmative action is to exploit the ambiguity in the strict scrutiny standard. As might be expected, this "standard" has varied from one trial to another and more importantly it is usually a moving target. The late U.S. Supreme Court Justice, Thurgood Marshall, anticipated this very outcome when he argued against the application of the strict scrutiny standard in the Croson decision. Strict scrutiny is "strict in theory and fatal in fact", he maintained because the standard is hardly ever met in reality.

The fact that many of the judges who have rendered decisions on affirmative action programmes have been appointed to their current positions by conservative administrations has also not helped. Almost every race conscious programme in minority contracting in the country has been the target of a legal challenge, no matter how well documented its factual predicate is. Local agencies are caught in a "no win" situation as they seek to remedy the historical exclusion of minority businesspersons from public sector procurement. As the law currently stands, Government agencies must pay for expensive disparity studies and the resulting affirmative action programmes are often still legally challenged. This means that the agencies must spend additional money to retain lawyers to defend their policies and programmes. At the end of the day, these policies are generally determined to be unconstitutional.

The Constitutional Challenge to Minority Business Affirmative Action Programmes

The first legal challenge to a minority business affirmative action programme to reach the Supreme Court was the case of Fullilove v. Klutznick 448 US 448 (1980). In this petition, the constitutionality of the federal government's 10 per cent set-aside programme, established in 1977, was challenged. The complaint stated that the programme violated the equal protection clause of the Fourteenth Amendment. But the Court upheld the 10 per cent minority business requirement. Justice Burger argued that the strict scrutiny standard was not applicable because it was a programme established by Congress and that the latter need not establish "specific findings of discrimination because it has broad authority and an affirmative duty to react to and address discrimination as a matter of national concern".[8] Justice Marshall argued that racial classifications are constitutional in remedying past discrimination if they "serve important governmental interest and are substantially related to the achievement of those purposes".[9] This "intermediate standard" is based on whether there is a "rational relationship" between the remedy and the Government's interest. It is not as exacting as the strict

scrutiny standard because there is no requirement to establish specific findings of discrimination.

Many state and local government agencies established affirmative action programmes following the Fullilove decision. They assumed the decision allowed them to apply the intermediate standard as a basis for their programmes. Prior to the 1989 Croson decision, the constitutionality of affirmative action remedies was tested in several cases before the Supreme Court. But the city of Richmond, Virginia, served as the testing ground for the most important ruling regarding minority business affirmative action.

Because of its legacy of Jim Crow discrimination, the City Council voted to enact an affirmative action plan in contracting in April 1983.[10] The purpose of the Ordinance was to increase the participation of minority businesses in public construction contracts awarded by the City. The decision was based on evidence indicating that: (1) The City had a 50 per cent African-American population yet only 0.67 per cent of prime construction had gone to minority firms over the previous five years; (2) local construction associations had virtually no minority members; (3) widespread discrimination existed in the local, state and national construction industries; (4) the proposed ordinance was consistent with the intermediate standard established in the Fullilove decision.

The plan was enacted for a period of five years and included African Americans, Hispanics, Asians, Eskimos and Aleuts. It required recipients of prime construction contracts to subcontract at least 30 per cent of the contract's value to minority firms. A waiver from the goal was provided in cases where minority firms were either qualified or not available.

Five months after the enactment of the plan, the City invited bids for the installation of plumbing fixtures at City jail. The J.A. Croson Company submitted the only bid on the project and requested a waiver from the minority-subcontracting requirement. The City rejected its waiver request and re-bid the contract.

The Croson Co. filed suit claiming the programme had violated its Constitutional rights. After several lower court decisions and appeals, the U.S. Supreme Court agreed to hear the case. The Court ruled the programme was unconstitutional because it did not meet the strict scrutiny standard. The decision was momentous because it was the first time

that a majority agreed that strict scrutiny would be applied to racial preference programmes. Justice O'Connor authored the 6-3-majority opinion. The opinion did not invalidate all race-based preferences, but by applying the strict scrutiny standard, it made their implementation significantly more difficult.

The decision held that the programme denied certain citizens the opportunity to compete for a fixed percentage of contracts based solely on their race. All classifications based on race, O'Connor argues, whether benefiting or burdening minorities or non-minorities, will be subject to strict scrutiny. This means that the "factual predicate" underlying racial preference programmes must be supported by adequate and specific findings of past discrimination. The generalized findings that are sufficient when the intermediate standard is applied were no longer applicable.

Justice Marshall dissented, arguing that strict scrutiny should be applied to those classifications that discriminate against minorities but not those designed to eliminate past discrimination. He asserted,

> In concluding that remedial classifications warrant no different standard of review under the Constitution than the most brute and repugnant forms of state-sponsored racism, a majority of this Court signals that it regards racial discrimination as largely a phenomenon of the past, and that government bodies need no longer preoccupy themselves with rectifying racial injustice. I, however, do not believe this Nation is anywhere close to eradicating racial discrimination or its vestiges. In constitutionalizing its wishful thinking, the majority today does a grave disservice not only to those victims of past and present racial discrimination in this Nation whom government has sought to assist, but also to this Court's long tradition of approaching issues of race with the utmost sensitivity.[11]

However, the majority of Justices ruled differently and argued that the Fourteenth Amendment limits the powers of states in contrast to the more sweeping powers of the Congress. Thus, Congress was not required to meet the strict scrutiny standard, but states and localities are.

This ruling meant that the factual predicate underlying an affirmative action plan must be supported by adequate findings of past discrimination. A programme cannot be justified on the argument that African-Americans constitute 50 per cent of the local population but receive less than one per cent of public contracts.

Supreme Court ruled that the city's findings did not provide a strong basis of evidence for its conclusion that remedial action based on race was necessary. Because the evidence presented did not point to specific instances of discrimination, the Court ruled that the city had failed to demonstrate a "compelling interest" in establishing a race-based preference programme.

The Court also criticized Richmond for including Spanish-speaking minorities, Asians, Eskimos, and Aleuts in its plan since it had not found evidence of past discrimination against them. Further, the Court argued that the city's plan allowed minorities to be eligible for the remedy no matter where they resided in the country. As such, the Court concluded that Richmond's 30 per cent goal was viewed as a quota, and quotas were outlawed by the U.S. Supreme Court's 1978 ruling in Regents of the University of California v. Bakke.[12]

In the Croson decision, the majority asserted that their ruling did not preclude a state or local entity from taking action to rectify discrimination. "If the City of Richmond had evidence before it that non-minority contractors were systematically excluding minority businesses from subcontracting opportunities it could take action to end the discriminatory exclusion".[13] The decision requires, however, that a disparity be established between the utilization of minority contractors and the availability of qualified minority contractors in the market area. It notes that a pattern of individual discriminatory acts, if supported by appropriate statistical proof is probative. But it also required local governments to establish remedies consistent with the scope of the injury, i.e. "narrowly tailored". Finally, the decision criticized the City of Richmond for not pursuing race-neutral devices such as simplifying bidding procedures, relaxing bonding requirements and providing technical assistance to minority bidders before resorting to race-conscious measures.

In the Croson decision, the U.S. Supreme Court struck down the City of Richmond's "set-aside" programme as unconstitutional because it did not satisfy the strict scrutiny analysis applied to "race-based" Government programmes. J.A. Croson Co. ("Croson") challenged the City of Richmond's minority contracting preference plan, which required prime contractors to subcontract at least 30 per cent of the dollar amount of contracts to one or more Minority Business Enterprises (MBEs).

The Supreme Court held that the City of Richmond's "set-aside" action plan violated the Equal Protection Clause of the Fourteenth Amendment because it did not first establish that the governmental entity had a "compelling governmental interest" in remedying past identified discrimination. Second, the programme was not "narrowly tailored" to achieve the goal of remedying the identified discrimination because it did not take into consideration race-neutral means to increase minority business participation in city contracting. The 30% goal, the Court argued, was simply an attempt at "racial balancing".[14]

It is critically important to note the difference between "Intermediate scrutiny" and "strict scrutiny". Intermediate scrutiny requires a direct, substantial relationship between the objective of the racial preference and the means chosen to accomplish that objective. The measure of evidence required to satisfy intermediate scrutiny is less than is necessary to satisfy strict scrutiny. Intermediate scrutiny requires that an affirmative action programme be "substantially related" to an important Government interest. For example, this interest might be in remedying the historical legacy of racial discrimination in a particular industry. Also, under this standard, the numerical goal does not have to be closely tied to the proportion of qualified contractors in the market.[15]

To meet the strict scrutiny standard, statistical evidence of discrimination is primarily used to determine whether or not there is a strong basis for a racial preference programme — that is, a compelling governmental interest. The statistical evidence must compare a government's **utilization** of minority firms with the **availability** of qualified, willing and able firms. The per cent of total revenue received by minority firms equals their utilization. Similarly, the per cent of all available firms that are minority constitutes availability. A disparity index is then generated. This index consists of the percentage of utilization divided by the percentage of availability. The resulting figure is then multiplied by 100 to generate a number between 0 and 100, with 100 consisting of full participation by minority contractors. An index value of 80 or less is viewed as an inference of discrimination. Disparities have also been measured in the form of standard deviation units. Specifically, when the actual utilization of minority firms varies from the expected utilization by more than two or three standard deviations, Courts have held that to

be statistically significant and to give rise to a presumption of discriminatory conduct.[16]

Under the strict scrutiny standard, State and Local governments cannot rely on national statistics to draw conclusions about the prevailing market conditions in their own regions. Additionally, while anecdotal evidence of discrimination may be used, if it is not accompanied by empirical evidence, it is insufficient in proving a systematic pattern of discrimination.

The Courts require that race or ethnic based affirmative action legislation and policies to remedy past identified discrimination must be "narrowly tailored". Several criteria or factors are used in determining whether a programme satisfies the "narrowly tailored" requirement.

> (1) The necessity for the relief and the efficacy of alternative remedies; (2) the flexibility and duration of the relief, including the availability of waiver provisions; (3) the relationship of numerical goals to the relevant labour market; and (4) the impact of the relief on the rights of innocent third parties.[17]

Some examples of race, ethnic and gender neutral efforts citied by the Courts include: training and financial assistance, non-discrimination provisions in contracts; mentoring, efforts to address prompt payments to smaller businesses, disaggregating large contracts into smaller contracts to make them more accessible to smaller businesses, greater emphasis on the advertisement of business opportunities, providing technical assistance, increasing outreach efforts, encouraging majority contractors to voluntarily include minority firms on projects, creating and distributing minority and women-owned business directories, and streamlining the bid process to increase small business participation.

An Overview of the Evolution of Important Case Law

In the 1995 Adarand Decision, the U.S. Supreme Court ruled that all Federal government programmes using racial or ethnic criteria as factors in procurement decisions must also pass a test of strict scrutiny in order to be constitutional.[18]

The Adarand Case involved a Federal highway construction project awarded by the USDOT Federal Highway Administration. This Federal contract contained a provision referred to as the "Subcontracting Compensation Clause" that authorized an additional payment to the prime contractor as an incentive to award subcontracts to minorities and women. The clause was implemented by the DOT in an attempt to achieve a minority subcontracting goal of 10 per cent for federally funded transportation projects.

A DOT prime contractor solicited bids for guardrails from Adarand Constructors, Inc. (a non-minority subcontractor) and from a minority subcontractor. Despite the fact that Adarand submitted the lowest bid, the prime contractor awarded the subcontract to the minority firm. At trial, the prime testified that it would have awarded the guardrail subcontract to Adarand were it not for the monetary bonus that it received by hiring the minority firm.

Following a lengthy appeals process, the Supreme Court ruled in a 5-4 decision that all race-based classifications of the Federal government must now meet the strict scrutiny standard.

Affirmative Action in the Education Arena

In the United States, there are many parallels between the application of affirmative action policies in education and in minority business contracting. At present, the U.S. Supreme Court is hearing arguments on two cases regarding complaints against the University of Michigan's admission policies, (see Gratz v. Bollinger and Grutter v. Bollinger). These complaints challenge the constitutionality of policies that are designed to promote educational diversity in both the undergraduate college and law school.

Whether the goal of education diversity is sufficient to establish a "compelling interest" under the strict scrutiny standard is a key issue in determining the outcome. If so, race-conscious policies, assuming they are narrowly tailored and not based on racial quotas, can be deemed Constitutional.

In the sphere of education, affirmative action policies have been used primarily to balance racially segregated school districts for K-12 education and to create more diverse student bodies at colleges and universities. Figures 6 and 7 indicate that racial disparities in education attainment continue to exist in the United States. In particular, the per cent of Blacks and Hispanics holding Bachelor Degrees, 15.5% and 10.9% respectively, is significantly below that of Whites (27.7%) and Asians (42.4%). The disparities are even more acute when one examines the nation's elite college and university programmes in science and engineering. Figure 7 provides information on the attainment of Ph.D. degrees and professional degrees by race over a twenty-year period. In 1978, Blacks received 4.1% of all such degrees and in 1998 the percentage had increased slightly to 5.2%. More revealing, however, is that the percentages of Black degree recipients are much lower in the sciences. For example, Blacks received only 2.2% of Ph.D. degrees in the physical sciences, 3% in engineering and 3.1% in life sciences. By contrast, they received 11.2% of degrees in education.

FIGURE 6. ***EDUCATION ATTAINMENT OF THE POPULATION, AGES 25 AND OVER,*** MARCH 1999

RACE	NO. OF PEOPLE	HIGH SCHOOL DEGREE	SOME COLLEGE	BACHELOR'S DEGREE OR MORE
WHITE	130,411.00	88%	53%	28%
BLACK	19,261.00	77%	41%	16%
ASIAN	6,467.00	85%	62%	42%
HISPANIC	16,425.00	56%	29%	11%

SOURCE: US CENSUS BUREAU, CURRENT POPULATION REPORTS, P20-528, MAVEN, 1999

FIGURE 7. ***RECIPIENTS OF PH.D. DEGREES BY RACE AND YEAR***

		1978		1998	
FIELD	RACE/ETHNICITY	TOTAL	%	TOTAL	%
ALL FIELDS	GROUP TOTAL	25,291	100.0%	28,218	100.0%
	KNOWN RACE/ETHNICITY	23,778	94.0%	27,352	96.9%
	ASIAN*	390	1.5%	1,168	4.1%

	Black	1,031	4.1%	1,467	5.2%
	Hispanic	486	1.9%	1,190	4.2%
	American Indian†	60	0.2%	189	0.7%
	White	21,811	86.2%	23,338	82.7%
Physical Sciences‡	Group Total	3,200	100.0%	3,660	100.0%
	Known Race/Ethnicity	2,947	92.1%	3,532	96.5%
	Asian*	81	2.5%	190	5.2%
	Black	51	1.6%	82	2.2%
	Hispanic	30	0.9%	102	2.8%
	American Indian†	5	0.2%	19	0.5%
	White	2,780	86.9%	3,139	85.8%
Engineering	Group Total	1,261	100.0%	2,543	100.0%
	Known Race/Ethnicity	1,168	92.6%	2,461	96.8%
	Asian*	63	5.0%	244	9.6%
	Black	9	0.7%	76	3.0%
	Hispanic	20	1.6%	100	3.9%
	American Indian†	2	0.2%	13	0.5%
	White	1,074	85.2%	2,028	79.7%
Life Sciences	Group Total	4,030	100.0%	5,288	100.0%
	Known Race/Ethnicity	3,794	94.1%	5,153	97.4%
	Asian*	90	2.2%	291	5.5%
	Black	73	1.8%	163	3.1%
	Hispanic	47	1.2%	212	4.0%
	American Indian†	8	0.2%	25	0.5%
	White	3,576	88.7%	4,462	84.4%
Social Sciences	Group Total	5,118	100.0%	5,312	100.0%
	Known Race/Ethnicity	4,815	94.1%	5,130	96.6%
	Asian*	52	1.0%	172	3.2%
	Black	170	3.3%	277	5.2%
	Hispanic	93	1.8%	293	5.5%
	American Indian†	6	0.1%	42	0.8%
	White	4,494	87.8%	4,346	81.8%

Humanities	Group Total	3,780	100.0%	4,241	100.0%
	Known Race/Ethnicity	3,560	94.2%	4,101	96.7%
	Asian*	29	0.8%	112	2.6%
	Black	80	2.1%	150	3.5%
	Hispanic	111	2.9%	157	3.7%
	American Indian†	8	0.2%	22	0.5%
	White	3,332	88.1%	3,660	86.3%
Education	Group Total	6,498	100.0%	5,529	100.0%
	Known Race/Ethnicity	6,175	95.0%	5,382	97.3%
	Asian*	57	0.9%	102	1.8%
	Black	585	9.0%	619	11.2%
	Hispanic	157	2.4%	277	5.0%
	American Indian†	29	0.4%	50	0.9%
	White	5,347	82.3%	4,334	78.4%
Professional/ Other Fields	Group Total	1,404	100.0%	1,645	100.0%
	Known Race/Ethnicity	1,319	93.9%	1,593	96.8%
	Asian*	18	1.3%	57	3.5%
	Black	63	4.5%	100	6.1%
	Hispanic	28	2.0%	49	3.0%
	American Indian†	2	0.1%	18	1.1%
	White	1,208	86.0%	1,369	83.2%

Source: nsf/nih/neh/used/usda, Survey of Earned Doctorates

A number of important developments have influenced the application of affirmative action in college admissions. Perhaps the most significant decision was rendered in 1978 — the U.S. Supreme Court ruling in the case of Regents of the University of California v. Bakke. The Court ruled that the University of California at Davis had set aside for disadvantaged minorities 16 out of 100 seats in the medical school entering class. This practice was ruled unconstitutional because it constituted a quota that prevented Whites from competing for those seats. Because Title VI of the 1964 Civil Rights Act prohibits any recipient of federal funds from discriminating, the Bakke decision applied to both public and private

universities. While the ruling struck down racial quotas, it did not prohibit the attention to race in admissions decisions. In fact, the Court ruled that the use of race in a competitive admissions process is constitutional, as long as it does not create a quota. Justice Powell argued that the promotion of racial diversity is rooted in the academic freedoms bestowed upon universities by the First Amendment. Further, this goal is consistent with the goal of geographic and economic diversity of the student body. Such goals enrich the educational experience of all students and ultimately lead to a more enlightened and aware electorate.

Several important decisions have been rendered since Bakke. Some have relied on the legal precedent established in Bakke and others have varied from it. Rulings relying on Bakke include the Sixth Circuit of U.S. Court of Appeals in *Grutter v. Bollinger* (the University of Michigan Law School case),[19] the Ninth Circuit U.S. Court of Appeals in *Smith v. University of Washington Law School*,[20] and the U.S. District Court in *Gratz v. Bollinger* (the University of Michigan undergraduate college).[21] The U.S. Court of Appeals for the Eleventh Circuit ruled, in *Johnson v. Board of Regents of the State of Georgia*,[22] that even if promoting diversity is a compelling interest, the University of Georgia's race-conscious admissions policy was not narrowly tailored and therefore unconstitutional. By contrast, in 1996 the case of *Hopwood v. Texas*,[23] the U.S. Court of Appeals for the Fifth Circuit found that *Bakke* was no longer relevant law and as such, the University of Texas Law School's race-conscious admissions policy was unconstitutional.

The Bakke decision established the precedent that the University of Michigan uses to achieve diversity in admissions. The University now uses numerous criteria, including race, as a basis for admission. Michigan uses race as a "plus" factor in admissions. The University's admission criteria, listed in Figure 8 below, are based on a system whereby an applicant can get up to a maximum of 150 points. These points are awarded for the following factors: Grade point average (max 80); Quality of high school (10); Curriculum difficulty (8); Standardized test score (12); Place of residency (10); Alumni Status (5); College essay (1); Personal achievement (5); Leadership and service (5); and "Miscellaneous criteria" that includes racial or minority status, socio-economic disadvantage, scholarship athlete or other factors. Individuals falling in

one of the latter categories can get up to 20 points. This procedure promotes competition in the admissions process, yet gives the University the flexibility to consider elements such as diversity.

In challenging the constitutionality of affirmative action programmes in higher education, opponents have argued that promoting diversity "is not sufficiently compelling to justify the use of race in admissions".[24] In particular, they point to the Croson decision, which forbids the application of race-conscious remedies to achieve societal goals. They argue instead that strict scrutiny is the most appropriate standard. Whether diversity is compelling is ultimately the key point on which the constitutionality of affirmative action in higher education will hinge.

Angelo Ancheta provides a good summary of the major counterarguments that universities have made in support of affirmative action. They have emphasized the importance of academic freedom of colleges and universities to determine their mission, goals, and the composition of their student bodies. Universities have also focused on the positive benefits of educational diversity. These include the enhancement of learning environment and improvements in students' learning and thinking. Educational diversity reduces stereotyping by preventing tokenism and racial isolation and it encourages racial interactions across campus. Finally, universities have stated that the benefit of educational diversity is the goal of adopting race-conscious admissions policies, not remedying the lingering effects of societal discrimination. (2003:6-7).

Recent landmark research conducted by Professor Patricia Gurin, concluded that students learn more and think deeper and in more complex ways in diverse educational environments.

> Taken together, the results of these original analyses are compelling. There is a consistent pattern of positive relationships between diversity in higher education and both learning and democracy outcomes. This pattern holds across racial and ethnic groups and across a broad range of outcomes. And the benefits of diversity are evident at the national level, after four years of college and five years after leaving college, and in the studies of Michigan students. This consistency is unusual in my experience as a social scientist. These analyses, which are supported by the research literature, provide strong evidence of the compelling benefits to our society of racial diversity in higher education.[25]

FIGURE 8. *UNIVERSITY OF MICHIGAN OFFICE OF UNDERGRADUATE ADMISSION POINT SOURCES*

ACADEMIC FACTORS

GPA

GPA	POINTS
2.5	50
2.6	52
2.7	54
2.8	56
2.9	58
3	60
3.1	62
3.2	64
3.3	66
3.4	68
3.5	70
3.6	72
3.7	74
3.8	76
3.9	78
4	80

SCHOOL FACTOR

QUALITY	POINTS
0	0
1	2
2	4
3	6
4	8
5	10

CURRICULUM FACTOR

DIFFICULTY	POINTS
-2	-4
-1	-2
0	0
1	2
2	4
3	6
4	8

TEST SCORE

ACT	SAT	POINTS
1-19	400-920	0
20-21	930-1000	6
22-26	1010-1190	10
27-30	1200-1350	11
31-36	1360-1600	12

OTHER FACTORS

GEOGRAPHY

RESIDENCY	POINTS
MICHIGAN	10
UNDER-REPRESENTED MI COUNTY	6
UNDER-REPRESENTED STATE	2

PERSONAL ACHIEVEMENT

LEVEL OF ACHIEVEMENT	POINTS
STATE	1
REGIONAL	3
NATIONAL	5

ALUMNI STATUS

STATUS	POINTS
LEGACY (PARENTS/STEP-PARENTS)	4
OTHER (GRANDPARENTS, SIBLINGS, SPOUSES)	1

LEADERSHIP AND SERVICE

LEVEL OF ACHIEVEMENT	POINTS
STATE	1
REGIONAL	3
NATIONAL	5

Required Essay

Essay Quality	Points
Outstanding Essay	1
Not Outstanding Essay	0

Jones, Joyce and Lewis, Latif, Black Enterprise Magazine, April 2003, p. 79.

Miscellaneous

Criteria Met	Points
Socioeconomic Disadvantage	20
Under-represented Racial/Ethnic Minority Identification or Education	20
Men in Nursing	5
Scholarship Athlete	20
Provost Discretion	20

Positive Discrimination in India

Introduction

India has a long-standing, wide-ranging and complex system of affirmative action policies, which have also been referred to by many scholars as compensatory discrimination policies. The goal of affirmative action policies in India is to be more inclusive, to compensate those at the lowest level of India's four-tiered caste system for centuries of past injustices and repression and to offset the disabilities currently suffered by this underprivileged class of people. Dr B.R. Ambedkar, who championed the cause of India's untouchables, argued in 1948 before India's constituent assembly: "A solution must be found [that will] recognize the existence of minorities to start with. It must also be such that it will enable majorities and minorities to merge some day into one". This set of complex policies has been in place for more than 50 years, and countries dealing with issues of racial discrimination can gain valuable insight from India's struggle with caste-based discrimination.

The Indian Government has argued that the Indian problem is outside the purview of international forums focusing on race-based

discrimination, since discrimination in India is based on caste, not race. On one hand, there has been an increase in the conflicts between the caste Hindus and the backward classes, particularly on policies aimed at implementing the Mandal Commission report, which increased reservations for "Other Backward Communities". However, the growing power and influence of the backward classes has also helped focus the attention of the international community on the ills of the caste system and caste based policies and politics.

This section focuses on discrimination in India's education system and the positive discrimination policies aimed at benefiting disadvantaged communities. In order to have a better understanding of the complexities and magnitude of the problem, section 1 begins with a brief historical review of untouchability in India. Section 2 consists of a brief review of the research focusing on the economic impact of caste-based discrimination and affirmative action policies, especially in education. An examination of the constitutional safeguards against untouchability and discrimination and some major court rulings in this regard form section 3; this section also defines some of the key terms used in discussions regarding caste-based discrimination. Section 4 studies policies specifically aimed at positive discrimination in educational institutions, while section 5 focuses on the merits and demerits of the system of positive discrimination. Finally, section 6 provides a summary of key findings and policy recommendations.

The Caste System and Untouchability: Historical and Current Perspectives

The caste system in India is over three thousand years old and dates back to the ancient Hindu scriptures called the Rig Vedas. Hinduism consists of four castes arranged in a hierarchy. People who do not belong to one of these castes are outcasts. The Vedic term for caste is "Varna" which means colour. Each Varna has its own rights and responsibilities. The highest Varna is of the Brahman. Members of this class are priests and the educated people of society. The next Varna in the hierarchy is

Kshatria whose members are the rulers and aristocrats. After them are the Vaisias who are the landlords and businessmen of society. Last in the four-tiered hierarchy are the Shudras, comprised of peasants and the working class. The first three Varnas are considered as "twice-born". Traditionally, members of these Varnas have access to religious education and go through religious ceremonies, giving them special spiritual rights that are denied to the Shudras. The caste system in India dictated all significant aspects of a person's life.

Below the caste hierarchy are the outcasts. They are considered untouchable by the four castes. Untouchables worked in degrading jobs such as cleaning sewage. They were called "Harijan" or children of God by Mahatma Gandhi, who wanted society to accept untouchables. In recent years they have been referred to as the "Dalit" or the oppressed people. The lower classes occupy three categories. The first category is called Scheduled Castes; it includes communities of untouchables. The second category, the Scheduled Tribes are also called "Adivasi", (meaning aboriginals) and includes communities that do not accept the caste system and reside deep in the jungles, forests and mountains of India, away from the main population. The third and more recent category, called Other Backward Classes, includes those who belong to the Shudra Varna and also former untouchables who converted from Hinduism to other religions such as Islam or Christianity. There is considerable controversy regarding the definition of Other Backward Classes, as various groups lobby hard to be included in this category.

The untouchability aspect of the caste system is highly oppressive and demeaning. Indian society considered people who worked in polluting and unclean occupations as untouchables; they had very few rights in society. The treatment of untouchables varied in different parts of the country. Cunningham and Menon (1997) cite Galanter's list of most common discriminatory practices. These include:

> (1) denial of access to public facilities such as wells, schools, post offices and courts; (2) prohibition of entry into Hindu temples; (3) exclusion from professions and profitable occupations; (4) residential segregation, typically outside the village boundaries; (5) denial of access to services such as restaurants, theatres and barber shops; (6) prohibition from using horses, bicycles, umbrellas, footwear or wearing jewellery; (7) restrictions on

movement by requiring prescribed distance from persons of higher caste while on roads and streets. [26]

For example, in some regions, the dwellings of these oppressed communities were at a distance from the settlements of the members of the four Varnas. The untouchables were not allowed to touch people from the four Varnas, enter homes of the higher Varnas or the temples or use the same wells used by members of the higher castes. During public occasions they were seated at a distance.

In modern India, there appears to be more flexibility in the caste system. Today there is increased education of the lower caste, employment of Dalit in higher government positions and marriages that cross caste boundaries are more widespread.[27] In cities, people belonging to different castes mingle with each other. However, in rural areas discrimination based on caste and sometimes even untouchability, still exists. Caste related tensions between the upper and lower castes sometimes lead to violent clashes in villages and cities.

A Brief Review of the Research on the Economic Impact of Caste-based Discrimination and Affirmative Action Policies

This review focuses on the relationship between caste, discrimination and economic outcomes in India, as well as the impact of positive discrimination policies, with particular emphasis on education. It does not review papers whose main focus is on poverty and inequality; nor does it review purely theoretical work that explains the existence of a segregated economy and its stability. Deshpande (2000a) provides a detailed review of the latter aspect.[28]

Rigorous empirical economic research on caste is somewhat limited and often conflicting. Deshpande (2001) examines regional variations in inter-caste disparity in India using the National Family and Health Survey 1992/93 data.[29] He identifies five variables, (occupation, education, landholdings, assets and livestock) as indictors of the standard of living of the three major castes and computes a Caste Deprivation (Development) Index similar to the Human Development Index. He argues that caste

should be an indicator of the stratification pattern of India's population. His evidence also questions the notion that substantial upward mobility has occurred during the 50 years of Indian independence. Despande's (2000b) study of inter-caste inequality in one of India's more egalitarian states, Kerala, confirms that "inter-caste inequality continues to underlie overall disparity".[30] His calculations, using the Theil Index, suggest that there is a low to medium level of overall inequality, and that there exists an elite or upper group that is more significant in the Other category than in the Schedule Caste or Tribes category. However, Lanjouw and Stern (1998) found that people in Palanpur perceived caste-based distinctions to be less important in recent decades.[31]

There are several studies of labour market caste-based discrimination. Bhattacherjee (1985) estimates the extent of wage discrimination against lower caste workers in an automobile firm in Bombay, India.[32] He finds that wage discrimination in this firm manifested itself in the undervaluation of lower caste human capital and employment-related characteristics in comparison to the upper caste workers. Rao (1992) finds that individuals who value prestige would be willing to take a pay cut to obtain the occupation of a caste higher than their own.[33] Banerjee and Knight (1985) find evidence of wage discrimination that operates in part through the job assignment process with Schedule Castes and Schedule Tribes entering into poorly paid, dead-end jobs. They also suggest that caste discrimination may be a formal sector phenomenon since these jobs are highly prized, and hence, there is greater resistance to the recruitment of workers from the Schedule Castes.[34] Lakshmanasamy and Madheswaran (1995) also find statistically significant differences in the earnings between Scheduled Castes and others and suggest that this difference would be even larger but for the reservation policies.[35]

The studies on social mobility have found that relatively little occurs. Many studies suggest that the lack of access to credit among the lower classes is a significant factor. Mayoux (1993) studies the silk reeling industry in Karnataka, a small-scale industry that receives Government support for disadvantaged groups. The study finds limited evidence of upward mobility (though not for the very poorest) and it points to the lack of access to credit as a result of prejudice as a

key constraint.[36] Lanjouw and Stern (1998) also discuss the problems encountered by poor access to credit in Palanpur. Their findings highlight the chaotic state of the village credit market, regarding the special difficulties faced by assetless households, the role of seasonal loans in kind, and the failure of public lending institutions to meet the credit needs of disadvantaged households.

It has also been argued that discrimination against Scheduled Castes and Tribes begins at the pre-market stage by restricting their access to education. Dhesi and Singh (1989) find evidence of differential access to education among different religious castes in Delhi, as well as the existence of wage discrimination.[37] Their analysis indicates that the high illiteracy rate among the Schedule Castes explains a significant portion of their lower earnings. Dhesi (1998) provides evidence of bias in the Indian education system, particularly at higher education levels. He argues:

> Social compulsions notwithstanding, primary education soon slid down the scale of priorities. In any case providing opportunities to disadvantaged social categories without taking into account their ability to act on it would not necessarily ensure the intended results. In addition to poverty, the high opportunity cost of schooling for these categories, poor quality schooling facilities, irrelevance of education to their immediate work needs, and prejudices of teachers account for their continued backwardness. In contrast, better-off social categories largely send their children to English medium private schools providing quality education. They virtually monopolize access to highly subsidized quality higher education and thus secure privileged access routes to dominant positions in society by acquiring cultural dispositions and competencies of the dominant elite. [38]

Dhesi's research indicates that the literacy rate in the general population (52%) is significantly higher than the literacy rates of Schedule Castes (30%) and Schedule Tribes (24%). The female literacy rates in the general population, Schedule Castes and Schedule Tribes are 39.29%, 19.03% and 14.5% respectively. His research uses a fairly large sample of the Delhi population and indicates that:

> …a very large portion of the educated belonging to the disadvantaged categories, especially the Schedule Castes are primary graduates. The gap between the two top social categories — Brahmins

and higher castes — and the remaining categories tends to increase significantly as we move along the higher stages of education.

His research also shows that the "highly subsidized higher education is almost monopolized by the top two social categories". He also suggests that access to schooling has a class character. His analysis indicates that disadvantaged groups are poor and live disproportionately in rural areas with poor education facilities. He asserts, "they not only have poor educational opportunity but also lack capacity to act on whatever is available. The drop-out rate, reflecting poor education quality as well as poor economic conditions of affected pupils, is relatively much higher among the disadvantaged groups".

Constitutional Safeguards, Backward Class Commissions and Court Rulings

A. Constitutional Safeguards

Prior (1996) provides a detailed analysis of compensatory discrimination in India.[39] Reservations in public employment and universities began in India under British rule and favoured Muslims, Christians, Anglo-Indians and other communal groups. The goal was to adjust the political balance among the various groups and improve the conditions of the disadvantaged. It was also suspected that such policies were a part of Britain's strategy to divide and rule.

Under the Indian Constitution, Articles 14, 15, 16 and 17 guarantee the people the right to equality and provide for improving the plight of the underprivileged. The provisions of these Articles are as follows:[40]

Article 14: Equality before law

The State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India.

Article 15: Prohibition of discrimination on grounds of religion, race, caste, sex or place of birth

(1) The State shall not discriminate against any citizen on grounds only of religion, race, caste, sex, place of birth…

(2) No citizen shall, on ground only of religion, race, caste, sex, place of birth, be subject to any disability, liability, restriction or condition with regard to -

a) access to shops, public restaurants, hotels and places of public entertainment; or

b) the use of wells, tanks, bathing ghats, roads and places of public resort maintained whole or partly out of State funds or dedicated to the use of general public.

(3) Nothing in this article shall prevent the State from making any special provision for women and children.

(4) Nothing in this article or in clause (2) or Article 29 shall prevent the State from making any special provision for the advancement of any socially and educationally backward classes of citizens or for the Scheduled Castes and the Scheduled Tribes.

Article 16: Equality of opportunity in matters of public employment

(1) There shall be equality of opportunity for all citizens in matters relating to employment or appointment to any office under the State.

(2) No citizen shall, on grounds only of religion, race, caste, sex, descent, place of birth, residence or any of them, be ineligible for, or discriminated against in respect of any employment or office under the State.

(3) Nothing in this article shall prevent Parliament from making any law prescribing, Government of, or any local or other authority within, a State or Union territory, any requirement as to residence within that State or Union territory prior to such employment or appointment.

(4) Nothing in this article shall prevent the State from making any provision for the reservation of appointments or posts in favour of any backward class of citizens which, in the

opinion of the State, is not adequately represented in the services under the State.

a) Nothing in this article shall prevent the State from making any provision for reservation in matters of promotion to any class or classes of posts in the services under the State in favour of the Scheduled Castes and the Scheduled Tribes which, in the opinion of the State, are not adequately represented in the services under the State.

(5) Nothing in this article shall affect the operation of any law which provides that the incumbent of an office in connection with the affairs of any religious or denominational institution or any member of the governing body thereof shall be a person professing a particular religion or belonging to a particular denomination.

Article 17: Abolition of untouchability

"Untouchability" is abolished and its practice in any form is forbidden. The enforcement of any disability arising out of "Untouchability" shall be an offence punishable in accordance with law.

The Constitution also provided for a special officer (Article 338) for the Scheduled Castes and Scheduled Tribes as well as for a Commission to investigate the condition of the Backward Classes (Article 340). Both of these were appointed by and are responsible to the President.

Article 338: National Commission for Scheduled Castes, Scheduled Tribes 41

There shall be a Special Officer for the Scheduled Castes and Scheduled Tribes to be appointed by the President.

(1) It shall be the duty of the Special Officer to investigate all matters relating to the safeguards provided for the Scheduled Castes and Scheduled Tribes under the Constitution and report to the President upon the working of those safeguards at such intervals as the President may direct, and the President shall cause all such reports to be laid before each House of Parliament.

Article 340: Appointment of a Commission to investigate the conditions of backward classes[42]

(1) The President may by order appoint a Commission consisting of such persons as he thinks fit to investigate the conditions of socially and educationally backward classes within the territory of India and the difficulties under which they labour and to make recommendations as to the steps that should be taken by the Union or any State to remove such difficulties and to improve their condition and as to the grants that should be made for the purpose by the Union or any State and the conditions subject to which such grants should be made, and the order appointing such Commission shall define the procedure to be followed by the Commission.

(2) A Commission so appointed shall investigate the matters referred to them and present to the President a report setting out the facts as found by them and making such recommendations as they think proper.

(3) The President shall cause a copy of the report so presented together with a memorandum explaining the action taken thereon to be laid before each House of Parliament.

Article 341(1): The authority to specify the castes, races under a Schedule[43]

The Constitution of India gave a special mandate to the President of India under Article 341(1) to specify the castes, races under a Schedule. The castes as listed become eligible for the purposes of discriminatory protections and favours designed for that purpose.

Article 29: Protection of interests of minorities

(1) Any section of the citizens residing in the territory of India or any part thereof having a distinct language, script or culture of its own shall have the right to conserve the same.

(2) No citizen shall be denied admission into any educational institution maintained by the State or receiving aid out of State funds on grounds only of religion, race, caste, language or any of them.

Article 30: Right of minorities to establish and administer educational institutions

(1) All minorities, whether based on religion or language, shall have the right to establish and administer educational institutions of their choice.

a) In making any law providing for the compulsory acquisition of any property of an educational institution established and administered by a minority, referred to in clause (1), the State shall ensure that the amount fixed by or determined under such law for the acquisition of such property is such as would not restrict or abrogate the right guaranteed under that clause.

(2) The State shall not, in granting aid to educational institutions, discriminate against any educational institution on the ground that it is under the management of a minority, whether based on religion or language.

Article 45: Directive Principles of State Policy (1950)

The State shall endeavour to provide within a period of ten years from the commencement of this Constitution, for free and compulsory education for all children until they complete the age of fourteen years.

B. Recommendations of the Backward Class Commissions[44]

i) The **First Backward Class Commission** was set up in 1953 to determine the criteria for identifying socially and educationally backward classes. The Commission's report in 1955 identified 2,399 groups. The criteria used to determine backwardness were: position in the Hindu hierarchy, trade and occupation, security of employment, level of education, and general representation in government positions. The Commission recommended reservations in government jobs between 25% and 40%, depending on the level of the position, and reservation up to 70% in technical and professional institutions for qualified backward community students. These recommendations

were rejected by the parliament since there were concerns about its methodology and internal consistency.

ii) The **Second Backward Class Commission** popularly known as the Mandal Commission, after its Chairperson. This Commission was appointed in 1978 and submitted its report in 1980. The Commission based its conclusions on an analysis of a survey of 405 districts conducted by the Bureau of Economics and Statistics, and designed with the assistance of top Indian social scientists. It set forth the criteria for identifying Other Backward Classes (other than Scheduled Castes and Tribes). Indicators of backwardness were grouped under three main headings: social, educational and economic. Some indicators of social backwardness include whether the class or caste depended on manual labour for its livelihood, whether most members perceived themselves as backward, and whether the region they came from was generally considered backward. It also considered whether 25% of females and 10% of males above the state's normal average were married by age 17 or under (in urban areas the comparable figures were 10% of the females and 5% of the males). Education criteria in determining backwardness included the number of children who had never attended school and classes or castes where the student dropout rate was 25% above the average. Economic indicators of backwardness included castes or classes whose total family assets were 25% below the state average, the number of households who had to borrow to meet basic living expenses, and households whose source of drinking water was more than half a kilometre from their homes.

Under the Mandal Commission recommendations, the total reservations for Schedule Castes, Tribes and Other Backward communities were 49.5%. The Commission observed that Scheduled Castes and Tribes make up approximately 22.5% of India's population and hence should have 22.5% of government jobs reserved for them. Because the courts ruled that the total reservation could not exceed 50%, the Commission recommended that the Other Backward Classes have 27% reserved for them despite the fact that they constituted 52% of the population. This 27% reservation was applicable to all government services as well as technical and professional educational institutions. The Commission also recommended that the percentage of backward classes that obtain

public employment through open competition should not be adjusted against the reservation of 27%. Reservations for Other Backward Classes should apply to initial placements as well as promotions, and unfulfilled quotas should be carried over for three years. This policy would apply to all private sector institutions that receive government assistance including universities and colleges. The Commission also recommended the establishment of a separate Ministry for Backward Classes and reevaluating the reservation scheme after twenty years. In 1990, the then Prime Minister, V.P. Singh, decided to implement the Mandal Commission's recommendations. This led to widespread communal clashes, self-immolations and continued violence; the Government's decision was challenged in India's Supreme Court.

C. Indian Supreme Court Decisions regarding Compensatory Discrimination

The Indian Supreme Court decisions have tackled many controversial and explosive issues regarding compensatory discrimination. The court first ruled on whether caste could be used as the sole test to determine backwardness in Balaji v. State of Mysore. The courts ruled that caste could not be the sole criterion for identification of backwardness but should be considered in conjunction with other factors such as occupation and place of residence. In Chitralekha v. State of Mysore, the courts permitted caste to be used as a measure of backwardness, as long as it was not the sole measure. Rajendran v. State of Madras required that caste be both socially and educationally backward so that only the really needy benefit from the compensatory discrimination. Kerala v. Thomas generally affirmed the compensatory discrimination policies.

The landmark case in recent times was Indra Sawhney v. Union of India that challenged the validity of former Prime Minister V.P. Singh's decision to implement the Mandal Commission recommendations. In its decision, the courts held that "even though the word caste is not specifically written in Article 16(4), it may still be used as a criterion for

determining backwardness".[45] For non-Hindus, the Government could use other criteria to identify backwardness. In the case of Other Backward Classes, no single standard was identified. The court also asserted that backwardness need not be social and educational for the purposes of Article 16(4) and opined that the Article referred mainly to social backwardness.

The court also ordered the Government to adopt an "economic means test" to ensure the more advanced members of the backward class did not profit from the reservation schemes. This test permitted the exclusion of the "creamy layer", which were those members of the backward classes who were financially well off and could provide for themselves without Government assistance. The Supreme Court also upheld the 50% rule for reservations and declined to extend reservations to promotions after the initial employment. The court did not approve an additional 10% reservation for poorer members of the upper class.

The "creamy layer" test has met with stiff opposition from the backward communities. Porter (2003) suggests that this argument may be flawed in many ways.[46] There is a need to ensure that the people of the backward communities termed the "creamy layer" who are in leadership positions currently continue to have access to those positions, so they can continue in their fight for equality. It cannot be assumed that since there are more members from backward communities in positions of status, this will automatically increase the class position of members of the backward class and negate the social stigma. Another argument against skimming this "creamy layer" suggests there may not be sufficient numbers of backward class people from this layer in positions of power, who can secure opportunities and access for members of their communities.

Affirmative Action in the Education System in India

Based on the constitutional provisions, the Government of India has in place several programmes that are targeted towards the educational

and professional advancement of individuals in Scheduled Castes and Scheduled Tribes. State governments can also provide reservation to Scheduled Castes and Scheduled Tribes and other backward classes in their respective states. Some examples of such policies are reservations for the backward communities in educational institutions, exemption from school fees, provision of stipends, scholarships and book grants, merit scholarships reservations that favour Schedule Castes, maintenance of hostels, special coaching for Schedule Caste students who are residents of hostels and special coaching for Schedule Caste students participating in competitive examinations.

The following is a summary of the key programmes of the Department of Education:

A. Elementary Education

i) Free and compulsory education is to be provided to all children up to the age of 14 years in India. A special provision for children belonging to the Schedule Castes and Schedule Tribes mandates that a primary school must be provided in Schedule Caste/Schedule Tribe habitations with populations of at least 200 (the comparable number is 300 in the general case).

ii) Operation Blackboard is designed to provide minimum infrastructure for primary schools. All the Schedule Caste and Schedule Tribe habitations are covered under Operation Blackboard.

iii) The District Primary Education Programme (DPEP) takes a holistic approach to elementary education and provides specifically for the development of strategies to improve the primary education of Scheduled Tribes. In the State of Rajasthan for example, the Lok Jumbish programme has developed special strategies for Schedule Caste and Tribe children through micro planning at the village level. Under this scheme, the children also receive free uniforms and textbooks, and there are provisions for the construction of low cost hostels.

B. Secondary Education

i) Education is free at secondary level in government schools.
ii) Further, in the case of new admissions, a reservation of 15% for the Schedule Castes and 7.5% for the Schedule Tribes is provided in the Kendriya Vidyalayas or Central Schools that are schools for children of transferable Government employees. There are also reservations in Navodaya Vidhyalayas, which are schools that provide quality education to talented children, particularly in rural areas.
iii) Qualifying standards are relaxed, if necessary, for Schedule Castes and Schedule Tribes candidates.
iv) There is a reservation of 15% in the recruitment of teachers in Kendriya Vidyalayas for the Schedule Castes and 7.5% for the Schedule Tribes. Other concessions include relaxation of the age limit by five years, no application fees and the inclusion of a Schedule Castes/Tribes member on the selection committee.

C. University and Higher Education

The University Grants Commission has issued instructions to all central universities, Education Secretaries of State Governments and Union Territory to implement reservation orders in matters of the admission of Schedule Castes and Schedule Tribes.

i) 15% of seats in all courses are to be reserved for students belonging to Schedule Castes; 7.5% for students belonging to Schedule Tribes.
ii) Candidates belonging to both categories are given a relaxation of 5% from the minimum qualifying level prescribed, if any, and if the reserved seats still remain unfilled, a further relaxation should be given so that all reserved seats are filled by those belonging to Schedule Caste and Schedule Tribe categories.
iii) Teacher Fellowships and Research Associateships are set aside for Schedule Caste and Schedule Tribe candidates, and a 10% relaxation in the qualifying criteria is allowed for Junior Research Fellowships.
iv) The University Grants Commission also provides for relaxation in the criteria for financial assistance to colleges enrolling Schedule Caste

and Schedule Tribe students as well as those located in backward regions.

v) The University Grants Commission has a programme of remedial courses for Schedule Caste and Schedule Tribe students in universities and colleges. Those universities and colleges that have more than 15% Schedule Caste and Schedule Tribe students are eligible for assistance.

Students from backward communities face significant problems even after they are admitted into universities, hence certain institutions have undertaken special in-house programmes of compensatory discrimination. A good example is the programme followed by the Indian Institute of Technology (IIT) in New Delhi. IIT accepts members of backward classes who have failed the qualifying exam by a small margin and gives them additional training and coursework that enhance their skills, thus preparing these candidates to compete with their peers in the classroom.

Merits and Demerits of India's Compensatory Discrimination Policies

The impact of positive discrimination policies has been a matter of widespread debate and violent public reactions. Some of the main arguments advanced by both sides involved in this debate are summarized below. The proponents of positive discrimination polices in India have identified several gains from these policies:

i) Jain and Ratnam (1994) argue: "The achievements of the affirmative action programmes in India are significant even if they fall short of the targets/quotas set". They also state that this would not have been possible but for the "significant reform in securing proportional representation in the political system for Schedule Castes and Schedule Tribes".[47] Galanter M. (1997) argues: "If one reflects the propensity of nations to neglect the claims of those at the bottom, I think it is fair to say that this policy of compensatory discrimination has been pursued with remarkable persistence and generosity (if not always with vigour and effectiveness)…".[48]

ii) The Government and proponents argue that this approach is the best among available options in the Indian context to address age-old discrimination and its lingering negative effects and to promote the equality guaranteed by the Constitution. Indeed, the fact that India has had a Schedule Caste President and a Schedule Caste Prime Minister is a sign of the progress that has been made since independence. On the other hand, there has been widespread discussion on how the reservation policy, initially meant to merge the different ethnic groups at a social level, turned out to be much less successful than anticipated. Some of the main problems associated with these policies are:[49]

i) Affirmative action, instead of lowering caste barriers, has made caste more of an issue, precisely because of the value it confers on the backward communities. This has the perverse result of strengthening the class identity and leading to greater social stratification.

ii) Beneficiaries of positive discrimination are often the elite among the lower castes, particularly in rural areas. This is viewed as a serious problem since it implies that the benefits of positive discrimination are not reaching those who need it most. The Supreme Court's directive to skim off the "creamy layer" is meant to address this issue.

iii) There is a feeling among the members of the "upper class" in India that reservation policies have placed the leadership of the country in the hands of people who came to powerful positions not by merit but by reservation polices and are, hence, incompetent to do their job successfully. Some argue that the efficiency of the Government may be undermined where merit is de-emphasized as the criteria for hiring and promotion.

iv) Many castes seem unable to adjust themselves to the fact that the backward communities now have easier access to education, higher incomes and better jobs. This has led to clashes between the dominant castes and backward communities, it has increased social unrest and made caste an explosive and divisive issue.

v) There is a great deal of anger and resentment among the younger generations of the upper class who feel that their opportunities are being restricted by their non-backward community status.

vi) There is continued pressure to expand the beneficiaries of positive discrimination by adding categories. In addition, when a caste manages to get categorized as "backward" it lobbies hard to retain that categorization, given all the benefits of compensatory discrimination.

vii) One of the most scathing criticisms of the positive discrimination policy is that it has not resulted in substantial upward mobility of the lower classes, especially in rural areas. Most of the backward communities remain low in the social order even today, while the upper castes continue to maintain their high position in the social hierarchy.

viii) There is also the risk that positive discrimination will be used to mobilize groups of voters and influence the voting process during the elections.

ix) These policies focus on the Government sector and do not address the discrimination that goes on in the private sector.

x) In the education system, lack of adequate preparation and skill is a major barrier in the retention and graduation rates of Schedule Caste and Schedule Tribe students. They are stigmatized on the basis of their caste affiliation since the class registers reveal their caste. Seenarine M. (1996) cites Chitnis as identifying several problems that hinder the backward communities' access to education.[50] These include (i) reluctance on the part of prestigious educational institutions to make special provisions for the admission of backward communities, (ii) inability of students admitted under the affirmative action programmes to cope with academic requirements, (iii) monopolization of admissions under the reservation policies by the economic elite from among the scheduled castes, (iv) a highly uneven representation of different Schedule Caste groups in education, (v) cheating and misrepresentation in the use of reservations in securing admissions, and (vi) growing resentment on the part of the upper castes against backward communities.

Brazil has the largest black population outside Africa. Until recent years, the Government consistently promoted the myth that it is a racial democracy. Implicit within this idealized democracy is the notion that, although whites and non-whites may not currently occupy equal ground in social standing, equal opportunities for advancement exist for all members of the society *regardless* of racial characteristics (Wood and Lovell 1992).

Historically, Brazilian politics were shaped by elites. These elites were largely white, wealthy, male and privileged. In fact, between the years 1889 and 1930, a growing concern of the elites was that Brazil's population was "too black". Therefore, an unofficial policy of *embranquecimento*, or whitening, was adopted. This policy, followed by means of importing, favoured the immigration of "lighter" workers (Johnson III, 1998).

By the 1930s, the proportion of whites had significantly increased while the percentage of Afro-Brazilians had decreased. But as the influence of Nazism, with its emphasis on white supremacy, began to spread in the 1930s, the policy of *embranquecimento* soon ended. Repulsed by the extremity of Nazi ideology, the elites began to embrace the idea that Brazilians were a culture of mixed ethnicity, often contrasting the "harmonious race relations" in Brazil with the racial segregation in the United States. The distorted idea of harmonious race relations of that period was propagated in the research of noted Brazilian sociologist Gilberto Freyre. He advanced the theory that Brazil's greater racial harmony was an outcome of the Catholic and Portuguese cultural influences on the institution of slavery in Brazil. These cultural influences, Freyre argued, made slavery in Brazil less degrading and more humane. Such misrepresentations of history, alongside the absence of blatant forms of segregation that existed in the apartheid era of South Africa or the Jim Crow era in the United States, minimized racial conflict in Brazil despite significant racial inequality.

From 1937 to 1945, Brazil entered the *Estado Novo* or New State era. This era marked one of the most repressive periods in Brazilian politics. While the Government continued to promote the myth of racial harmony, a host of political parties was banned, including the *Frente Negra Brasileora* (Black Brazilian Frontier), a prominent Black political group.

The years between 1945 and 1964 brought another change of the political landscape. During this period, national parties with mass participation emerged (Santos 1986, 1987). The idea of racial harmony flourished again among the elites, and this led to the passage of the Afonso Arinos Law (1951), outlawing racial discrimination in public venues.

As the United States was experiencing the Civil Rights and Black Power movements, the military took control of the Government in Brazil. During this period, which lasted from 1964 to 1985, only very moderate civilian influence was permitted (Sorj and Almeida 1984; Skidmore 1988).

When the military withdrew from political power in 1985, Brazil reinstated its democratic Government. Despite a positive change in the political structure and new constitutional guarantees introduced in 1988, large inequalities still existed between the country's white minority and the mixed and Black majority. Afro-Brazilians are under–represented in the legislature, State bureaucracy and the military. Further, they have long been excluded from the private sector. For example, some newspapers advertise jobs stipulating "good appearance", as a code word for white.

Education System

For more than three-quarters of a century, politicians have recognized the importance of eliminating illiteracy, providing universal access to basic education and improving the performance of the education system in order to further enhance ecnomic growth (Romanelli 1978).

Despite the consensus of public officials and political parties on the above priorities, one quarter of the population still has no formal schooling. Explanations for the continuing lack of improvement in the Brazilian education system include: the scarcity of financial and human resources, overstaffed and under-qualified administrative and planning agencies at all levels and the lack of effective reform strategies (Plank 1991; Castro 1989). The failure also appears in more basic forms, including a scarcity of textbooks, dilapidated school buildings, rampant administrative inefficiencies and low teacher salaries.

Brazil's education system also suffers from inequalities in the allocation of resources among regions (Plank, 1991). Perhaps the most striking evidence of this is the significant gap between the developed and prosperous regions of the south-east and the rural and destitute regions of the north-east. State schools in the south-east spend 20 times more per pupil compared to municipal schools serving the rural north-east. Although the initial enrolment rate is similar between the rich and the poor regions, the difference is evident at later stages. While only half the children in the rural north-east receive less than four years of schooling, four out of every five children from the richest households complete primary school.

Another factor reinforcing educational inequality is public support for private schools in the Brazilian education system. Private schools receive large quantities of public money through direct and indirect transfers from the Federal and State governments. As such, public schools are hurt not only by the loss of potential revenues but also by the loss of parents who potentially could have provided an articulate and influential lobbying power. These subsidies reinforce the educational disadvantage of Blacks because more than two-thirds of Brazil's poor are Black, while the average monthly income of whites is more than double that of the Afro-Brazilian population. Hence, Blacks are less likely to benefit from private school subsidies.

Finally, about 60 per cent of the federal education budget continues to be devoted to the support of federal universities (Verhine 1991, Gomes 1988; Plank 1991). In contrast, although Afro-Brazilians make up half of Brazil's population of 170 million, only 2.2 percent of Brazil's 1.6 million college students are black (Jones, 2002).

The Brazilian Government is beginning to address its discrimination problem by slowly calling for action. At the 2001 United Nations Conference in South Africa, Brazil's officials agreed to adopt quota systems for Afro-Brazilians in higher education and civil service jobs. Gillberto Saboia, Brazil's senior spokesman on race affairs adds that these are pilot programmes that could develop into "more wide-ranging policies" (Downie 2001). Recently, the new government of President Luiz Lula da Silva implemented these wide-ranging policies.

On 13 May 2001, President Fernando Henrique Cardoso signed a decree initiating the "National Programme for Affirmative Action", which promotes diversity in government agencies and federal public administration. He also put forth the "II National Programme on Human Rights" outlining the direction of the nation's citizen rights. Brazilian Minister of Foreign Relations, Celso Lafer, explained that this is a "policy of inclusion which favours diversity" (Press Release No. 064/2002), and he expressed that Brazil should "expand towards the safeguarding and detailed defence of the rights of groups socially discriminated against and those of the disadvantaged" (Press Release No. 065/2002). These programmes are necessary to end the oppression of minorities (Lexis-Nexis2, 2001).

Affirmative Action programmes grant Afro-Brazilians 20% of all federal government jobs, 20% of a $150 million job-training budget of the Labour Ministry, 40% of those hired to work on a poverty programme by the Ministry of Social Security, and 20 scholarships for special training for diplomat exams through the Ministry of Foreign Relations. In addition to these programmes, lawmakers are pushing for 25% of all television, movie and theatre roles to Afro-Brazilians (Downie 2001).

As in the United States, opponents of affirmative action argue that these programmes represent reverse racism that, by definition, go against their very intent — to eliminate discrimination. Proponents counter that discriminating for disadvantaged groups is the only way to solve persistent inequalities.

Afro-Brazilians have higher dropout rates than whites in primary school, especially in impoverished areas. Therefore, an affirmative

action programme that merely holds positions for uneducated individuals will never work without a complimentary education programme. To address this issue, the Brazilian Government adopted "Bolsa Escola" (school attendance) grants. These grants are designed for the poor because a majority of the poor in Brazil is black (Guillebeau 1999). "Bolsa Escola" grants, a creative programme that pays poverty-stricken families to keep their children in school, are distributed to a "representative proportion" of Blacks (Downie 2001). To qualify, impoverished families must have children enrolled in and attending primary school. The objective of this programme is to keep children learning in school instead of begging or selling items on the street (Ministry of Education official press release).

Barriers to Implementing Polices and Strategies

Blacks are under-represented in Congress and have little power to overcome a disadvantaged culture. Until the current administration, of the 21 cabinet ministers and 11 Supreme Court judges none was Afro-Brazilian while the 2000 census revealed that 45 per cent of the population claims some African ancestry (Downie 2001).

A complicating feature is that in Brazil, there are over 300 different classifications of race, and each of these various shades of brown is used to describe skin colour and ancestry (Guillebeau 1999). Because of this, opponents of affirmative action in Brazil say that "free-riders" or opportunists will exploit the system and reap all benefits from the programme. These include middle or upper class Afro-Brazilians who would take reserved jobs and scholarships from those who actually require government help. As in India, this is known as "skimming the cream". Also, opponents claim that poor whites will have an even harder time because they are as much in need of help, but are discriminated against because of their skin colour. Another criticism is that unprepared Afro-Brazilian students or employees will be unable to successfully compete against whites. "Poor pupils find it hard to compete with privately educated whites for places at free public universities" (*Economist* 2000). It is argued that this will result in a high turnover rate, a high dropout rate, and increased resentment of Afro-Brazilians and sceptics of affirmative action.

Proponents of affirmative action dismiss the argument of skimming the cream because Brazil does not have a black middle class. Advocates claim that once Afro-Brazilians form a middle class, then this concern may be addressed. Second, the impact on poor whites is believed to be minimal because Afro-Brazilians make up more than 70% of those below the poverty line. Also, social welfare programmes already exist specifically to help poor citizens, regardless of skin colour.

1. Larry Rohter, "Racial Quotas in Brazil", *New York Times* (5 April 2003)
2. 347 US 483, 1954.
3. This Order was amended in 1976 by Executive Order 11375.
4. Public Law 95-28;91 Stat. 117.
5. Public Law 95-507 [92 Stat. 1757].
6. Minority businesses include those owned by Blacks, Hispanics, Asians and Pacific Islanders, and Native Americans and Aleuts.
7. See W.E.B. Du Bois and A. Dill, *The Negro American Artisan* 17 (Atlanta, GA: Atlanta University Press, 1912) 32-33.
8. Rice, Mitchell, "Government Set-asides, Minority Business Enterprises, and the Supreme Court", *Public Administration Review*, 51.2 (March/April 1991): 117.
9. *ibid.*
10. For background summaries, see the National Cooperative Highway Research Program's, "Minority and Disadvantaged Business Enterprise Requirements in Public Contracting", *Legal Research Digest*, 25 (September, 1992): 1-28;
    Dixon, Dianne, "The Dismantling of Affirmative Action Programs: Evaluating City of Richmond v. J.A. Croson Co.", *Journal of Human Rights,* VII (1990): 35-57;
    Stoelting, David, "Minority Business Set-Asides Must be Supported by Specific Evidence of Prior Discrimination" *Cincinnati Law Review*, 58 (1990): 1097-1135; and Rice, Mitchell, ibid: 114-22.
11. 488 US at 752.
12. 438 US 265 (1978).
13. *ibid*, p. 729.
14. 488 US at 507.
15. Ensley Branch, 31 F.3d at 1582.
16. *Peightal v. Metropolitan Dade County*, 26 F. 3d 1545, 1556 (11th Cir. 1994); see *Dade County*, 122 F.3d at 917.
17. *Dade County*, 122 F.3d at 927 (citations omitted).
18. Adarand Construction, Inc. v. Pena, 515 US 200 (1995).
19. 288 F.3d 732 (6th Cir. 2002).
20. 233 F.3d 1188 (9th Cir. 2000), cert. denied, 121 S. Ct. 2192 (2001).
21. 122 F. Supp. 2d 811 (E.D. Mich. 2000)
22. 263 F. 3d 1234 (11th Cir. 2001).
23. 78 F.3d 932 (5th Cir.), cert. denied, 518 US 1033 (1996).
24. For a comprehensive review of the entire issue, see Ancheta, Angelo, "Revisiting Bakke and Diversity-Based Admissions: Constitutional Law, Social Science Research and the University of Michigan Affirmative Action Cases", *The Civil Rights Project at Harvard University*, Cambridge, MA, p. 4.
25. See "Expert Report of Patricia Gurin", *Gratz v. Bollinger*, No. 97-75321 (E.D. Mich.) and *Grutter v. Bollinger,* No. 97-7575928.

26. Marc Galanter "Competing Equalities: Law and the Backward Classes of India" (1984); Cunningham and Menon, "Seeking Equality in Multicultural Societies" (1997).
27. This is in comparison to the traditional arranged marriages that were between members of the same caste.
28. Deshpande, A. "Recasting Economic Inequality" *Review of Social Economy* LVIII.3 (2000a).
29. Deshpande, A. "Caste at Birth? Redefining Disparity in India", *Review of Development Economics* 5.1 (2001): 130-144.
30. Deshpande, A. "Does Caste Still Define Disparity? A Look at Inequality in Kerala, India", *American Economic Review* 90.2 (2000b): 322-25. He groups the samples into 3 categories: Scheduled Caste, Schedule Tribes and Other.
31. Lanjouw, P. and Stern, N. "Economic Development in Palanpur over Five Decades", Oxford: Clarendon Press (1998).
32. Bhattacherjee D. "A Note on Caste Discrimination in a Bombay Automobile Firm", *Industrial Relations* 24.1 (1985): 155-59.
33. Rao, V. "Does 'Prestige' Matter? Compensating Differentials for Social Mobility in the Indian Caste System", *Economic Research Center, University of Chicago Working Paper,* PRC 92-6 (1992).
34. Banerjee, B. and Knight J.B. "Caste Discrimination in the Indian Urban Labor Market", *Journal of Development Economics* 17 (1985): 277-307.
35. Lakshmanasamy, T. and Madheswaran, S. "Discrimination by Community: Evidence from Indian Scientific and Technical Labor Market", *Indian Journal of Social Sciences* 8.1 (1995): 59-77.
36. Mayoux, L. "A Development Success Story? Low Caste Entrepreneurship and Inequality: An Indian Case Study", *Development and Change* 24.3 (1993): 541-568.
37. Dhesi, A. S. and Singh, S. "Education, Labor Market Distortions and Relative Earnings of Different Religion-Caste Categories in India", *Canadian Journal of Development Studies* X.1 (1989): 75-89.
38. Dhesi A. S. "Caste, Class Synergies and Discrimination in India", *International Journal of Social Economics* 25 (1998): 1030-1048.
39. Prior E.J. "Constitutional Fairness or Fraud on the Constitution? Compensatory Discrimination in India", Case *Western Reserve Journal of International Law* 28.1 (Winter 1996).
40. http://www.oefre.unibe.ch/law/icl/in00000_.html
41. http://www.dalitchristians.com/Html/dalitrights.htm
42. *ibid.*
43. *ibid.*
44. Sections 3b and 3c are based on Prior E.J. *ibid.*
45. Case E. J. (1977)
46. Poter, A. " Why the Creamy Layer Should not be Excluded from Affirmative Action Programs: An Essay on Leadership and Responsibility in Social and Political Context", *Rethinking Equality in the Global Society Conference* 1997, rev. ed., Washington University, 2003.
47. Jain, H.C. and Ratnam, C.S.V. "Affirmative action in Employment for the Scheduled Castes and the Scheduled Tribes in India", *International Journal of Manpower* 15.7 (1994): 6-25.

48. Galanter, M. "Pursuing Equality: An Assessment of India's Policy of Compensatory Discrimination for Disadvantaged Groups", in Kaviraj, S., ed. *Politics in India* (Oxford University Press, Delhi, 1997): 187-199.
49. Among the papers dealing with these issues are Sujit M. Raman, "Caste in Stone", *Harvard International Review* 21.4: 30-34; Cunningham C.D., "Affirmative Action: India's example", *Civil Rights Journal* (Fall 1999); Cunningham C.D. and Menon N.R.M. "Race, Caste, Class…? Rethinking Affirmative Action", *Michigan Law Review* 97 (1999): 1296-1310.
50. Seenarine, M. *Dalit Women: Victims or Beneficiaries of Affirmative Action Policies in India: A Case Study* (1996), available at www.saxakali.com/Saxakali-publications/dalit1.htm.

Genetics and the Life Sciences: New Discriminations and Inequalities

Dialo Diop

"Those who cannot remember the past are condemned to repeat it", as George Santayana said: the study of the past should help to understand the present and the insights gained should serve as a guide for the future.

It is commonly held that social inequalities first made their appearance when the primitive communities of hunters and gatherers split up after having mastered the domestication of plants and animals, the surpluses gained from agriculture and the raising of animals leading to unequal distribution of wealth between the two different types of producers. With the development of crafts and the invention of writing, the struggle for the distribution of wealth was accompanied by competition to acquire knowledge. Following the development of the State, the two struggles combined in the confrontation to conquer political power, which had become the source of, and the privileged means of access to, tangible and intangible social goods.

However, it was only after the decline of pharaonic African antiquity, characterized by the notion of "Maât" or "Truth-Justice", that the first signs were seen of an attempt at doctrinal justification of the existence of inequalities of legal status between human beings. Such attempts emerged in Graeco-Roman city states and involved, in particular, discrimination between "Eupatrids" and "Thetes" in Athens, "Patricians" and "Plebeians" in Rome, or between "Equals" and "Hilotes" in Spartica. (See Aristotle.)

While this type of discriminatory rationalization was originally based on ad hoc mythologies, these were rapidly replaced by the religious dogmas associated with the Semite monotheisms (Judaism, Christianity

and Islam) which, in their turn, over the centuries, gave way to modern scientific discourse. In this way, myths, religions and the sciences have successively served as justificatory theories for the maintenance or even aggravation of segregation between individuals and social groups, often accompanied by all sorts of persecutions.

However, it was in European modernity that the systematic theoretical approach towards the three fundamental inequalities – between the sexes, races and classes – reached its doctrinal paroxysm.

Without even going into the famous but purely theological controversy of Valladolid which, at the dawn of the sixteenth century, opposed Las Casas to Sepuvelda concerning the possession of a "soul" by American Indians, who were then the victims of the first modern genocide, and leaving aside the sinister "Black Codes" of the Spanish and French monarchies of the seventeenth century – which simply represented a tardy legal justification for the massive deportation and enslavement of Africans for the New World colonies – it is possible to situate and to date the first classification of human races with scientific pretensions to 1758 and the publication of *Systema naturae* by the Swedish naturalist, Carl Linné, the inventor of the term Homo sapiens. In his taxonomy, the human races were divided into four varieties defined principally by their geographic origins and secondarily by three characteristics: skin colour, temperament and general attitudes. According to these criteria, human diversity could be divided into four distinct races: in the order given, Americanus (red skinned, choleric and straight), Europeus (white, sanguine and energetic), Asiaticus (yellow, melancholic and rigid) and Afer or Africanus (black, phlegmatic and relaxed).

However, it fell to Linné's German disciple Blumenbach, regarded as the father of physical anthropology, to take up and revise the Linnean system in his thesis for the Doctorate in Medicine *De generis humanis varietate nativa* (1775), and to replace it in 1795 by a system defining five races which, according to the author, "take into account the different types of humans in a way that better corresponds with the truths of Nature". Therefore his anthropological treatise describes a human pyramid with the "Caucasian" at the top, the "African" and the "Oriental" at the base, and with the "American-Indian" and the "Malaysian" as intermediate types. This subtle change of "racial geometry", from

geographical distribution to hierarchical scale, marked, according to Stephen Jay Gould, "a fateful transition in the history of Western science".

Indeed, during the same period in France, Gobineau published his monumental four-volume study *Essai sur l'inégalité des races humaines* (1853-1855). In his introduction he went beyond the threshold of "a permanent, completely separate, original, native inequality, between the various human races" by affirming that "the ethnic question dominates all other problems in history … and the inequality of the races is sufficient to explain the whole dynamic of the destinies of peoples". Emphasizing that the "hierarchy of languages corresponds rigorously to the hierarchy of the races", he titled the conclusion of his first book: "Recapitulation: the respective characters of the three great races, the social effects of interbreeding; superiority of the white race, and, within this group, of the Aryan".

When speaking about the beginnings of this apparently scientific racist discourse, the pre-Darwinian creationist period is normally distinguished from that which followed the publication of the principal work of the British naturalist Charles Darwin, *On the Origin of Species* (1859), for Darwin's novel theory of evolution – that the fight for life is based on natural selection by the survival of the fittest – revolutionized the whole of biology.

Thus, in the context of creationism, the opposition between the proponents of monogenesis as against polygenesis divided the principal naturalists of the nineteenth century, such as Cuvier in France and Agassiz in the United States of America, both of whom considered, however, that "the native Africans represent the most degraded of the human races". During this period, for example, Dr Morton, a collector of Amerindian skulls in Philadelphia, undertook the measurement of their volume by filling them first with mustard seeds and then with lead shot. He published *Crania Americana* in 1839, and in 1844 followed this with *Crania Aegyptica*, using mummies supplied by the American Consulate in Cairo. The measurement of internal skull capacity lead him to affirm that Amerindians and Africans possessed inferior mental faculties, which explained their inaptitude for civilization. Some doctors even went so far as to invent imaginary racial diseases such as Dr Cartwright's

"dyesthesia" (a deficiency in blood decarbonization in the lungs) which was supposedly "the true cause of the alteration of the spirit of the people of Africa" and "drapetomania" (the compulsive urge of the slave to escape) which shows that the "reformist delirium" invented by twentieth century Soviet psychiatrists was not really an innovation!

During the post-Darwinian period, both mono- and polygenists were happy to accept the theory of evolution, which provided a rational basis for their common racism. The French surgeon Broca, founder of the *Société Anthropologique de Paris* (1859) and a respectful follower of Morton whose measurements he refined, became the recognized master of cranial measurements. Having estimated that "the conformation of the Negro is irrefutably close to that of the monkey" he wrote: "On average, the encephalic mass of an adult is greater than that of an elderly person, that of a man than of a woman, of great men than of mediocre and of the superior races than of the inferior". His conclusion is irrevocable: "Never will a people with black skin, wooly hair and a prognathous face raise itself spontaneously to a civilized state".

In the same way, Darwin's cousin, Sir Francis Galton, the inventor of eugenics (the artificial selection of species) and a proponent of quantification who is regarded as the pioneer of modern statistics, took a decisive step in his book *Hereditary Genius* (1869) by affirming: "Temperament, including aptitude for work, is hereditary in the same way as all the other faculties". At the same time as Reitzius defined his cephalic index or rating, Dr Freeman, the author of 3500 lobotomies, estimated that "women react better than men and Blacks better than Whites" to such brain surgery.

However, the principal perversion of Darwinian evolutionary theory showed in the dogma of "recapitulation", according to which ontogenesis reproduces phylogenesis, adults from inferior groups (races, classes and sexes lumped together) being equivalent to children from superior groups. The social Darwinist, Herbert Spencer, summarized the idea precisely: "The intellectual traits of the savage are to be found in the children of civilized peoples" (1910). In a similar vein, Cesare Lombroso's theory of born criminals as atavistic (1876) affirmed that murderers, bankrupts or prostitutes have identifiable anatomical, physiological or social stigmata. A defender of the biological character

of crime as a result of "vicious heredity", he eventually included epilepsy in the same category. Similarly, Dr Langdon-Down had entitled the first description of what is still called Down's syndrome, "Observation on an Ethnic Classification of Idiots" (1866), whence the term "mongolism" which is still associated with it.

The beginning of the twentieth century was marked by the development of the theory of hereditary intelligence. Based on the work in France of Binet (*Étude expérimentale de l'intelligence*, 1903), the American behaviourist school misused his famous "mental tests", which were initially designed to identify children with learning difficulties. Even though Binet had warned against the "persistence of unconscious influences and the astonishing malleability of objective quantitative data when it is used at the service of preconceived ideas", this did not stop Goddard, his principal translator and popularizer in the United States, from claiming that "normal intelligence appears to be a unitary character, transmitted in a purely Mendelian way". Having created the term "moron" to designate the slightly mentally deficient and to distinguish them from "idiots" and "imbeciles" (which are respectively defined as those incapable of learning the spoken or the written language), he recommended applying to such people "the solution of nutrition without reproduction" which involved either sterilization or colonization and deportation.

One of the major consequences of the theory of the hereditary "Intelligence Quotient" (IQ), which according to Stephen Jay Gould is an "American invention", was the systematic use of these tests for all immigrants (the Binet-Simon measurement scale having been replaced by the Stanford-Binet scale); in 1917, during the First World War, their use was extended to include all army recruits. One million seven hundred and fifty thousand military mental tests were carried out by Goddard, assisted by Terman and Yerkes.

Indeed, throughout the twentieth century, various psychologists, for the main part Anglo-American, attempted to develop the scientific bases for this hereditary hypothesis, to the point of falsifying the data; from Spearman and his "g factor" which measures "general intelligence" and Sir Cyril Burt who developed the statistical method of factorial analysis to demonstrate the innate nature of intelligence, up to the notorious "bell curve" of Herrnstein and Murray (1994) during which time

geneticists worked relentlessly but in vain to trace the "gene of violence" and the "crime chromosome", be it supernumerary or not.

However, to conclude this brief summary two essential facts need to be underlined before returning, in the conclusion, to the lessons to be drawn from the past: the ad hoc theses of scientific racism were not limited to the closed circle of scholarship, but were popularized through the press and through the so-called colonial or universal exhibitions, which drew enormous crowds. "Human Zoos" and "Black Villages" were then a sinister fashion in Europe as in America, beginning in the early nineteenth century with the exhibition showing the sadly famous "Hottentot Venus" (Saajte Bartmann, to give her her real name). Such shows ended only in 1930.

On the other hand, this ideological discourse, which was dominant for so long in the West and perfectly representative of what Kuhn calls the "normal science" of the period, was however criticized by a marginal scientific counter-current, of which the best illustration remains beyond any doubt the response to the theories of Gobineau by the erudite Haitian, J. Antenor Firmin, in his work *De l'égalité des races humaines* (1885). Let us also cite the definitive refutation of skull measurement by the South African doctor and anthropologist P.V. Tobias (1970) and the exhaustive rejection of the faulty data of the proponents of the theory of innate intelligence by Lewontin and Gould (1981).

THE MODERN GENETIC REVOLUTION

From classical genetics to molecular genetics

The development of Darwinism coincided with the birth of genetics as a distinct biological discipline. It was in 1866 that the Austrian monk, Gregor Mendel, published the results of his work on the crossing of the pea, by studying several simple characteristics visible to the naked eye (size, smooth or wrinkled aspect, etc.).Various hybridization series, examined over several generations, allowed him to establish two generalizations which became the fundamental laws of so-called Mendelian genetics: the segregation/separation of parental characteristics and their

independent/random association. Unknown by the scientific community for many years, Mendel's research was rediscovered in 1900, before being developed, notably by combining it with microscopic evidence of chromosomes in the cellular nuclei. In this way Morgan, working on the animal model of the drosophila or fruit fly, became the real father of modern genetics, with the discovery of mutations occurring in a precise position (locus) of a given chromosome, along with modification of the corresponding characteristic (1915).

Once the genetic bases of the variability of living plant or animal species had been established, along with the parallel between genotype (genetic make-up) and phenotype (observable characteristics), classical genetics developed rapidly, especially in medicine (hereditary illnesses, blood groups, etc.) and in the study of human populations. However, it was microbial genetics (especially with respect to bacteria and viruses) that led, in the middle of the twentieth century, to the identification of the material basis of hereditary: DNA with its characteristic double helix structure, followed soon after by the cracking of the genetic code controlling the synthesis of proteins.

These fundamental discoveries of Watson and Crick led to the beginning of the present molecular revolution, which continues to bring sweeping changes to the whole of biology.

Once the gene was physically accessible and could be manipulated artificially in the laboratory, its structure and functions were defined, which led to the possibility of both determining and possibly modifying its nucleotide sequence. The development of this new molecular paradigm, which has become "normal science" in biology, has given birth to the technology called recombinant DNA or genetic engineering.

Genetic engineering: GMO plants and animals

Like classical genetics, molecular genetics was first applied to microorganisms and the plant world, followed by laboratory and farm animals, before being applied to the human being. Recombining DNA techniques were initially developed on bacteria and their (bacteriophagous)

viruses. The next step was the discovery that the laws and mechanisms governing the genetic expression of these prokaryotes also applied to eukaryotic organisms (possessing a differentiated nucleus) within the plant and animal worlds.

Within the context of so-called "advanced" industrial societies, this series of discoveries concerning the molecular logic of the living world led gradually to experimentation in the transfer of genes between different species, to meet the aims of agricultural production and animal breeding. Plant biotechnology was the first to generate genetically modified organisms (GMOs), such as varieties of maize, soya, manioc, etc., carrying genes capable of resisting pesticides and herbicides, which were developed and commercialized by the multinational firms in the food and agriculture industry.

In parallel, public and private biomedical research laboratories have created genetically modified experimental animals such as transgenic mice.

Thus, in the space of a few decades, the genetic engineering biotechnicians have not only succeeded in cloning a mammal by nuclear transfer – the famous sheep Dolly created in Scotland by Wilmut (1997) – but also, and above all, finished the project of sequencing the whole of the human genome, as announced in 2000.

The extension to humans of technologies used in agronomy and veterinary science was thus opened up, initially from a mainly biomedical perspective. The possibility of curing through somatic gene therapy serious hereditary ailments (haemoglobinopathy, cystic fibrosis, muscular dystrophy, etc.) has been added to the mass production of medicines or vaccinations produced through genetic combination of micro-organisms or animal cells.

The euphoria resulting from such successes even led certain scientific fanatics to envisage going beyond "test tube babies", to the eventual creation of "synthetic babies" using genetic manipulation of cells from the germ line (ovules and spermatozoa).

Proof can be found, a fortiori, that latent fears of the "progress" involved in biotechnologies being applied to the human being are legitimate if unforeseen side effects are taken into account, such as cases of leukemia among children undergoing gene therapy for severe

congenital immune deficiency, which led to the interruption of experimentation at the Necker Hospital for sick children (*Groupe hospitalier Necker-Enfants Malades*) in Paris.

However, without getting into science fiction, there are risks of discrimination if not of eugenics in bio-techniques that have already become commonplace. For example, one of the unexpected consequences of medically assisted procreation (MAP) – in vitro fertilization and embryo transfer, pre-natal, or indeed, pre-implantation diagnosis, selection of embryos, etc. – although it was originally designed to treat conjugal sterility, has been the preferential selection of male fetuses through selective abortion, to the point of completely changing the sex ratio in strongly patriarchal societies such as India or China. In these countries, before the development of MAP, the use of ultrasound scans to diagnose the sex of the fetus had the same result, with the added risk of late abortion. If this revealing example deals with the outcome of conception, it will be shown later that experimental procedures on humans also reveal various forms of discrimination.

Now, in the same way that prospective parents have been able to choose the sex of their child, it is plausible to imagine that with the generalization of human biotechnology, they will be able to choose height or skin colour, nose shape or IQ, if this can be genetically determined. Hence the problem of human cloning in order to "improve" the species.

Human cloning: therapeutic or reproductive

First of all, it is advisable to be cautious as to the technical possibility of cloning a human being, knowing that, on the one hand, Dr Wilmut's team went through hundreds of failures before obtaining Dolly, and on the other, the final destiny of this cloned sheep was to fall victim to premature ageing before being put down. It is legitimate to doubt that a similar series of trials and errors would be tolerated in the case of experimentation on humans, in spite of the great diversity of legislation and regulation from one country to another. Since the lifting of the moratorium at the end of the Asilomar Conference (1975), while the European

Union has formally rejected all forms of reproductive cloning, the British position on the question is much less clear, while the United States limit their position to forbidding this type of research within publicly funded laboratories. On the other hand, there seems to be a consensus, among the triad (Japan included) concerning the principle of cloning for therapeutic reasons. However, the dividing line between the two types of cloning seems even finer since the recent announcement by a team of Chinese medical biologists that they had obtained two human embryos through nuclear transfer (see the *Wall Street Journal*, 13 October 2003), which has been presented as the final step before reproductive cloning.

Whether this is the case or not, one does not need to be a seer to anticipate the risks that might derive from the generalized manipulation of the human genome, in profoundly inegalitarian, productivist and technicist societies, motivated by the quest for individual profit. If one judges by the precedents represented by the environmental consequences of plant GMO (in spite of the Treaty of Rio and the contradictory opinions of experts) or again by the exorbitant price of vaccines or hormones produced by genetic engineering compared to the equi-valents purified from natural organisms, it seems obvious that the first discrimination to be feared will be that the products generated by these cutting-edge technologies will be inaccessible for the majority of humanity, on a global scale between different countries, and locally, within each individual country as well. Beyond the unequal access based on fortune or social class, another frightening aspect is the greater vulnerability of the disadvantaged social classes to the perverse effects which inevitably happen sooner or later as part of the development of new techniques. And last and above all else, how can one not worry about the risk of eugenics which is inherent in ongoing research on the alleged "genes" for intelligence or idiocy, of beauty or ugliness, of strength or weakness, or even of homo- or heterosexuality? These fears are even more justified when the neoliberal ideology so dominant at present seems to consider that only a State-controlled eugenic policy is unacceptable (the prototype of which is Nazism), whereas private eugenics used for personal comfort depends on individual sovereignty, the argument being that

no law forbids parents from wanting to "improve" their progeny on the basis of physical, intellectual, aesthetic or other criteria of excellence.

It seems, therefore, that the downside of genetic engineering for humans could be its unacceptable social cost, even in the absence of any intervention in the germ line, as indicated by the preservation of "sperm banks" of Nobel prize-winning scientists in California, or, on the other hand, the continuing of research into biological indicators of social behaviour such as aggressiveness, violence or crime. The multiple dangers associated with the artificial selection of the "fittest", which presupposes the negative selection and elimination of the "unfit", is not just limited to the lack of equal access to the new products of biotechnology, but also involves various discriminations observed during the very process of discovery, experimentation and evaluation of these innovative techniques. This aspect of the question, which is often ignored, requires a reminder of some historical facts.

While it is well known that it was as a consequence of the Nazi crimes committed by the emblematic Dr Mengele that the Nuremberg Code instituted the principle that the patient must give explicit prior consent to any human medical experimentation, a principle later consolidated by the Helsinki Declaration (1964), and while certain accidents due to such well known medicines as sulfanilamide and thalidomide are still taught to students of medicine, other tragedies, manifestly linked to a form of ethnic, racial, class or sex discrimination, are nonetheless carefully kept secret. Let us cite as an example the study led by the Public Health Service of the University of Tuskegee in Alabama concerning hundreds of African-American agricultural labourers, who were known to have a syphilitic infection but who were left without antibiotic treatment from 1932 to 1972 in order to observe the natural evolution of the disease; or the Willowbrook scandal (in which mentally retarded children were infected with the hepatitis virus) and the Jewish Chronic Disease Hospital (where chronically ill or mentally deficient patients were infected with active cancerous cells); or again the experimentation of new vaccines on prisoners, in return for reduced sentences, especially given the notorious over-representation of the non-White population in the U.S. prison population, etc.

It would be a mistake to believe that such abuses are past history and unthinkable nowadays. Two recent examples should give sufficient proof: following the revelation that neurobiological researchers, in the last fifty years, and unknown to the families concerned, had removed the brains of thousands of patients who had died in psychiatric hospitals, the British Parliament has adopted a law making it obligatory to obtain written authority from a dead person's family before any autopsy.

The second scandal, revealed by the *Washington Post* in January 2001, concerns the "real life" trial of a new antibiotic (Troyan) developed by the giant pharmaceutical company Pfizer, on children in Nigeria during an outbreak of meningitis. Thirty families have indeed filed a lawsuit against the manufacturer in a U.S. District Court.

Thus, everything happens as if fact continues to prevail over law and private commercial interests over the general public interest. If so, it is necessary to inquire into the relevance and usefulness of the efforts undertaken, especially by UNESCO, in order to establish international legislation that respects the rights of the human being.

This point will be discussed in detail in the third part of this report.

LIFE SCIENCES AND TRAINEE MAGICIANS

The new frontier of the neurosciences

Everyone knows that neuropsychiatric pathology remains the principal boundary to the impressive advances made by scientific medicine. Logically, therefore, so-called cognitive neuroscience is on the cutting edge of contemporary biomedical research.

If the frontal-cerebral cortex is really the distinguishing characteristic of the human being, improved knowledge of the mechanisms by which it governs our behaviour bears both hope and fear.

Without going back to the endless debate in behavioural genetics as to the respective importance of biological and environmental influences, nature or nurture, in determining human behaviour, it must be admitted that the discovery of encephalic neuromediators combined

with the development of psychoactive drugs tends to support the views of the proponents of biological determinism. The proven efficiency of lithium salts in the treatment of manic-depressive psychoses as early as 1949, and of psychotropics such as neuroleptics and anti-depressants have reinforced the dominant tendency to replace political and social control of deviant behaviour by pharmacological control. This over-medicalization of social misfits of all ages (Prozac for depressed adults, Ritalin for hyperactive children) says much about the potential threats hanging over the increasing numbers of people without adequate medical coverage. At its most extreme, the utopia of the instant drug for happiness, the "soma" in Aldous Huxley's *Brave New World* could become reality, in the same way as the Orwellian universe of *Nineteen Eighty-Four*'s Big Brother has become true with the extension of long distance surveillance made possible by the other great modern revolution in information technology.

The potential victims of the setting up of a hypothetical scientific behaviour police are quite likely to be the same as the victims of the regular police throughout the world.

As reality often surpasses fiction, it is impossible to overemphasize the need for concrete measures of protection: scientific research is too serious to be left to the scientists. Consider the following:

"better quality agricultural production, food improved especially for our sated health through modification of the fatty structure and the sugar levels or by removal of the allergens but also safer and more efficient medicines, more pliable and resistant new fibres for microsurgery, amazingly less polluting bio-fuels and depollutants for our highly endangered environment (…) There is no war to win, it is already too late for ideological struggle. The historical revolution is here, well rooted. The biotechnological revolution has replaced the physical and chemical revolution of previous centuries. It is inevitable, irreversible, whatever we think of it, we cannot escape". This long quotation by a French ministerial "expert" should be given in full: "technological progress is the only means to power for all States. No doubt future empires will be powerful 'biotech' poles which will collide like tectonic plates and crush the weakest. This will be the subtle twenty-first century war for ever smarter products". No further comment is necessary.

Stem cells and the prolongation of life

The overall ageing of the populations of the North has become a real social problem. It is no longer just an issue of social security and pensions, but also of pure neurobiology.

In this connection, the discovery that stem cells exist not only in the embryo but also in adults has destroyed one of the most solidly established dogma of contemporary medicine, namely that, since nerve cells are the only cells that never regenerate in the human organism, one is born with a neuron capital that can only decrease with age. Proof of adult stem cells with neurogenic potential (uni- / pluri-/ multi-potent) has therefore opened up credible perspectives for cellular therapy, or even for rejuvenation or prolonging active life.

This radically new field of research, which is not yet technically or legally codified, is the object of keen competition within the triad. Quite recently, French biologists protested to their authorities about delays in revising French bioethics laws, which were hampering them in applying for European grants.

Given the extremely widespread fear among humans of ageing and dying, so-called regenerative medicine already envisages life expectancy of over one hundred years without memory loss or major physical handicap. Beyond the resulting radical change in population age structure, with demographic consequences in particular for generation replacement, there is good reason to believe that the economic and social costs of such innovations would not be spread harmoniously among the States of the planetary village, nor even between different categories of citizens within the same country.

New aspects of former inequalities

Considering the major traditional inequalities that have weighed on the so-called “inferior” sex, races or classes since Greek and Roman antiquity, the enormous progress accomplished by humanity since then has not, on the whole, had the effect of alleviating, still less of eliminating

them. On the contrary, those inequalities have taken root and become exaggerated in people's minds. The apparent acceleration of universal time associated with the current scientific and technological revolution has changed nothing in this respect.

In the biomedical domain in particular, the development of diagnostic tests, of efficient medicines and vaccines for the great endemic and epidemic diseases (leprosy, tuberculosis, malaria, cholera, meningitis, etc.) has in no way reduced their incidence and prevalence over vast areas of the world, and not just in the countries of the South. These days, no one denies that morbidity and mortality rates within the African or Hispanic American communities in the U.S.A. have proved to be similar to those of the so-called developing countries of Africa or South America, including rates of HIV infection. The same medical-health divide can be found between the West and the East of Europe.

Which is to say that, in the battle against all forms of discrimination, the real question is not technological, but political. And if one accepts that scientific and technological progress has become the motor of the "knowledge society", then consideration of the aims of research activity seems as essential as questions about implementation.

In his relentless critique of the "mismeasure of Man", Stephen Jay Gould pointed to the four characteristics of the Western philosophical tradition which, according to him, are the basis for biological determinism: reductionism, reification, hierarchy and a taste for dichotomy.

This biological determinism is the very essence of the molecular approach that has invaded the various disciplines of the life sciences, to such an extent that all its manifestations seem destined to be reduced to mere physico-chemical phenomena. Indeed, the vaunted ambition of biology to dethrone physics as the "queen of all sciences" seems to be something of a conceit given how much the exploits of genomics owe to breakthroughs in physics and by physicists.

Thus, fundamental questioning should focus on the purpose of research, which has been pushed aside as a "philosophical" subject, with only issues about how to do research being accepted as scientific.

Analysis makes it clear enough that the motor (in both the literal and figurative sense) of scientific and technological research is war, in

every sense of the word, since the military finances the greater part of research into the physical and life sciences.

The liberal principle is that "he who pays the piper calls the tune". As a result, the army, again, sets the principal themes for both public and private research (via State subsidies). President Bush recently exemplified this by granting several million dollars to two prominent American biologists, Smith and Venter, requesting them to recombine a toxic bacterium in order to equip it to produce hydrogen (an energy-substitute for oil) and consume carbon dioxide (to fight against the greenhouse effect).

It also seems that the main motivation in competition between researchers comes down to a quest for profit and/or for personal or national prestige.

Under these conditions, it is hardly surprising that the Promethean ideal that has constantly imbued the materialistic spirit of the West has ended up by declaring an unending war against nature, including human nature. Since technological progress is not neutral, either politically or societally, each innovation carries the mark of its origin. The present tendency to transform the planet into a giant laboratory where all experiments are permissible, provided they are technically feasible and economically profitable, can only end in Hobbes's "war of all against all". Changing the course of this disastrous, multi-secular trend requires much more than trivial legal provisions against abuses, which would be as much use as a plaster on a wooden leg.

Prevention of associated risks

The existing risks of discrimination need to be distinguished from potential future ones which are affected by the margin of uncertainty linked to the evolution of technology and of society as a whole.

In the immediate future, it is obvious that the expected benefits of the biomedical revolution will be unequally spread, both between North and South and between nationals of any given country. Moreover, the expected advantages in terms of public health are largely counterbalanced by the drawbacks deriving from the social and political context of their implementation, dominated as it is by individualism and greed.

For example, it is now impossible to take out a life insurance policy without producing medical evidence of the absence of any detectable illness likely to affect survival prospects including, of course, HIV. What will happen when it becomes necessary to present one's HLA (human leukocyte antigen) type and/or genetic identity card before signing a life insurance policy? For such is the logic inherent in predictive medicine in capitalist society; it is indeed already possible to identify immunogenetic profiles for a predisposition to insulin-dependent diabetes, incapacitating chronic inflammatory rheumatism as well as systemic disorders. Is it humanly conceivable to deprive an individual of medical health protection on the grounds of specific exposure to such or such an illness? Only a narrowly economistic and vulgarly materialistic approach could justify such an aberration.

As to potential dangers, without getting into utopian futurism, it is possible to wonder if, once the application of patent law to living beings has been confirmed, mere access to natural plant and animal resources will be restricted according to more or less transparent modalities.

For its part, UNESCO has taken the initiative to global level by adopting in 1997 a Universal Declaration on the Human Genome and Human Rights, followed in 2003 by an International Declaration on Human Genetic Data.

In so far as they go beyond reaffirming the major principles of human rights, fundamental freedoms and human dignity, these texts appear to be the result of a compromise between contradictory imperatives: the elaboration of a legal framework capable of influencing the legislation and national regulations of Member States and protecting the rights of the individual, while nonetheless guaranteeing freedom of research, on the basis of non-discriminatory and non-stigmatizing ethical procedures. While defining the standards that should prevail during the collection, treatment and use of genetic data, proteomics and biological samples, it is stipulated that the only acceptable finalities are:

- diagnosis and healthcare including detection and predictive tests
- medical and other scientific research, including epidemiological and genetic studies of populations

- forensic medicine, civil or criminal proceedings and other judicial processes
- or any other objective compatible with the Universal Declaration of Human Rights and with international law and human rights

There is clearly tension here between the freedom of the researchers in the life sciences to investigate and create, on the one hand, and the fundamental rights of the individual, on the other. This reflects the unending controversy between the defenders of "human nature" and the proponents of the "human condition": essence or existence. This is not a merely metaphysical question since, among other things, it poses the problem of the stage of development when one is in the presence of a human being who, whether real or virtual, is already, by that very fact, endowed with natural, inalienable and inviolable rights: at conception, as an embryo, as a fetus or at birth?

Nonetheless, some people dismiss such issues considering them to be of an ontological or ideological nature and in no way scientific.

However, the compromise underlying the international standards reflects in part the ambivalence of the biotechnologies themselves, liable as they are to produce at the same time benefits for public health, enormous industrial profits and various upheavals in the social equilibrium which are usually accompanied by more or less serious violations of the human rights that are now universally recognized.

This contradictory character, while inherent to genetic engineering, is not limited to it. It can be observed at each major stage of modern scientific or technological progress. This makes it vital that researchers in the various disciplines involved in the natural and life sciences, especially since the apocalypse caused at Hiroshima and Nagasaki, should be concerned about the use to which their discoveries and inventions are put. Doubtless it is not just by chance that the centre of gravity in technical and scientific innovation moved, at the end of the Second World War, from Europe (especially Germany) towards the U.S.A., which has become the new focal point of the desire for hegemonic power.

In this connection, it is revealing that it was the American writer Francis Fukuyama, eulogist of "liberal democracy" and theorist of the "end of history", who wrote an essay about the consequences of the

biotechnical revolution, *Our Post-Human Future*, the title of which appears as eloquent – or rather grandiloquent – as the quotes from Nietzsche that head most of the chapters. Fukuyama locates biotechnology midway between the two present-day extremes represented, in his view, by nuclear armament and information technology. In the field of biotechnology, he rejects both an absolute ban and total laissez-faire, and admits that: "in the final analysis, science itself is simply a tool to obtain human objectives. What polities determine to be appropriate ends are not ultimately a matter of science". As a consequence he recommends that "countries should regulate politically the development and use of technology, by establishing institutions to distinguish between technical progress which contributes towards human prosperity and that which threatens the dignity and well-being of Man. These regulatory institutions should be invested with sufficient power to impose discriminations on a national level, which could then be extended internationally". But further on he adds: "the only way to control the spread of technology is to conclude an international agreement entailing restrictive regulations, which is extremely difficult to negotiate and even more difficult to enforce. Without such an international agreement, any nation which chooses to limit itself makes things easier for less scrupulous nations".

He points, moreover, to the danger of a "captive regulator", which is defined as: "the group which is supposed to control the activities of an industry but which becomes progressively the agent of this industry". He underlines the need to draw "red lines" that should not be crossed and the "need for institutions endowed with true powers of enforcement", especially as concerns pre-implantation diagnosis and embryo selection, germ-line engineering, the creation of hybrid creatures using human genes or new psychotropic drugs. He concludes by discussing the possibility of a post-human future which would make it possible to "take charge of one's own biological make-up instead of leaving it up to the blind forces of natural selection", explaining that "we need not accept any of these future worlds under the false standard of freedom, be it one promising unlimited rights to reproduce or unfettered scientific research".

Although Ulrich Beck's refutation of the idea of a "post-industrial" era has decisively shown that "*post* is the magic word for perplexity

bogged down in fashion" (see *Risk Society*, 1986), it is nonetheless true that the latest results published concerning the birth of parthenogenetic mice (which is to say, mice created by the fusion of two ovocytes, without a spermatozoon), which have reached adult age and are now capable of reproducing (see *Nature*, 22 April 2004), or proposed experiments involving "the cross-breeding of higher primates and humans", or even of women acting as hosts to chimpanzee or gorilla embryos, etc., are all so many facts which amply justify the perplexity, the confusion, even anguish that correctly informed people feel, including the great apostle of neo-liberalism, Francis Fukuyama.

It certainly seems as if the world is in the midst of becoming a giant factory-laboratory wherein all experiments (recombinations, recycling, manipulations, etc.) on inert and living matter will be permitted, as long as they turn out to be technically feasible and financially profitable.

This reiterates the importance of the efforts made by UNESCO to harmonize legislation and national regulations, not just between the countries of the North, which all play an active part in the current lively competition in the biomedical domain, but also and especially in the countries of the South, where any specific legal framework is often lacking and where their inhabitants are the first potential victims of possible negative fallout from this series of innovations. It remains to be said that, in the North as in the South, this type of legal protection should aim at giving preference to the poor, ethnic and racial minorities, women and children, as well as to all the physically and socially disadvantaged groups (be they handicapped, delinquents, criminals, etc.).

UNESCO's efforts show the urgency of action aimed at the scientific community itself, which is sometimes tempted by scientism and happy to engage in ferocious competition for prestige and/or profit between national public and private laboratories. This infernal logic is the source of the worst deviations, from the extremely controversial taking out of patents on life to all types of fraud in the production and publication of research results. It is necessary to work together to define and apply rigorously the principles of a new ethic of responsibility in biomedical research, basing these on accumulated experience; for example the lessons to be drawn from such deplorable precedents as the epidemic in the West of bovine spongiform encephalopathy, the so-called "mad

cow disease", and the destructive invasion of natural plants by transgenic crops grown in neighbouring fields, which has been observed throughout the world.

Although these cases are taken from agronomic or veterinary research, it is clearly to be feared that in the biomedical domain, for the same reasons, the forthcoming transition from preventative to predictive medicine might dash the hopes invested in it.

It is certainly the case that this new stage in scientific medicine, which was made possible by direct access to genomic and proteomic data, no longer aims at curing the ill but at maintaining individuals in good health. Beginning with the hypothesis that every pathological state results from an imbalance between the genetic programme of an individual and the constraints of the environment, the new approach tries to define the individual's biological profile in order to identify any possible morbid predisposition towards certain pathologies and thus block their occurrence. The predictive intervention therefore presupposes two prior conditions: knowledge of the individual background (risk factors due to genetic sequences or known immunological types) and the capacity to act, sometimes on the endogenous causes, sometimes on the environmental conditions liable to encourage the development of endogenously predisposed pathologies, given that the environment includes climate and nutrition as well as cultural level or socio-economic status.

However, in the present context of market globalization, dominant thinking tends to cede the control of these essential parameters for health to the competitive play of market forces: the theoretical dogma holds that an "invisible hand" regulates the relation between supply and demand and automatically leads to dynamic equilibria. The concrete reality is quite different, as shown by the material impossibility for the vast majority of people to feed themselves correctly, to have access to decent accommodation and to be adequately educated. It can even be affirmed that the result obtained is the exact opposite of the prediction. Resources are accumulated and wasted by a minority at one pole of the world market, while the majority at the other pole suffer deprivation and misery, even as the role of regulation and State control in relations between producers and consumers of goods, or between suppliers and users of public and private services, is increasingly challenged or even

rejected. Given this, how reasonable is it to envisage that a safe environment, from the point of view of public health, might be effectively mastered? One might as well put square pegs in round holes.

That is probably the reason why the current approach to predictive medicine remains essentially individual. Repair of molecular damage by gene therapy or by eugenic techniques, as well as the suppression of pathogenic environmental triggering factors, are considered case by case, according to personal choices. There are thus good reasons to think that the promises held out by this medicine of the future will, in the same way as its predecessors, prove largely illusionary for the vast majority.

Conclusion

What message should be drawn from the preceding discussion?

On the one hand, it is clear that the history of modern biomedical science has, from its origins, been inseparable from the development of multifarious discrimination between different human groups, on the basis of extremely variable and whimsical criteria. Racism, which asserts the natural inferiority of so-called "coloured people" and the absolute supremacy of the white race is only the most polished and extreme expression of this.

However, even though the present understanding of the life sciences has led to the abandonment of the larger part of this doctrine, mainly owing to proof of the Negro-African origins of humanity – "Eve was black" – its systematic critique from a scientific point of view has still not been popularized and, in any case, is not yet taught to the general public. Therefore, racial prejudices and scornful behaviour towards non-Whites, women and the poor are still part of daily life and remain anchored in the collective subconscious of the West.

Moreover, here is the place to dispose of a recent and hypocritical fashion: to decree that "races do not exist", under the pretext that this concept has no biological or genetic basis. The argument appears just as specious as to claim that the notion of a species is genetically invalid because humans and chimpanzees share almost 95% of their genomic

sequences. The living reality, which is much more prosaic, relates to phenotypes rather than genotype, and the notion of race, in zoology as in botany, serves only to point to the diversity of varieties within the same species. Racism makes its appearance only with the desire to order such variation hierarchically, which is a feature of all living things.

On the other hand, it should be emphasized that cultural contempt has today replaced ethno-racial prejudice: customs and civilizations that differ from one's own suffer from aggressive or condescending ostracism. Hence the major importance of the UNESCO Universal Declaration on Cultural Diversity, which opportunely serves as a reminder that: "cultural pluralism gives policy expression to the reality of cultural diversity" and is "indissociable from a democratic framework". Finally, the supposed neutrality of scientific progress and contemporary techniques should be called into question with respect to the biomedical domain, given the worldwide context of hegemonic competition, the will to power and the cult of profit/money.

It is no exaggeration to say that, as long as the way of the world is driven by these false values, any scientific breakthrough and all biotechnological prowess will probably lead to opposite results from those initially expected. This will not be the first time that, by a sort of perversion of the human intellect, technical and scientific advances will lead to social regression, to the despoiling of nature and, in the end, to the degradation of humanity and to death, rather than to the preservation and improvement of life.

The best way of preventing such disastrous development lies, in my opinion, in public debate, confronting all sides of the question, on the purposes and aims of scientific research in biology and in medicine.

The Mismeasure of Man by Stephen Jay Gould, W. W. Norton & Co., (1981).
Our Post-Human Future by Francis Fukuyama, Farrar, Strauss and Giroux, (2002).
Naissance de la médecine prédictive by Jacques Ruffié, Editions Odile Jacob, (1993).
Leçons d'histoire de la pensée médicale by P. Meyer et P. Triadou, Editions Odile Jacob.
Histoire de la médecine by Jacques Sournia, Editions La Découverte, (1997).
Du progrès dans la domestication by René Riesel, Editions Encyclopédie des Nuisances, (2003).

Combating racism and xenophobia in cyberspace

Legal issues affecting hate speech and the means to promote international cooperation

Annie Khalil

The Internet[1] is a global network connecting individuals by means of their personal computers or other electronic devices. In recent years, the number of computers hosting Internet content and the number of users has increased tremendously. In 1991 for instance, there were about 700,000 host computers whereas in 2000 the number of host computers was estimated at 104 million.[2] By 2001, over 390 million people were using the Internet with 70% of users located in Europe, the United States, or Canada while 15% came from Australia, China or Japan. The forecast for the year 2003 was that there would be about 774 million users worldwide.[3] The growth of the Internet represents a revolution in communication as significant as the one that resulted from the development of the printing press in the fifteenth century. In the case of the Internet, however, the time required for its impact to spread around the world has been dramatically telescoped. A process that previously lasted centuries has now taken place in a matter of a few years.

The advent and availability of electronic communications has profoundly altered our *modus vivendi*. The ability to contact people, to send and receive information in a matter of a few seconds regardless of time and distance has changed the working environment for ever, yielding an impact in many fields: business, government, entertainment, education, etc. Gradually, a whole new world, referred to as "cyberspace", has

emerged. Since cyberspace falls outside the control of any person or government it has often been viewed as a place where all kinds of actions and information are permissible.[4]

At the same time, the development of this new medium has raised a broad range of political and legal questions including the following:

- Should access to the Internet be regulated? If so, what standards should apply and when? On what grounds?
- Should the Internet itself be governed or regulated? If so, which country's laws will apply to the use of the Internet?
- What actions on the Internet constitute a crime?
- Who has/will have jurisdiction over crimes committed on the Internet?

The impact of the Internet is felt in every legal system and this new medium poses increasing challenges for the legal community. Some people hold the view that there is no "law of the Internet" implying that existing laws must be adapted to regulate online content. Others consider that there is a growing need to establish a new legal framework for the net.[5] The common thread between these two approaches is that the Internet does not lie outside the law but is subject to it as with any other means of communication.

As a general rule, laws governing the right of communication are drafted in a neutral manner that applies to any dissemination of information irrespective of the medium. Such laws are therefore fully applicable to messages conveyed on the Internet. The core of the problem lies not so much in the lack of appropriate rules as in the impediments preventing their proper application namely the polycentric or diffused structure of the Internet, its ubiquity and its cover of anonymity. The Internet can help in hiding the real identity of the user, hence giving people reason to believe that government is unable to regulate online behaviour and content. Nevertheless, identification technologies will soon be available which will in turn challenge online anonymity.

As technological progress slowly opens the way for new power struggles in the digital age, it is not surprising that governments are trying to shape the code of the net to preserve their authority. However, while considering the political impact of this technology we should

not disregard other key factors such as the way it is used and the social environment in which it is deployed. Bearing in mind these three factors, design, use and environment, it appears that the Internet may be used to promote as well as to diminish democracy.[6]

THE INTERNET: A DOUBLE-EDGED SWORD

"Unfortunately, the features that make the Internet an asset to democracy and the realization of human rights are the very characteristics that also render it an efficient and thereby dangerous tool for promoting hatred against identifiable minority groups." (Karen Mock, 2000). The statement clearly sums up the problem underlying the widespread use of the Internet.

The Internet as a medium for cross-border communication and information

By establishing direct contact between individuals and groups throughout the world, the Internet has rapidly become a basic means for communication, education, advertising and commerce. As the European Commission against Racism and Intolerance (ECRI, 2000) notes: "The Internet offers an unprecedented means of facilitating cross-border communication of information on human rights, establishing educational and awareness-raising networks to combat racism and intolerance".

In fact, this so-called network of networks is "embedded in the real world", to borrow the expression of an Internet pioneer. It has the merit of transferring power down to the level of non-governmental organizations, communities and even individuals thereby putting them on a more equal footing with States and governmental institutions. Human rights groups can use the Internet to attract world attention to violations and to the brutal practices of abusers. To take one example, encryption, which is a technology to ensure that communications are kept private, has become an essential component of human rights

work since it allows field workers to collect, transmit and store communications without compromising the safety of the victims. In years to come, relief organizations can expect that the speed of the Internet will increasingly strengthen the impact of their efforts.[7]

Like the telephone, the Internet provides a way to communicate with others: a person using a chat room to converse with friends can engage in a fast-paced conversation as the friends' words appear on the screen just a few seconds after they have been typed. Like television, the Internet can "broadcast" information to large audiences. Millions of Internet users can view the same site simultaneously and the site itself is similar to a television programme in that it is able to transmit text, sound, photos and moving images.[8]

Unlike traditional broadcast media,[9] however, the Internet provides a decentralized and open environment which seems to promote freedom of expression, information and communication among citizens. The Internet empowers individuals as it enables them to create their own content and interact with a large audience worldwide at a low cost, thereby enhancing the diversity of the available information and allowing a greater exchange of the views expressed by the users.[10]

Beyond low cost and availability, the Internet provides a new type of information distribution since time and space are compressed. In developing countries for instance, the Internet is helping to promote advocacy and social change. In Senegal, youth leaders have established cyber-cafés to connect with other young people around the world. Ecuador makes use of the Internet to wire news to community radio stations. In other parts of South America, distance-learning programmes on population and reproductive health are offered over the Internet. In addition, a website linking a network of Turkish NGOs fighting against gender-based violence has been launched in recent years.[11]

One of the most appealing features of the Internet is probably its capacity to transcend existing geographical boundaries and to enable a free flow of information, especially in countries where open discourse may be suppressed for various reasons. On the other hand, this same medium may be used to disseminate anti-democratic and offensive content. It may also impede the participation of developing countries due to their lack of adequate communication infrastructure and relatively

high costs. Thus, the Internet may be regarded as a double-edged sword and increased attention should be given not only to the numerous advantages it provides but also to its major drawbacks.

The Internet as a factor of social and economic discrimination

In line with the global nature of the Internet, the notion of "fading national borders" gives rise to new challenges. In a world in which the collective attention span is becoming shorter and shorter, the voices of many Internet beneficiaries, whether individuals, non-profit organizations or business companies, may easily become lost in cyberspace.[12] In only a few years, information and communication technologies (ICTs) have quickly become a source of economic discrimination between rich nations and poor ones as well as a source of discrimination between individuals.

The Internet as a measure of inequality between developed and developing countries

Often, new ICTs have created a digital divide between information "haves" and "have nots". In scores of nations around the world, basic telecommunication infrastructures are practically non-existent and divergences in Internet access still prevail. As digital literacy and economic well-being have become intertwined, technology-related inequalities have further widened the gap between the world's rich and poor. One African official reported that there are more phone lines in Manhattan than in all of sub-Saharan Africa.[13]

On the other hand, the number of American Internet users roughly tripled between 1996 and 1999 as a result of easy access and the decrease in computer prices.[14] In wealthy nations, however, new questions are most likely to occur and their scope goes beyond mere Internet

access. One important question that arises, for example, is "what will the person do once he or she is online?" The answer to this question seems to depend much more on the basic level of education of the user than on the availability of the technology.

The use of the Internet for incitement to racism and xenophobia

The use of the Internet to set up educational and awareness-raising networks in the field of combating racism and intolerance is good practice which should be supported and further developed. However, the Internet also represents a source of growing concern and increasing attention should be paid to its "dark side".

A recent report issued by the Irish Government refers to the "down side" of new technologies owing to the emergence of a host of illegal uses of the Internet. Some of these include:

- Invasion of privacy, including unsolicited electronic communications and the misuse of personal information in databases.
- Harmful communications: illegal material including child pornography, violent material, racial or religious vilification and defamatory publications.[15]

For years, hate groups have created all kinds of written materials for propaganda purposes, including books, magazines, newspapers, flyers and even graffiti. With the progress of information technologies, these groups have furthered their initiatives by using radio and public access cable TV and other means. Although racist, xenophobic, homophobic[16] and sexist material has been disseminated previously by older methods such as mail and messages on telephone answering machines, bigots have flocked to the Internet to rally their supporters and to intimidate those whom they perceive as their enemies. As a result, the Internet has made hate propaganda more accessible by addressing a larger number of users.

In order to connect to the Internet, a typical home user needs a computer, a telephone line and a means to dial up. Very often, Internet connections may be made for the price of a local telephone call,

giving users access to any web page available on the World Wide Web.[17] They can communicate via electronic mail (email) with people regardless of their location, participate in "chat rooms" and above all post their personal content on web pages accessible from anywhere on the Internet. They have the opportunity to post their own web page on Internet Service Providers (ISPs) located within their local jurisdiction, often without any restrictions.[18] With the aid of the Internet, every user becomes a potential publisher capable of broadcasting his or her ideas to the world. Consequently, "the content of the Internet is as diverse as human thought".[19]

The Internet "boom" has thus become a source of potent dangers. So far, much of the attention has been focused on online pornography and less has been said of the high risks of promoting hate online. While deeply disturbing, to a great extent the growth of extremism on the Internet reflects the expansion of this worldwide network. What began as a small computer network used primarily by scientists and academic researchers has been quickly transformed to a mass medium.

As the Internet has become a convenient tool for communication at a relatively low cost, it has been increasingly used by individuals and groups to convey messages of hate and racism. These individuals are often socially marginalized and not powerful enough to spread their personal opinions through newspapers or broadcast media. As geographical distance constitutes a major impediment to the exchange of views, the Internet is used by hatemongers to violate home privacy and to attract the attention of innocent third parties such as children and others who may be prone to recruitment into hate groups.[20]

Like-minded racists and bigots employ USENET, a network which consists of thousands of public discussion groups (or newsgroups), to engage in racist exchanges in a completely overt manner.[21] These newsgroups, which provide a forum where people can write, read or respond to messages, attract hundreds of participants, some of whom are active (those who write) and others passive (those who simply read or "lurk"). Haters of all sorts can also use electronic mailing lists (or listservs)[22] to send messages fuelled with racist hatred to the addresses contained in these lists. The ties linking bigots together are further strengthened through recourse to private email which is never completely "private" as

computer savvy individuals can intercept private messages. Others make use of cryptographic programmes to encode written material rendering it unreadable by anyone who lacks the means to decode it.

The Internet allows purveyors of hate to promote and recruit for their cause while preserving their anonymity. It enables them not only to communicate with each other but also to share their opinions with the rest of the world by disseminating racist material online.[23] With the help of the Internet, extremists are even able to give instructions to those seeking to act out their intolerance in the most violent ways. Beyond that, web development tools have made it simple for bigots to create sites that resemble those of reputable organizations.

As a result, hate groups using the Internet can easily portray themselves as legitimate voices of authority. In sum, it can be said that the Web offers three main benefits to racist groups: broad reach at a relatively low cost or no financial investment, protection from prosecution and difficulty in tracing and investigating hate speech.

Hate is pervasive on the Internet and there are currently hundreds of hate groups which maintain a web presence. Less than a decade ago, in 1995, former Knights of the Ku Klux Klan (KKK) leader, Don Black, established *Stormfront*, the first white supremacist site on the World Wide Web. This was just the beginning of racial hatred on the Internet. Since then, Internet access and the creation of web pages has become less expensive and less technologically demanding which has greatly contributed to an increase in the number of sites and also in the number of people visiting those sites.

Estimates as to the actual number of such sites vary to a large extent but it is generally agreed that racist sites on the Internet number at least in the hundreds.[24] This growth in the number of sites has been accompanied at times by an enhanced sophistication. Some sites even include graphics or music and are specifically tailored to target the most vulnerable categories, like children, who may come across them. A site like *Stormfront*, for instance, contains a "Kids' page" with explicit racist content.

For the purpose of this study, attention will be given to selected hate groups which have been "at the top of the list" of cyberspace bigotry in recent years. Within this category, the *Anti-Defamation League* and the

Southern Poverty Law Center, two of the most active organizations fighting hate online, have identified the Neo-Nazis, the Ku Klux Klan and the Christian Identity as well as a number of other sites fuelled by racial hatred.

Neo-Nazis

The anti-Semitic racist ideas of Adolf Hitler have not been fully consigned to the past; a wide range of groups promoting anti-Semitism still exists. One prominent US organization, the *National Alliance*, blames Jews for inflation, media "brainwashing" and governmental corruption while associating Blacks with criminals and rioters. Another website entitled *This Time the World*, which openly displays a giant swastika, contains the text of speeches by leading political figures in Nazi Germany as well as a "gallery" of Nazi art. In addition, Neo-Nazi skinheads (violent shaven-headed youth) have established their own websites, many of which are devoted to racist hard rock music.[25]

Ku Klux Klan

Today, the Ku Klux Klan is more fragmented than in the Second World War era. However, the group has been using the Internet as a "means of revitalization" which enables it to spread its traditional message of hatred for Blacks, Jews and immigrants.[26] One Klan site proposes as one of its principal objectives the defence of the "superiority of the White race", underlining the alleged "marked difference between the White and the Negro race" and campaigning "against miscegenation of the races". Another site advocates ending "the uncontrolled, outrageous and unprecedented plague of immigration". In addition, the number of websites linked to the *National Association for the Advancement of White People (NAAWP)*, a group founded by former Klan leader, David Duke, has registered tremendous growth in recent years.

"Christian" Identity

The Identity Church movement promotes a mixture of racism, anti-Semitism and religion which considers that Blacks and other minorities are inferior "mud people". Through its numerous websites, the group stresses the superiority of the Aryan (White) race and the

need to preserve its "purity". It goes even further, expressing approval for white separatism and referring to ethnic minorities as "the natural enemies of the Aryan (White) Race".[27]

The World Church of the Creator (WCOTC)

The *World Church of the Creator (WCOTC)* shares the views of the *Christian Identity*, affirming that non-whites are subhuman "mud people". It strongly attacks Christianity, Judaism, Blacks and immigrants, declaring for instance that Blacks are "physiologically inferior and inherently criminal".

The group provides links to other well-designed sites, many of which feature drawings of WCOTC supporters brutalizing "non-Whites". The WCOTC's *Women's Frontier* website declares that the "White female voice must be heard" if the Church is to "truly accomplish its goal of taking back White territory worldwide". As for the group's Kids website, it employs enticing graphics to lure young users and contains simplified versions of WCOTC documents that are accessible to children. The site portrays a white family alongside the following phrase "the purpose of making this page is to help the younger members of the White Race understand our fight".[28]

White Supremacists

Various groups promote the supremacy of the white race or have incorporated ideas common to the above-mentioned hate groups. The number of white supremacist sites is alarming. Some insult and offend black people, some denigrate Muslims or Jews, while others target homosexuals. There is a site explaining why Jews and Hindus should work together against Muslims as well as an entire portal devoted to anti-Semitism.

David Duke, America's best-known and most politically active racist, makes use of the Internet to share his racist views with an international audience. *Stormfront*, for instance, displays the "White Pride World Wide" logo and clearly states that it targets "(…) men and women fighting to preserve their White Western culture… (and is) a forum for planning strategies and forming political and social groups to ensure victory".[29] Concerned that the "non-white birth-rate", "massive immigra-

tion" and "racial intermarriage" will "reduce the founding people of America into a minority", Duke stresses the "genetic potential" of the white race and underlines the "innate intellectual and psychological differences" between whites and minorities. In addition, *Stormfront* also hosts a number of racist sites against Jews and Arabs such as *Kahane.org* which vilify Palestinians and Arabs in general.

While many hate sites are bigoted in their approach, others disguise themselves as legitimate sources of information, which makes it more difficult to identify them. For instance, one site appears to deal with the life of the civil rights leader, Dr Martin Luther King, Jr. Any student doing research on Dr King who might check this site could easily be duped into believing this is true history. Just by scrolling further down, the observer notices that it actually contains racist propaganda from the *National Alliance*.[30]

The "virus of hate" thus spreads across the world via the Internet in the blink of an eye – or rather at the click of a mouse. This new medium allows extremists to address an audience of millions, many of whom are young and gullible. An important question arises at this stage: what is the most effective way to respond to this "dark side" of the Internet?

In an attempt to answer this multidimensional question, it is necessary to take into account existing legal and non-legal measures to combat racism on the Internet. With respect to the former, the first part of this paper provides insight into government regulation of online hate by a careful study of selected cases from different regions of the world. The second part of this paper highlights the responses of private actors – ISPs in particular – and considers the various approaches that have been adopted by end-users.

LEGISLATION AND CASE LAW AROUND THE WORLD

To date, there are no specific laws on cyber racism although a large number of countries have laws prohibiting racist speech. The minimum standard for preventing hate on the net is imposed by the United Nations *International Convention on the Elimination of all Forms*

of Racial Discrimination. Article 4 of this Convention obliges States to punish "all dissemination of ideas based on racial superiority or hatred, incitement to racial discrimination, as well as all acts of violence or incitement to such acts against any race or group of persons of another colour or ethnic origin".[31] These rules also apply to hate speech on the Internet.

Revisionism[32] is the exception to this common rule as only Germany, Belgium, France, Switzerland and Austria have passed laws on the subject. These laws are drafted in neutral terms and are therefore applicable to hate messages on the Internet, thereby filling the "legal vacuum" as far as racism on the Internet is concerned.[33]

The debate on the merits of outlawing hate speech[34] on the Internet faces two critical questions, one ethical and one practical. The latter can be broken down into two further elements: who will decide what should be banned and how will this be done? No one at the moment is entrusted with protecting what we may call "our online morals". As nothing is legally banned worldwide, we frequently come across the most virulent forms of hate speech.

One of the reasons why we are not likely to see a single body exercising international censorship rights in the near future, or at least setting the minimum standards to regulate Internet-based speech, is simply because there are no universal norms about what is morally acceptable.[35] Some perfectly ordinary fashion magazine from Europe could be regarded as highly offensive to a religious country in the Middle East.

Various civil rights groups and a large number of individuals would like to ban any site that promotes violence and hatred. On the other hand, there is an argument in favour of freedom of speech allowing people to say whatever they wish provided they do not act in a violent manner. But who can guarantee that their opinions are not likely to influence others who may be more prone to react in a violent way? The real problem is how to define when one person's right to freedom of speech impinges on another individual's rights to freedom from being insulted.[36]

The first thing that comes to mind when people are presented with the scope of the problem is that "there ought to be a law". However,

in an attempt to provide relevant answers as to what can be done in the future about the spread of hate through cyberspace, it is important to examine what has already been done in this field.

Government regulation of online hate

As a general rule, regulation of content falls into two categories: regulation of information published on the Web or circulated via email and regulation of content flowing through ISPs. Attorneys and lawmakers are struggling to find ways to combat hate speech, a challenge made even more difficult by the fact that the Internet has no boundaries. A computer user in Western Europe can access sites in the United States and similarly citizens in North America can read sites that have been created in countries across the Atlantic. In Europe and elsewhere it remains to be decided which actions (e.g. viewing controversial sites, creating offensive sites, offering access to prohibited sites) should be punished.[37]

Many approaches have been tried so far. Many countries have been more aggressive than the United States in fighting hate on the Internet because of the lack of legal constraint there arising from the First Amendment to the United States Constitution. Thus, most Western countries have already enacted laws more restrictive of hate speech than those applicable in the United States. Countries such as France and Germany seek to balance the right to free expression, including speech on the Internet, with the citizens' rights to protection from bigotry.

In recent years, there has been a growing number of cases in national courts which target the creators of racist content and those who host it. Numerous countries strive to monitor Internet content available on hosts within their own jurisdictions and to prohibit access to illegal or harmful material by issuing licences for providers which aim to restrict the dissemination of such content. Some countries even legislate to make it punishable by law for end-users to visit prohibited sites.[38]

Selected examples in Europe: France and Germany

France

Yahoo! Inc. is a United States based company that provides many services including an online auction site that allows people to sell and to purchase swastikas and other Nazi symbols. This site is accessible either directly or indirectly to any person connected to the Internet including French citizens. Yahoo's local French subsidiary, Yahoo.fr, for example, provides a link to the US site. *The League Against Racism and anti-Semitism and the French Union of Jewish Students* (the complainants) therefore petitioned a French court to "adopt the necessary measures in order to prevent the display and the sale of Nazi materials throughout French territory".[39] For its part, Yahoo submitted that the petition should be denied as the French court lacked territorial competence to rule in this case since the auction site was operating from the United States and in any case it was technically impossible to block access by French residents to the site.

However, the French court concluded that the sale of Nazi objects violated French law banning the sale of material prone to incite racial hatred. In addition, by allowing the material to be viewed in France, the US based company had committed a prejudice on French soil. The court also concluded provisionally that Yahoo's technical competence could be used to prevent French users from accessing the auction site. The court held that Yahoo could identify the geographical origin of most visitors who had access to the auction site by means of the visitors' Internet Protocol (IP) address.[40] It therefore found that Yahoo would be able to prevent any person located in France from viewing this site. Moreover, according to the court, Yahoo could also deny access to the auction site to any person failing to reveal his geographical origin. Thus, the French court ordered Yahoo to "take all necessary measures to prohibit any access to the auction site via Yahoo by persons residing in France".[41] In November 2000, the same court granted a petition requiring Yahoo to prevent French citizens from accessing certain content hosted by the US based company even though these sites were located outside France.

More recently, on 26 March 2002, the Supreme Court (*Tribunal de Grande Instance*) in Paris sentenced the author of racist messages published in several discussion forums to 18 months imprisonment. In his defence, the accused stated that often he was simply disseminating messages that had been already transmitted by other individuals.[42]

Following a complaint filed by the International League against Racism and anti-Semitism (*Ligue Internationale contre le Racisme et l'Antisémitisme, LICRA*), an Internet user was arrested on 30 November 2000 for publishing 42 messages promoting anti-Semitism in various discussion forums.[43]

The Court took into account all the elements involved, including incitement to racial hatred, violence and discrimination against members of the Jewish community. The accused admitted to being the author of the messages, which were published under different names, as a reaction to the Middle East conflict and to the racist anti-Arab messages he had been receiving.

In the view of the judges, however, these circumstances did not suffice to negate the responsibility of the accused. According to the judges, "the mere reading of these messages clearly shows that the author is blaming the members of the Jewish community for the current situation in Palestine, and by doing so, is inciting to hatred and violence towards them in a particularly serious manner".[44] The outcome was that the accused was given a suspended prison sentence of 18 months, fined 70 euros and ordered to pay 1500 euros compensation to each of the civil parties concerned.

In sum, French law provides for four kinds of offences regarding Internet-based racism: insult, defamation, provocation, and denial of crimes against humanity. The same law applies to all statements made on the Internet or by other means of communication. The main difficulties lie in the inadequate technical training of police to locate the person responsible for a statement on the Internet and the insufficient support of access providers, especially US providers, in assisting the authorities to identify the authors of anonymous messages spread via the Internet.[45]

Germany

A country like Germany is of particular interest since it has a long history of campaigns to combat hate speech on the Internet. This owes much to Germany's history involving religious and racial hatred. As a result, the *German Constitution* as it has been subsequently interpreted by the country's constitutional court, allows free expression only within limits. Racist speech and extremist political parties for instance are not tolerated under the Constitution.[46] Thus, whereas Article 5 of the German Constitution, known as the *Basic Law*, affirms the right to freedom of opinion and expression, this right is not absolute. It is balanced by the "citizen's right to personal respect" and the guarantee of human dignity set out in Article 1 of the *Basic Law*.

Sections of the *Criminal Code* concerning hate speech contain provisions making incitement to violence and hatred a punishable offence. In 1994, the Federal Constitutional Court decided that Holocaust denial is not protected speech under Article 5 since it expresses a "claim of fact that has been proven untrue".[47] These laws have been used to prosecute hate speech as, for example, in 1999 when Neo-Nazi Manfred Roeder was sentenced to two years in prison for referring to the Holocaust as "humbug".

In 1995, in an attempt to deal with both access providers and creators of illegal material, Germany considered the possibility of applying its Criminal Code to the Internet. A year later, the ISP T-Online, a subsidiary of the German phone company Telekom, elected to block access to Web Communications, an ISP that hosted the *Zündelsite*, a well known Holocaust denial site. Canadian Holocaust denier, Ernst Zündel, was accused of violating Section 131 of the Criminal Code and it was acknowledged that ISPs providing access to the *Zündelsite* might be held criminally liable.[48]

In 1997, Germany passed its *Multimedia Law* also known as the *Act on the Utilization of Teleservices*. Under this law, ISPs can be held liable if they knowingly make illegal content "available for use" and if it is technically possible for ISPs to refrain from doing so. The following year, Felix Somm, the former managing director of CompuServe's German division, was found guilty of violating the Multimedia Law for having provided access for German Internet users to illegal porno-

graphic content. In 1999, a Bavarian court overturned the verdict as it found that there was nothing more Somm could have done to block access to those sites.[49]

More recently, in December 2000, the *Bundesgerichtshof*, Germany's highest court on civil affairs, ruled that German law is applicable to foreigners who post illegal content on servers located in other countries provided that the content is accessed by people in Germany. In doing so, the court reversed a lower court ruling in the prosecution of Australian Holocaust denier, Frederick Toben, who was arrested for distributing leaflets denying the Holocaust during a visit to Germany in 1999. At the trial, the presiding judge had found that Toben's printed material was a violation of German law but decided that Toben could not be penalized for posting online material inciting to racial hatred on a server located outside Germany. However, the *Bundesgerichtshof* held that German laws banning the Nazi party and any forms of glorification related to it were applicable to Internet content originating outside German borders but accessed from Germany and therefore applied to the content of Toben's website.[50]

Selected examples in North America: the United States and Canada

The United States

It is probably no accident that freedom of speech is the first freedom mentioned in the *First Amendment*. The framers of the American Constitution believed that liberty of expression was the hallmark of a democratic society. Hence, the *First Amendment* in the United States protects the right of American citizens to freely express their opinions even when they make offensive statements.[51] To date, courts have hardly made a distinction between speech on the Internet on the one hand and in print media or broadcast media on the other. The United States Supreme Court first crafted its free speech doctrine long before the Internet was conceived. In a series of cases, the Court ruled that protections under the *First Amendment* usually extended to hate speech unless

the speech provided a "real" threat against an identifiable individual, organization or institution.[52]

"Threats" are one of the many examples of unprotected speech in the United States. Generally defined as declarations of "intention to inflict punishment, loss, or pain on another, or to injure another by the commission of some unlawful act",[53] threats, including those animated by racial hatred, are not protected under the *First Amendment*. Thus, a threatening private message received by a victim through the Internet or a public message disseminated on a website underlining the intention to commit acts of racially motivated violence may be punishable by law. Similarly, harassing speech, incitement to violence and libelous[54] speech are not protected under the *First Amendment*. However, these only constitute a "legally actionable offence" in certain cases fulfilling specific criteria.

Statements fuelled by hatred of an ethnic, racial or religious group generally do not constitute harassment even if those statements cause distress to individual members of a specific ethnic group. However, if a person directs racist statements on a regular basis at a single victim, such speech may be regarded as harassment even if the racist remarks do not explicitly mention the victim. In addition, it is possible to prosecute racially motivated harassing speech disseminated over the Internet as a violation of state or federal laws.[55]

The rationale for protecting hate speech varies in the United States and American courts have often been inconsistent over the last 50 years in how they have dealt with these issues. If a person delivers a hate speech denigrating a specific religious or ethnic group, as a general rule it would not be considered a hate crime since no criminal act has occurred. On the other hand, the United States legal system does acknowledge certain limits to free speech as mentioned above. Thus, threats, harassment, incitement to violence and individual defamation are prohibited. However, the U.S. legal system does not include the concept of collective or group defamation.[56]

Despite the obstacles to punishing online speech, a few recent prosecutions have been successful as in the Machado case. In September 1996, Richard Machado sent a threatening email message signed "Asian Hater" to 60 Asian students at the University of California,

Irvine, (UCI). Machado stated, among other things, that he hated Asians and that if they were not at UCI, the school would be better known. He also blamed them for all the crimes that occurred on campus and said that if they did not leave, he would hunt them all down and kill them.[57] Machado did not sign his real name and sent the threatening message from an account that did not reveal his identity. He admitted later, however, during two interviews with the police that he was the author of this message.

In August 1997, the US attorney for the Central District of California charged him with violating an article that prohibits interference with a federally protected activity (attending a public college) because of the race, colour, religion or national origin of the victim. Machado was convicted of violating the Asian students' civil rights in February 1998 and sentenced to two years in prison. In this case, Machado's actions could also have been considered a criminal offence even if his threatening message did not contain racial hatred or was not aimed at students engaging in a "Federally protected" activity. However, he was prosecuted under Federal law because the messages he sent were motivated by racial bias and targeted people engaged in a "Federally protected" activity.[58]

In 1996, the U.S. Congress enacted the *Telecommunications Act*, in an attempt to address some of the problems stemming from Internet speech. Among other objectives, part of the Act aimed at prohibiting the display of "indecent materials". However, the US Supreme Court determined that this provision violated the free speech guarantees provided by the *First Amendment* of the *United States Constitution*. The Court made it clear that "racist speech" and the transmission of racist materials are protected by the *First Amendment* as are other transmissions of "patently offensive" speech.[59]

To date, relatively few court cases have specifically addressed the problem of hate speech on the Internet. It therefore remains difficult to prosecute hate speech in the United States owing firstly to constitutional protection and secondly to the difficulties of tracing the perpetrators of online hate crimes since websites can be easily created, relocated, renamed or abandoned overnight.[60]

Canada

Although free speech is protected by the Canadian *Charter of Rights and Freedoms* there are a number of provisions relating to racist speech in addition to those stated in the country's *Criminal Code*. For instance, Sections 318 to 320 of the Canadian *Criminal Code*, which criminalize hate speech, have been found to be constitutional by the country's Supreme Court. In addition, the Canadian Human Rights Act specifically targets hate speech by addressing the telephonic communication of bigotry. The section deems it: "a discriminatory practice when people repeatedly communicate telephonically materials that are likely to expose people to hatred or contempt because they are identifiable on the basis of race, religion, or another prohibited ground of discrimination".[61] The Act provides for the establishment of Human Rights Tribunals to hear cases alleging violations of its provisions.

In 1997, a Human Rights Tribunal convened to hear a complaint filed against Holocaust-denier Ernest Zündel and the *Zündelsite*. Zündel and the website bearing his name were communicating material that discriminated on the grounds of race, religion, and national or ethnic origin and were accessible from within Canada, thereby violating Section 13 of the *Human Rights Act*. The issues at stake included deciding whether the Internet is a "telephonic device" under Section 13, whether Zündel really had control over the site as the latter was located on a server in the United States and whether the site itself was promoting hatred.[62]

After six years of legal struggle, the Canadian Human Rights Commission, after considering Zündel's right to free speech, ordered him to close his website on the grounds that it constituted anti-Semitic propaganda. In January 2002, the Commission found that "the social benefits of eliminating hate speech outweighed the issues of protection of free speech".[63] The Commission did note that even if Mr Zündel was ordered to "cease and desist" from using his website the latter could be easily transferred to a number of "mirror sites" where supporters could recreate it. For his part, the Chief Commissioner of the Canadian Human Rights Commission stated that "we now know that the Internet is not a 'lawless zone' and cannot be used to promote hate".[64]

The *Zündelsite* itself, however, continues to operate under the direction of Ingrid Rimland in California who claims full authorship

of the site in her own name – not Zündel's – citing her freedom to publish in the United States under the *First Amendment* of the Constitution.

Selected examples in Asia-Pacific: Australia and Singapore

Australia

Australia has recently adopted legislation to address problematic Internet content. On 1 January 2000, the Federal Parliament introduced an amendment to the *Broadcasting Services Act*. This amendment sought to ban Internet content considered as Refused Classification (RC) or X by the Australian Classification Board and to enable citizens to file complaints with the Australian Broadcasting Authority (ABA) about suspected RC or X rated content.[65]

Upon the examination of a complaint and the classification of the content under RC or X, the ABA may issue a final notice to the ISP, requesting it to comply with the "final take-down order". If the ISP fails to comply with the ABA's decision, it is subject to prosecution. Furthermore, the Act also applies to ISPs operating beyond Australian boundaries and urges them to "take all reasonable steps to prevent end-users from accessing content".[66] RC classified content extends to various forms of racist content. Material that is considered to promote, incite or instruct crime or violence against a specific ethnic group will be classified RC by the ABA. Such material will be prohibited and ordered to be removed from the hosting ISP.

In addition to these measures, Australia also applies the Federal *Racial Discrimination Act* through the Human Rights and Equal Opportunity Commission. The Commission heard a case involving the same Australian website which resulted in Toben's conviction in Germany for publishing Holocaust-denial material. The Commission ruled that the "insulting and offensive" content constituted a breach of the Act. It ordered that the material be removed from the site and that a letter of apology be sent to the complainants.

In March 2001, proceedings began at the Federal Court of Australia to enforce the decision of the Commission. In September 2002, the Federal Court of Australia found that Toben had violated Part IIA of the *Racial Discrimination Act 1975*. It ordered him to remove specific anti-Semitic material from his websites, to refrain from distributing, publishing or republishing such material to the public either directly or through any agent via the Internet or otherwise.[67]

Singapore

In a country like Singapore, the Government decides what is acceptable (in terms of political and sexual content) and acts as a filter of information both at international and domestic level. Singapore has gone ahead in placing the Internet in the same category as other broadcast media. Thus Internet communications are made subject to the standards set by the Singapore Broadcasting Authority (SBA), the *Penal Code* and the *Maintenance of Religious Harmony Act* among others.[68]

For instance, in 1996, the SBA enacted legislation to protect local values. These regulations apply, among others, to ISPs providing Internet content for economic, political or religious purposes and are considered applicable to racist speech. These regulations specifically require ISPs to obtain a licence before operating. Whenever the SBA sees that a site contains improper content, it requires any licensee to "blacklist" it. Moreover, ISPs are expected to ensure that their services are not used for any purpose that is "against the public interest, public order, or national harmony".[69]

The Government oversees the enforcement of these regulations through the use of "proxy servers". ISPs are required to refer their customers to the Government's servers which, in turn, deny access to blacklisted sites and those which fail to comply with the regulations are suspended or fined. In addition, visitors to prohibited sites are subject to penalties including imprisonment. It is important to point to the fact that users lacking proxy settings cannot access the Internet in general and those using proxy servers do not have access to the prohibited sites.[70]

However, the use of proxy servers remains problematic in many cases. As proxy servers usually operate with a list of sites to which they

refuse to give access owing to the harmful content they contain, content providers can easily relocate their sites to other addresses. In addition, the blacklists employed by the proxy servers to discard illegal content can hardly be exhaustive owing to the emergence of thousands of websites every day.

Hotline approaches by industry and private organizations

In recent years, many countries have witnessed sustained governmental regulative efforts in the fight against Internet-based racism and hate speech. Governments, however, are not the only actors involved in this field. Private organizations, for example, are increasingly adopting a hotline approach to combat offensive speech including racist speech.

Hotlines provide a mechanism for receiving complaints from the public about alleged illegal content (such as child pornography or xenophobia) and/or illegal use of the Internet. Typically, reports may be made by email, phone, fax, website or letter. Once the report is received, it is logged into the hotline database system and where it is not anonymous, an email receipt will be sent to the user who submitted the report.

Once the report is logged, the material will be assessed as to whether it is potentially illegal under national legislation. If the reported material is hosted on a locally based server, the manager of the server is identified. The hotline may then issue a notice to the law enforcement agency, which in turn may initiate a criminal investigation. Alternatively, the hotline may directly inform the ISP responsible seeking the removal of the offending content. Benefiting from the support of government, industry, law enforcement and Internet users in their countries of operation, hotlines must therefore have effective and transparent procedures for dealing with complaints.[71]

In 1997, the *Complaints Bureau for Discrimination (MDI)* was established in the Netherlands by the *Magenta Foundation* in order to combat discriminatory views expressed on the Internet. Where an expression

on the Internet is considered to constitute a criminal offence, a request to remove it within 48 hours will be sent to the user at the origin of the offending expression. Where the user ignores the request, a complaint is filed against him. Already, the relatively small number of convictions imposed by the courts has shocked the Internet community and put racists on their guard. These successful prosecutions have enhanced the credibility of the MDI.

Originally a volunteer organization, the MDI is today State-funded. Internet users in the Netherlands may thus inform MDI about sites hosting content that is believed to violate Netherlands law. Where MDI decides that the content violates the law, it requests the ISP to remove it. The latter generally complies. In 2000, for instance, 410 out of 440 "illegal expressions" were removed from the Internet.[72] The following year MDI began to cooperate with the *National Centre on Discrimination*. Where the ISP refuses to remove it, the MDI may request the Centre to prosecute those responsible for posting the "offending content".

The United Kingdom adopted a similar approach by establishing the *Internet Watch Foundation (IWF)* in 1996 to examine complaints about illegal content. This body, which is funded by local ISPs, is the result of the joint efforts of industry, Government and law enforcement agencies. When the IWF decides that certain content has violated British law, it requests its removal by the ISP, which is obliged to comply with the request in order to avoid prosecution.[73] More generally, a number of European hotlines has been created in recent years to combat racist speech. For instance, the FSM in Germany targets "racist or fascist material" whereas the ISPA in Austria deals with "right wing radicalism", among other issues.

Most hotline organizations in Europe also belong to a hotline association called *INHOPE* which has expanded the scope of its activity beyond child pornography to encompass the growth of racist content on the Internet. The core objective of INHOPE is "to protect young people from harmful and illegal uses of the Internet". In order to achieve this objective, the association is endeavouring to enhance cooperation between European Internet hotline providers as well as to launch new hotlines and to promote Internet safety awareness and education in Europe.[74]

As a result of all these efforts, access providers concerned about their public image, such as Yahoo or Geocities, have often complied with requests to remove racist websites, even in countries where there is little threat of prosecution (e.g. the U.S.A.). This is also because many of their customers refuse to associate with racism, anti-Semitism or Holocaust denial.[75]

Despite its numerous advantages, the hotline approach which targets the offending website and its hosting ISP has limited scope. In fact, where both the creator of racist content and the hosting ISP are located outside the jurisdiction, they do not fall within the reach of the hotline. Even if the hosting ISP is located within the jurisdiction, the success of the hotline in blocking access to the problematic site may not prevent users from having access to the content since the content creator may relocate his site on another ISP. Hotlines may succeed to a certain extent. However, they cannot be expected to fully prevent access to racist content from outside their jurisdictions.[76]

Internet Service Providers and online hate

Various ISPs have adopted codes of conduct ranging from the principles of "netiquette", to confidentiality measures and principles of content regulation. Most of these codes are based on a commitment to ban the hosting of racist sites. At the European Union level, EuroISPA includes ISP organizations located in Austria, Belgium, Denmark, Finland, France, Germany, Ireland, Italy, the Netherlands and the United Kingdom. It tries to promote European interests while responding to the concerns of the public as to harmful content, including racist content. For instance, the code adopted by the French *Association des fournisseurs d'accès et de services internet (AFA)* provides that ISPs in France should be able to detect illegal content and pay attention to users' comments.[77]

The Code of the *Canadian Association of Internet Providers* calls for an investigation of complaints concerning alleged illegal content and focuses on public education about Internet-related and technology issues. In the United States, however, a few ISPs have developed their

own policies in this area. One example is Angelfire, which prohibits web pages containing links to pornography, foul language and hate propaganda. Similarly, America Online prohibits "hateful language" as well attacks on the basis of race, national origin, ethnicity or religion while Prodigy Internet bans "blatant expressions of bigotry, racism and/or hate".[78]

In Japan, the *Telecom Services Association (Telesa)*, an association of ISPs follows a specific *Guideline for Codes of Practice for Internet Service Providers* which declares that ISPs must specify in their user agreements that users are not to display illegal or offensive communication, including information likely to discriminate others. Under Article 7 of the above-mentioned Code, members may request the sender of harmful material to refrain from dispatching it and ultimately may block the user's ISP's services. They also have the opportunity to monitor and gather relevant information about content that has been the subject of a complaint.[79]

Filtering techniques to protect Internet users

Visiting a Web page involves both the Web user accessing the page and the server hosting it. While ISPs and other organizations hosting websites can restrict hate speech by refusing to harbour a hate site, hate speech can also be restricted through the use of a "filter" which denies the user access to sites containing certain types of problematic speech.[80] What is exactly an Internet filter? A filter helps screen out undesirable objects and the most common use on the Internet is the screening of pornographic material. The use of the filter itself raises important ethical questions such as whether filters should be employed in schools or libraries, and/or whether they should be mandated by law.[81]

Many software products have been developed to help end-users to combat the problem of biased Internet speech. Some of them block access to or blacklist sites deemed undesirable by either the user or the manufacturer while others allow the user to access only those sites considered desirable. Most of these products provide a list of sites with problematic content and it is the task of the end-user to add or delete sites.

When a user who lacks the password to disable the software enters the IP address (also called Universal Resource Locator or URL) of a listed site the software product prevents the computer from accessing the site.[82]

Other filtering software operates by means of "keyword" searches that also allow end-users to eliminate or add to the list of sites as some words are strong indicators of racist or other offensive content. *Net Nanny* is a typical example of such a product. It automatically blocks the host computer if any of the words in its glossary is found in the course of an Internet search. The only way to reverse the blocking is to enter a valid password. Filtering software such as *Surfwatch*, *Cyber Patrol*, *CyberSitter* and *Hate Filter*® is specifically designed for hate speech. These programmes can generally be purchased at relatively low cost.[83]

For instance, *Hate Filter*® has been developed by the *Anti-Defamation League* to protect children from accessing the sites of individuals or groups considered to be advocating hatred, bigotry or even violence towards others on the basis of religion, race, ethnicity, sexual orientation or other characteristics. The filter does not attempt to remove these sites or to censor their content nor does it seek to limit speech on the Internet. It is simply a tool that enables parents to judge whether their child is mature enough to be exposed to these sites.[84]

Other filtering systems such as *WiseChoice*, which was created on the initiative of a parent in the United States, are also being adopted on an individual basis. *WiseChoice* strives to block a number of sites which promote offensive chat or hate speech while preserving access to other information available by means of the Internet. Customers may also suggest blocking sites if they find them offensive or request that sites be unblocked if they feel they should be accessible.[85]

However, filtering systems that depend on keyword search may not always be the solution to counter problematic speech on the Internet. In fact, creators may intentionally avoid the use of keywords employed by the filters by using synonyms or misspelling words. By the same token, some keywords may also appear in a completely different "bias-free" context. A typical example is the word "breast" which was used in a filtering software to block access to sites containing pornographic material. As a result, not only relevant sites were blocked but also sites dealing with breast cancer and others providing recipes for chicken breasts.[86]

Rating systems

Rating systems are intended for use in conjunction with the available filtering technologies. They allow a content creator to rate or categorize the content of his site or other sites of special interest to him. Since the mid 1990s, various rating systems have been developed. However, they proved to be rather inconsistent and were not very popular with end-users. But they gained further momentum in 1999 with the establishment of the *Internet Content Rating Association (ICRA)* as an independent non-profit organization operating in Europe and North America. Some of its members include the world's largest Internet companies such as AOL, Microsoft and IBM.[87]

For instance, since December 2000, an organization such as ICRA has been involved in the creation of a culture-neutral rating system that may be employed by content providers and end-users. The system uses the *Platform for Internet Content Selection (PICS)* which enables the association of labels with content. The content creator visiting the ICRA website can fill in a questionnaire related to racist content in order to evaluate to what degree it may be harmful to children and more generally to what extent it may prejudice people. ICRA has suggested adapting the questionnaire to a wide range of individual and cultural needs.

Upon submission of the questionnaire to ICRA, the system issues a code representing the Content Label which is subsequently added to the site by the content creator. As a result, the computer of the site visitor registers the content label, thereby informing the end-user of the nature of the content. The labelling of sites assists in the drawing up of a list of sites to be either avoided or visited, an initiative which can be undertaken by the users themselves to ensure control over their lists of selected sites.[88]

Content-labelling systems such as the one proposed by ICRA have their drawbacks as they largely depend on the voluntary rating of the content by the content creator. Thus, it is not surprising that some creators of racist material will simply refuse to rate their material while others may do so in a less objective and honest manner. Therefore, rating systems are often regarded as "inconsistent" and highly subjective, relying to a great extent on the cultural component.[89]

End-user approaches

Today, end-users have at their disposal a number of devices to protect them from accessing "problematic" sites. For instance, *Anonymizer* is a website that enables the end-user to access web pages, including prohibited sites, while preserving his anonymity and hiding his identity from those who monitor his activities. He may also request to receive web pages as email attachments so that he avoids visiting the site and thus being traced for inappropriate visits.[90]

In Canada, there are a number of "hate watch" websites trying to expose and prevent illegal material on the Internet. Some of these were established by the Government while others were created by human rights and anti-racist NGOs such as the *League for Human Rights of B'nai Brith Canada* and the *Canadian Anti-Racism Education and Research Society*. Both groups monitor hate online and mobilize communities to lobby ISPs and to urge them to drop websites that violate Canadian law.[91]

Other end-user approaches consist in the establishment of web-based organizations such as *HateWatch*. This organization claims to have the most recent catalogue of hate groups who recruit and organize through the Web. Their answer to fighting hatred online is to expose it. As the founder of *HateWatch*, David Goldman, once stated: "There is no evidence that linking into a hate site either encourages or exacerbates the situation".[92] Thus, *HateWatch* currently provides direct links to over 300 sites on the Internet.

On the other hand, end-user approaches present numerous flaws. Some of these, which consist of blocking selected files by either the user or the manufacturer, may be under-inclusive as they cannot possibly encompass the scores of websites emerging on a daily basis. More generally, rating and filtering systems are likely to prevent individuals from using the Internet to exchange information on topics that may be deemed controversial. They can also impose heavy compliance costs on speakers and distort the cultural diversity of the Internet by imposing labels or rating according to a single classification system. In the long run, they may even threaten to transform the Internet into a homogenized medium.[93]

The use of rating and filtering systems to substitute for government regulation of Internet content has raised serious concerns in the international arena. In this regard, members of the *Global Internet Liberty Campaign* have monitored the development of filtering proposals around the world. They have issued two statements on the issue: *Impact of Self-Regulation and Filtering on Human Rights to Freedom of Expression* in March 1998 and a *Submission to the World Wide Web Consortium on PICS Rules* in December 1997. These joint statements reflect the scope of international concern over the potential impact that online content regulation could have on the right to freedom of opinion and expression guaranteed by Article 19 of the *Universal Declaration of Human Rights.*[94]

INTERNATIONAL RESPONSES TO THE REGULATION OF INTERNET-BASED RACISM

While many States have criminalized certain acts relating to racist or xenophobic content, the dissemination of such material by computers poses even greater challenges for law enforcement. Thus, a coordinated approach encompassing effective domestic and international response seems necessary. Regulation of hate speech and racist propaganda was one of the main topics discussed at the *World Conference against Racism, Racial Discrimination, Xenophobia, and Related Intolerance (WCAR)* held in Durban, South Africa (31 August to 7 September 2001). The issue of racism on the Internet has been a growing concern within the United Nations. This is reflected in the UN sponsored seminars, the resolutions of the *Human Rights Commission* and the activities of the *Office of the United Nations High Commissioner for Human Rights.*[95]

These international responses to combat racism are complemented by regional efforts that are particularly sustained at the European level.

The *European Commission against Racism and Intolerance (ECRI)* was established following the First Summit of Heads of State and Government of the Member States of the Council of Europe held in Vienna in October 1993. The task of ECRI is to combat racism, xenophobia, anti-Semitism and intolerance at the European level and to further strengthen the protection of human rights. It also aims to review the legislation of Member States, their policies and other related measures. In addition, ECRI suggests further action at local, national and European level. It formulates general policy recommendations to Member States and examines the legal instruments in view of their reinforcement.[96] ECRI's programme of activities includes three aspects: the country-by-country approach, work on general themes and activities in relation to civil society.

ECRI stresses the importance of including the issue of combating racism, xenophobia and intolerance in all current and future work at the international level. Thus, ECRI aims to suppress illegal content on the Internet, basing itself on the fundamental principle of respect for human rights which requires a fight against racial hatred. To this end, ECRI encourages the development of codes of conduct and the adoption of self-regulatory measures for all parties involved in Internet use.

In the past, racial hatred took a back-seat on the political agenda. However, the Council of Europe's approval of the *Cybercrime Convention* – the world's first international treaty on cybercrime which was drawn up with the participation of the United States and Canada – is one step forward in the fight against online racist content.[97] In 2001, the Council of Europe decided to back the *Cybercrime Convention* with a *Protocol*[98] that defines and outlaws hate speech on computer networks. The drafters of the *Protocol* were advised to consider ways of preventing "illegal hosting" where servers are located in a country with more lenient laws.

As the *Cybercrime Convention* was negotiated among the European Member States with the presence of non-Member States like the United States the issue of Internet-based racism was left aside since the American Constitution protects the right to free speech. A more pragmatic approach was therefore needed to ensure the effectiveness of the Convention. This was achieved by the adoption of a *Protocol* whose main

objective is to promote international legal cooperation to combat racism by attempting to harmonize criminal laws of the Member States. It is important to note that the *Protocol* does not alter the parent *Convention* but rather supplements it by widening its scope to include the offences of racist and xenophobic propaganda.[99]

The *Protocol*, which was published in May 2002, requires signatory States to allow prosecution of people who take advantage of existing legislation to make racist or xenophobic propaganda. The idea is to make the Internet like any other media as far as the dissemination of racist ideas is involved and hence to apply the same types of restrictions. However, within the framework of the Protocol, limitations on freedom of expression remain an exception.[100] It is expected that the 34 countries that have already signed the *Cybercrime Convention* will also sign the *Protocol* with the possible exception of the United States. Should the United States refuse to sign the *Protocol* the country may need to justify its unwillingness to cooperate on the issue of Internet-based racism.

For its part, the European Commission emphasized the need to control racist content online by providing $ 5.37 million (6 million euros) to an Internet safety project. This funding will form the final part of the *Safer Internet Action Plan* which was originally set up to tackle illegal and racist content on the Internet. These funds are intended to finance an awareness campaign on the potential dangers of children using Internet chat rooms. Part of the funds will also be allocated for the creation of hotlines across Europe to enable people to report about harmful content they encounter on the Internet.[101]

Many initiatives have been taken at the European level to combat racism on the Internet. However, prosecuting authorities in most European countries are not adequately trained to deal with the problem of the dissemination of racist messages via the Internet. Europe still requires a common basis for dealing with racist crimes, especially in view of the rise in extreme right-wing movements in countries like France and Austria for instance.

In this regard, the European Commission has proposed to start from the premise that what is illegal in the real world should be considered illegal online. The Commission's draft proposal seeks to ensure

that the anti-racism legislation of Member States applies to people who design racist web pages for use within Europe even if they are not physically located in European Union territory. The proposal endeavours to make it a criminal offence for the creation of such a website on EU territory even if the material is not hosted in Europe.

In the case of serious public threats or insults and the distribution of racist material, the Commission proposes punishments for various offences, which may also be extraditable. A minimum prison term of two years would be applicable on most types of serious offences. These include "public incitement to violence or hatred for a racist or xenophobic purpose" and "directing, supporting or participating in the activities of a racist or xenophobic group, with the intention of contributing to the organization's criminal activities".[102]

It thus appears that Europe is endeavouring to strike a balance between the right to protection from racial discrimination and freedom of expression. This approach is reflected in the Council of Europe's adoption in April 2002 of a *Draft Declaration on Freedom of Communication on the Internet*. The Declaration reaffirms the need to "balance freedom of expression and information with other legitimate rights and interests" and to "balance between the right of users of the Internet not to disclose their identity and the need for law enforcement authorities to trace the authors of criminal deeds". The Declaration also states that "prior control of communications on the Internet should remain an exception" and that public authorities "should not through general measures, including technical measures, deny access by the public to information and other communications on the internet".[103]

In a nutshell, there is a growing need for more active awareness-raising among the public especially young Internet users and also for enhanced cooperation between European Union Member States including a greater harmonization of their national practices. In this regard, the setting-up of a coordinating body, which would act as a permanent monitoring centre, a mediating body and partner in the preparation of codes of conduct may be a positive step for the future.[104]

The United Nations High Commissioner for Human Rights

In recent years, the *Office of the High Commissioner for Human Rights* has taken various initiatives to underscore its commitment to combating Internet-based speech. In November 1997, the UNHCHR organized *a Seminar on the Role of the Internet with regard to the Provisions of the International Convention on the Elimination of All Forms of Racial Discrimination* within the framework of the *Third Decade to Combat Racism and Racial Discrimination*. It was one of the first important steps on a global scale in combating racist practices on the Internet and reaffirming the commitment of the international community to eradicate racism and racial discrimination.[105]

The main objective of the expert Seminar was to assess the implementation of the *International Convention on the Elimination of All Forms of Racial Discrimination*. It noted more specifically that new technological developments in the communications sphere and in particular computer networks such as the Internet could be used to disseminate racist and xenophobic propaganda throughout the world. The Seminar recommended that Member States of the United Nations pursue their cooperation and set up international juridical measures in compliance with their obligations under international law in order to prohibit Internet-based racism while respecting individual rights such as freedom of speech. The expert seminar organized by UNHCHR was a major contribution to the preparation of the WCAR.[106]

The actions of other organizations

Private actors have adopted a different approach in tackling Internet-based hate speech. For instance, the *Southern Poverty Law Center* in the United States has launched a "tolerance" website that contains information about racist content and the responses of individuals in combating it. There exist a number of sites for children with stories as well as a site where children can display their own work. Other sites show parents and

teachers how to guide children to ensure the proper use of the Internet. The organization has also provided space for some American-based hate sites. Whenever a user clicks on them, "truth balloons" appear to counter the misrepresentations contained in these sites. In addition, the site contains not only links to web pages with maps of active hate groups in the United States but also to sites of human rights groups.[107]

Chichester University in the United Kingdom has established a site for children and youth. The visitor to the site first provides information about his age, race and religion. The site then introduces the visitor to other children of the same age who describe their own experiences with racism. In addition to games, the site provides statistics and other information relating to the fight against racism as well as links to other public service sites.

The *Media Awareness* network is a Canadian non-profit organization which operates an educational website named the *Web Awareness Canada* site which gives information to parents, teachers and students to help them use the Internet in a safer mode and deal with offensive content. One of the computer games for instance enables children to "detect bias and harmful stereotyping in online content".[108] For its part, the *Movement Against Racism and for Friendship Amongst Peoples (MRAP)* has created a website with information-testing games for adults and children on well known persons and events in the struggle against racism in addition to articles about legislation as well as legal cases involving racist issues.

TOWARDS AN INTEGRATED STRATEGY TO COMBAT RACISM IN CYBERSPACE

Within the framework of the *World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance*, held in Durban, South Africa from 31 August to 7 September 2001, UNESCO organized a panel discussion whose main focus was on racism and the role of the media. This event was organized in collaboration with the Office of the High Commissioner for Human Rights (OHCHR) and in partnership with the International Council on Human Rights Policy (IHCRP). The main

objective of this panel discussion was to examine the potential role of the media in the protection of human rights and the struggle against racism.

To date, UNESCO has stressed the importance of the media, including the "new media" (Internet), in the protection of human rights. Indeed, Information and Communication Technologies (ICTs) can prove efficient tools in the implementation of human rights as they allow those living in poverty to voice their opinions and ask for a broader recognition of their rights. ICTs clearly play a positive role in widening the scope for social inclusion and breaking down entrenched structures of discrimination. They can be extremely helpful for human rights organizations seeking to denounce the abuses of their governments.

However, it should be borne in mind that ICTs have been increasingly "misused" in recent years for the purpose of incitement to racial hatred and discrimination on the basis of race, colour, ethnicity, religion and other characteristics. As an ethical Organization seeking to preserve the human dignity of human beings, UNESCO must therefore make additional efforts to address the problem of Internet-based racism through an enhanced cooperation on an international scale but also at the level of national governments.

Overview of UNESCO's recent initiatives in the realm of cyberspace law

In recent years, UNESCO has been increasingly aware of the problem of Internet-based racism and of its negative impact on respect for the fundamental human rights. The Organization has published reports and discussions on its website concerning the general issue of content regulation of the Internet including the spread of racist content.

In this regard, the Organization convened an experts meeting in Monaco in September 1998 to discuss legal issues pertaining to the new environment of Cyberspace. The experts were invited to advise the Director-General on the feasibility of elaborating, under the auspices of UNESCO, a universal ethical and legal framework in this domain. They

noted that "cyberspace offers benefits and opportunities as well as undesirable consequences that raise complex issues for humanity".[109] They also recognized UNESCO as the sole international organization within the United Nations system capable of building a world consensus on the principles, laws and codes that should govern the emerging information society.

However, the rights that were addressed during the meeting mainly concerned freedom of expression and participation in the information society. Less was said about the "right to freedom from discrimination" and the respect of human dignity which are of major importance when dealing with the use of cyberspace as a new medium for incitement to racial hatred.

UNESCO held another meeting in September 1998 in Seoul (Republic of Korea). The conclusions drawn at the end of that meeting once again focused on promoting freedom of expression and the free flow of information. On the other hand, it was mentioned that cyberspace should develop in "a way that is respectful of those fundamental rights and democratic governance" and that the "current discussions concerning cyberspace activities tend mainly to be triggered by economic rather than social and cultural considerations".[110]

More recently, in November 2002, UNESCO hosted a symposium on "Freedom of Expression in the Information Society" where issues of major importance were discussed including the setting of international standards for the regulation of cyberspace. Despite the various initiatives which have been taken so far at regional level (e.g. by European institutions), it remains to be seen whether their scope could be extended in order to establish a universal instrument on the regulation of the Internet. In the absence of such a standard-setting document, it is important to suggest alternative courses of action in the short- and medium-term.

Potential courses of action in the future

There are four choices when dealing with hate on the Internet:

1) Ignore it, a strategy "based on the premise that the part spreading the hate literature needs attention to survive".[111] Ignoring hate mongers means that they would not get the publicity they desire.
2) Expose it, "based on the concept of harmony through education". By educating the public about the truth and making sure that they see hate speech as a distortion of the truth, hate speech is more likely to lose its effectiveness.
3) Criminalize it, "based on the power of law". By making the dissemination of hate messages an illegal action, hatemongers may choose to curtail their propaganda activities by limiting the flow of their racist publications online.
4) Hack it, which simply means making it impossible to find by blocking out certain sites – a strategy exactly opposite that of ignoring it. Hacking would consist in making it difficult for people to access information. Instead of making hate literature illegal to publish, it would make it impossible to find. For instance, many universities in the United States have banned certain types of problematic speech from their networks by blocking access to specific sites.

Each of these four options has been used previously to deal with the problem of Internet-based racism. While each one has its own advantages and drawbacks, it appears that the only effective solution in the long run is to expose hate groups to the public. As an alternative to banning hate speech, many anti-hate activists use the net to expose such speech. They have realized that the Internet can be also a powerful tool to expose hate, not only to spread it. Many people are monitoring hate on the net personally while others have formed larger groups, such as the *Nizkor Project* which follows the principle that "more speech, not censorship is the only way to fight the spread of hateful ideas that incite groups to mistrust and suspect one another".[112] Yet, exposing these sites alone may not be enough to combat hate on the net.

Increased intersectoral cooperation

Combating hate through education may be one of the alternatives in fighting the dissemination of racist speech via the Internet. The very nature of the Internet makes it more difficult to enact legislation or apply censorship and although a campaign to combat hate through education would not reach everyone, if just one person is steered away from hate groups, it will have been worth the effort. In this regard, UNESCO has the education and communication expertise to disseminate information on hate speech and on the means to combat it.

As an ethical Organization, UNESCO has adopted ethical and self-regulatory codes of conduct that prohibit the use of racist terms, prejudicial stereotypes and unnecessary references to race, religion and other characteristics.

Enhanced international cooperation with relevant organizations and governments

UNESCO should not only maintain but also strengthen its cooperation ties with the UN system organizations (such as the OHCHR) and regional organizations (at European Union level) which have been making sustained efforts to combat racism on the Internet. The Organization should focus on a "multidimensional" form of cooperation, involving actors from all spheres on the international arena: governments, municipalities, NGOs, private organizations, industry, etc. Although the Organization does not have the power to legislate or to interfere in the domestic affairs of governments, UNESCO can nonetheless support the adoption of measures aimed at combating biased speech on the net. UNESCO can work closely with NGOs which are trying to monitor hate on the net by compiling a list of hate sites governments can encourage institutions to block.

The establishment of an international coordinating body to combat hate speech on the Internet may be a long-term objective whose realization will largely depend on the degree of cooperation among the

various actors involved, including the organizations of the UN system such as UNESCO. Yet it remains to be seen whether it is feasible considering the numerous obstacles most likely to stand in the way, such as the existing disparities in the legislation of national governments.

Future challenges and their implication for UNESCO's programme of action

Providing access to the Internet is an admirable goal. However, access without respect for human rights is deplorable and a serious breach of standards and safety. UNESCO should make every possible effort to support initiatives undertaken to combat hate on the net. In the medium-term, the Organization could try to establish a code of "good practice", which will be implemented within the framework of a more comprehensive strategy. In the long-term, UNESCO may participate in the establishment of a body to develop a comprehensive policy on codes of practice relating to the Internet in partnership with other organizations such as the Council of Europe.[113] Many people may feel that it is far easier and far more effective to create institutions and practices in a new medium than to reform them in an old one.

One of the main challenges for UNESCO in the future will be to establish a balance between the right to freedom of expression in cyberspace and the right to freedom of discrimination. To date, much of the Organization's work has been focused on the former and much less has been said about the respect for human dignity in the digital era, a situation which tends to undermine fundamental human rights and the foundations of democracy.

Thus, there needs to be a reorientation of the ongoing debate over Internet content. A more "open-minded" debate will go beyond the regulatory measures – whose efficiency may be questionable – in order to explore the potential of educational approaches that may be less destructive of free expression. The battle against hate on the Internet has only just begun. Although it may seem like a hopeless battle at times it is perhaps "better to light a candle than to curse the darkness".

1. The word "Internet" refers to a means for interconnecting computer networks. Originally funded by the US Department of Defense for research and military use, the Internet was widely used for academic and commercial research during the 1970s and 1980s. The recent popularity of the Internet is widely credited to the use of the World Wide Web (WWW or simply Web). *Seminar on the Role of the Internet with regard to the Provisions of the International Convention on the Elimination of All Forms of Racial Discrimination*, Geneva, 10-14 November 1997. (Source: www.unhchr.ch)
2. *ITU Telecommunication Indicators Update*. (Source: www.itu.int)
3. *Global Internet Statistics*. (Source: www.glreach.com/globstats/index.php3)
4. Debra Guzman, *Seminar on the Role of the Internet with regard to the Provisions of the International Convention on the Elimination of all Forms of Racial Discrimination*, 1997. (Source: www.unhchr.ch)
5. *Combating Extremism in Cyberspace: The Legal Issues Affecting Internet Hate Speech*, Report of the Anti-Defamation League, 2000, p. 1. (Source: www.adl.org)
6. Andrew L. Shapiro, *The Internet*, Foreign Policy, Summer 1999, p. 15
7. Ibid, p.24
8. *Poisoning the Web: Hatred Online Internet Bigotry, Extremism and Violence*, Report of the Anti-Defamation League. (Source: www.adl.org/poisoning_web/about_net.asp)
9. Media may be tangible or intangible. Tangible media include video cassettes, disks, CD-ROMs and DVDs, books and any other vehicle for pictures, sound or writing. The use of a cable, fibre, radio or a satellite to transport a signal carrying particular material from one place to another comes into the category of intangible media. The definition of media includes all technical means. Although the new means of communication are not expressly mentioned, they are covered in the same way as traditional media. Thus, sending material electronically and making a publication available on the Internet falls into the definition of "media".
10. Julian Thomas, Gareth Grainger, Karen Koomen, Roslyn Van Vliet, *Governing Information and Communication Technologies*, World Communication and Information Report 1999-2000,1999, p. 121
11. Ibid, p. 120
12. Andrew L. Shapiro, *The Internet*, Foreign Policy, Summer 1999, p. 16.
13. Ibid, p. 20.
14. Ibid.
15. Julian Thomas, Gareth Grainger, Karen Koomen, Roslyn Van Vliet, *Governing Information and Communication Technologies*, World Communication and Information Report 1999-2000, p. 123
16. Homophobia is the hatred or fear of homosexuals, sometimes leading to acts of violence and expressions of hostility (Source: www.adl.org/hate-patrol/hate_patrol_print.asp).
17. Morry Lipson, *The Use of the Internet for Purposes of Incitement to Racial Hatred, Racist Propaganda and Xenophobia, and on Ways of Promoting International Co-operation*, United to Combat Racism, UNESCO, 2001, p. 229.

18. Ibid.
19. *Poisoning the Web: Hatred - Online Internet Bigotry, Extremism and Violence*, Report of the Anti-Defamation League (1999). (Source: www.adl.org)
20. Ibid.
21. Revisionism is the denial of an internationally acknowledged genocide. (Source: assembly.coe.int/Documents/WorkingDocs/doc01/EDOC9263.htm), alt.politics.white-power or alt-revisionism.
22. Such lists are like private "bulletin boards" available only to subscribers. Some of them keep their subscription information confidential but most of them are easy to join.
23. Morry Lipson, *The Use of the Internet for Purposes of Incitement to Racial Hatred, Racist Propaganda and Xenophobia, and on Ways of Promoting International Co-operation*, United to Combat Racism, UNESCO, 2001, p. 230.
24. Ibid. According to estimates provided by the Council of Europe, the current number of racist websites amounts to 4,000, including 2,500 in the United States. The same phenomenon can be observed in Europe where 50,000 swastikas were counted in the year 2000, including 20,000 in Germany alone. Sweden, Finland and Austria are unfortunately as badly affected as Germany. (Source: assembly.coe.int/Documents/WorkingDocs/Doc02/EDOC9538.htm).
25. *Hate on the World Wide Web: A Brief Guide to Cyberspace Bigotry*, Report of the Anti-Defamation League. (Source: www.adl.org/special_reports/hate_on_www/print.asp)
26. Ibid.
27. Ibid.
28. Ibid.
29. Morry Lipson, *The Use of the Internet for Purposes of Incitement to Racial Hatred, Racist Propaganda and Xenophobia, and on Ways of Promoting International Co-operation*, United to Combat Racism, UNESCO, 2001, p. 230.
30. *Racists, Bigots and the Law on the Internet, Assessing the Problem Hate on the Internet.* (Source: www.adl.org/internet/internet_law2.asp.
31. Ibid.
32. Editor's note: In this context, "revisionism" refers to the denial by certain historians of the Holocaust during the Second World War.
33. *Racism and Xenophobia in Cyberspace.* (Source: assembly.coe.int)
34. Hate speech is "an expression which is abusive, insulting, intimidating, harassing and/or which incites to violence, hatred or discrimination" (Sandra Coliver, *Striking a Balance: Hate Speech, Freedom of Expression and Non-Discrimination*)
35. *Racism and bigotry are rife on the Internet.* (Source: www.sabcnews.com)
36. Ibid.
37. *Combating Extremism in Cyberspace: The Legal Issues Affecting Internet Hate Speech*, Report of the Anti-Defamation League, 2000, p. 20. (Source: www.adl.org)
38. Morry Lipson, *The Use of the Internet for Purposes of Incitement to Racial Hatred, Racist Propaganda and Xenophobia, and on Ways of Promoting International Co-operation*, United to Combat Racism, UNESCO, 2001, p. 228.
39. Ibid, p. 230.

40. Editor's Note : The IP address or Internet Protocol is a numerical address that corresponds to the domain name of each website.
41. Morry Lipson, *The Use of the Internet for Purposes of Incitement to Racial Hatred, Racist Propaganda and Xenophobia, and on Ways of Promoting International Co-operation*, United to Combat Racism, UNESCO, 2001, p. 232.
42. *Dix-huit mois de prison pour propos racistes tenus sur des forums de discussion.* (Source : www.foruminternet.org/actualites/lire.phtml?id=297)
43. *France.soc.politique, newsgroup.France.soc.politique,* www.republica.fr, fr.soc. histoire, etc.
44. Ibid.
45. *Racism on the internet: the possibilities and limits of legislation.* (Source: www. stockholmforum.se)
46. *Combating Extremism in Cyberspace: The Legal Issues Affecting Internet Hate Speech*, Report of the Anti-Defamation League, 2000, p. 20. (Source: www. adl.org)
47. Ibid, p. 21.
48. Ibid.
49. Ibid, p. 22.
50. Morry Lipson, *The Use of the Internet for Purposes of Incitement to Racial Hatred, Racist Propaganda and Xenophobia, and on Ways of Promoting International Co-operation*, United to Combat Racism, UNESCO, p. 232.
51. *Free Speech.* (Source: www.aclu.org)
52. *Combating Extremism in Cyberspace: The Legal Issues Affecting Internet Hate Speech*, Report of the Anti-Defamation League, 2000, p. 3. (Source: www.adl.org)
53. Ibid, p. 4.
54. Libelous speech includes hateful comments directed towards Jews, Blacks or any other religious or racial group in general. (Source: *Combating Extremism in Cyberspace: The Legal Issues Affecting Internet Hate Speech*, Report of the Anti-Defamation League, 2000, p. 5) (Source: www.adl.org)
55. *Combating Extremism in Cyberspace: The Legal Issues Affecting Internet Hate Speech*, Report of the Anti-Defamation League, 2000, p. 4. (Source: www. adl.org)
56. *Racism on the internet: the possibilities and limits of legislation.* (Source: www. stockholmforum.se)
57. *Combating Extremism in Cyberspace: The Legal Issues Affecting Internet Hate Speech*, Report of the Anti-Defamation League, 2000, p. 6. (Source: www. adl.org)
58. Ibid, p. 7.
59. Morry Lipson, *The Use of the Internet for Purposes of Incitement to Racial Hatred, Racist Propaganda and Xenophobia, and on Ways of Promoting International Co-operation*, United to Combat Racism, UNESCO, p. 235.
60. *Combating Extremism in Cyberspace: The Legal Issues Affecting Internet Hate Speech*, Report of the Anti-Defamation League, 2000, p. 6. (Source: www. adl.org)
61. Ibid, p. 22.
62. Ibid, p. 23.
63. *Holocaust denial website banned.* (Source: www.indexonline.org)
64. Ibid.

65. *ABA Annual Report 1999-2000.* (Source: www.aba.gov.au)
66. Morry Lipson, *The Use of the Internet for Purposes of Incitement to Racial Hatred, Racist Propaganda and Xenophobia, and on Ways of Promoting International Co-operation*, United to Combat Racism, UNESCO, p. 233.
67. *Case Summary, Federal Court of Australia, Jones v. Toben [2002] FCA 1150.* (Source: www.mpd.selkirk.bc.ca/webdev/arcom/viewcontent asp?ID=50)
68. Madan Mohan Rao, *Regulatory Challenges in the Emerging Internet Media Environment.* (Source: www.isoc.org)
69. Morry Lipson, *The Use of the Internet for Purposes of Incitement to Racial Hatred, Racist Propaganda and Xenophobia, and on Ways of Promoting International Co-operation*, United to Combat Racism, UNESCO, p. 235.
70. Ibid, p. 236.
71. *First Inhope Report.* (Source: www.inhope.org/doc/report2002.pdf)
72. Ronald Eissens, *Fighting on-line racism, anti-Semitism and revisionism – The Complaints Bureau for Discrimination on the Internet in the Netherlands.* (Source: www.stockholmforum.se)
73. Morry Lipson, *The Use of the Internet for Purposes of Incitement to Racial Hatred, Racist Propaganda and Xenophobia, and on Ways of Promoting International Co-operation*, United to Combat Racism, UNESCO, p. 239.
74. Ibid.
75. *Racism on the Internet: the possibilities and limits of legislation.* (Source: www.stockholm.se)
76. Ibid, p. 243.
77. Ibid, p. 240.
78. Morry Lipson, *The Use of the Internet for Purposes of Incitement to Racial Hatred, Racist Propaganda and Xenophobia, and on Ways of Promoting International Co-operation*, United to Combat Racism, UNESCO, p. 240.
79. Ibid.
80. *Combating Extremism in Cyberspace: The Legal Issues Affecting Internet Hate Speech*, Report of the Anti-Defamation League, 2000, p. 17. (Source: www.adl.org)
81. *Speech Issues, Internet Filters.* (Source: legacy.eos.ncsu.edu).
82. Morry Lipson, *The Use of the Internet for Purposes of Incitement to Racial Hatred, Racist Propaganda and Xenophobia, and on Ways of Promoting International Co-operation*, United to Combat Racism, UNESCO, p. 241.
83. Ibid.
84. *HateFilter®.* (Source: www.adl.org/hatefilter/default.asp)
85. *Internet Filter and Site Blocking,* (Source: www.wisechoice.net)
86. Ibid, p. 242.
87. Ibid.
88. Morry Lipson, *The Use of the Internet for Purposes of Incitement to Racial Hatred, Racist Propaganda and Xenophobia, and on Ways of Promoting International Co-operation*, United to Combat Racism, UNESCO, p. 242.
89. Ibid, p. 244.
90. Ibid.
91. See the International Convention on the Elimination of all Forms of Racial Discrimination. (Source: untreaty.un.org/English/TreatyEvent2001/pdf/06e.pdf)

92. *Fighting Hate on the Net.* (Source: racerelations.about.com/library/weekly/aa062800a.htm)
93. *Global Internet Liberty Campaign statement on international ratings and filters.* (Source: www.eff.org)
94. Ibid.
95. *Regulation of Racism on the Internet.* (Source: www.hri.ca)
96. *The European Commission Against Racism and Intolerance*, www.coe.int/T/E/human_rights/Ecri/1-ECRI
97. *Europe hopes to outlaw hate speech online.* (Source: news.com)
98. The Protocol defines racist or xenophobic material as follows: "written material, any image or any other representation of ideas or theories which advocates, promotes or incites hatred, discrimination or violence against an individual or group of individuals, based on race, colour, descent or national ethnic origin, as well as religion if used as a pretext for any of these factors". (Source: Interview with Ignasi Guardans, the Spanish Liberal, Democratic and Reformers' Group (LDR). Cf. www.coe.int)
99. *Draft Additional Protocol to the Convention on Cybercrime concerning the criminalisation of acts of a racist and xenophobic nature committed through computer systems.* (Source: assembly.coe.int)
100. *Interview with Ignasi Guardans, the Spanish Liberal, Democratic and Reformers' Group (LDR*). (Source: www.coe.int)
101 Ibid.
102. *Law against Internet racism.* (Source: www.dawn.com/2001/11/28/int13.htm)
103. *Draft Declaration on Freedom of Communication on the Internet.* (Source: www.coe.int)
104. *Problem of the dissemination of racist messages via the Internet, Legal Instruments to combat racism on the Internet* (Report prepared by the Swiss Institute of Comparative Law). (Source: www.coe.int/ecri)
105. S*eminar on the Role of the Internet with regard to the Provisions of the International Convention on the Elimination of all Forms of Racial Discrimination.* (Source: www.unhchr.ch)
106. *Ibid.*
107. Morry Lipson, *The Use of the Internet for Purposes of Incitement to Racial Hatred, Racist Propaganda and Xenophobia, and on Ways of Promoting International Co-operation*, United to Combat Racism, UNESCO, p. 246.
108. Ibid.
109. (Source: www.unesco.org)
110. *Final Report of the Asia-Pacific Regional Expert Meeting on Legal Framework of Cyberspace (8-10 September 1998, Seoul, Republic of Korea).* (Source: www.unesco.org)
111. *Hate in the Internet.* (Source: www.yucc.yorku.ca)
112. Ibid.
113. *The Governance of Cyberspace: Racism on the Internet.* (Source: www.media-awareness.ca/english/resources/articles/online_hate/governance_cyberspace.cfm)

Contributing authors

PROFESSOR KINHIDE MUSHAKOJI

Educated at Gakushuin University in Tokyo and the *Institut des Sciences Politiques* in Paris, Professor Mushakoji, who is particularly interested in peace research, is the former Director of the Institute of International Relations at Sophia University, Tokyo. He founded the Institute in 1969, a year after joining the Sophia faculty. He has been a visiting professor at Princeton University and Northwestern University (U.S.A). Subsequently, he held the post of Senior Specialist at the East-West Center in Hawaii and Consultant to the Committee on Society, Development and Peace in Geneva. As an authority on international affairs, he was Vice-Rector of the Regional and Global Studies Division of the United Nations University from 1976 to 1989. He is currently Vice President of the International Movement against All Forms of Discrimination and Racism (IMADR) and Director of the Centre for Asia Pacific Partnership at Osaka University of Economics and Law.

DR RAY JUREIDINI

Awarded a Commonwealth postgraduate scholarship, in 1986 Dr Jureidini completed his doctorate on life insurance at Flinders University in South Australia. Following academic positions at five Australian universities, for the past five years he has been Associate Professor of Sociology at the American University of Beirut. His research interest over the past decade has been on human rights in relation to racism, ethnicity and migration, more recently with a focus on Lebanon and the Middle East. His publications include numerous articles and book chapters as well as co-editing a successful introductory Australian sociology textbook. The most recent publications focus on temporary labour migration (guest workers) in Lebanon and the Middle East, concentrating on female migrant domestic workers, and include publications by the International Labour Organisation (ILO), the International Organization for Migration (IOM) and the United Nations Research Institute for Social Development (UNRISD).

Professor Takashi Miyajima

Educated at Tokyo University, Professor Miyajima was Professor of Sociology at Ochanomizu University from 1973 and is currently at Rikkyo University where he has been since 1995. He was a visiting professor at the *École des Hautes Études en Sciences Sociales* (EHESS) from 1982 to 1983. As a researcher he was sent by the Japanese Ministry of Education to the EHESS as well as to the University of Bonn from 1989 to 1990 with his particular interest in the issues relating to migration, minorities and discrimination.

Dr Thomas D. Boston

Dr Thomas D. Boston is a Professor of Economics. In 1976 he took a Ph.D. in Economics at Cornell University. Currently Professor of Economics at the Georgia Institute of Technology, he has been a Visiting Scholar of Stanford University's Department of Economics (1983-84) and Associate Professor of Clark-Atlanta University (1978-85). He has served as past President of the National Economic Association and Senior Economist to the Joint Economic Committee of Congress (1991/92). Dr Boston's research focuses primarily on the economic status of African Americans and minority business and community development issues.

Usha Nair-Reichert

Usha C. Nair-Reichert is a graduate of Purdue University (U.S.A.). She teaches courses in international economics and operations of multinational enterprises. Her research interests are in the areas of trade policy, intellectual property rights, multinational investments, monetary policy and economic development. She has also worked with several community outreach projects focusing on issues such as poverty, health care and education.

Dr Dialo Diop

Born in 1951 in Senegal, Dr Dialo Diop holds a B.A. in Philosophy from Paris VIII University (1968), an M.D. from Paris 6 University (1982), and an M.Sc. in Molecular Biology from Paris VII (1987). He has held a lectureship in Microbiology at Dakar University Medical School since 1989 and is currently a Ph.D. candidate at Paris VI.

Ms Annie Khalil

Consultant, Division of Human Rights and Struggle against Discrimination, UNESCO.

Studies on Human Rights 2004

Struggle against Discrimination

Studies on Human Rights is an annual publication of research papers on different aspects of human rights. The series is produced by the Division of Human Rights and Struggle against Discrimination of UNESCO's Social and Human Sciences Sector.

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Sector for Social and Human Sciences
UNESCO
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75732 Paris Cedex 15
France