

## Dossier on the Subject of Institutional Racism

Exclusion and discrimination are not always only caused by individuals who intentionally discriminate against others. A hitherto neglected form of discrimination is institutional discrimination.

The present dossier attempts to describe institutional forms of discrimination as opposed to direct discrimination emanating from individuals. As people with a migratory background or people of colour, PoC, (people or persons of colour is a self-chosen term of people who are marginalized by white supremacy and are affected by every day, institutional or other forms of racism due to ethnic attributions) are mostly target group of this form of institutional discrimination, which we wish to present in this dossier, we speak of institutional racism. It is, however, not intended to denounce individuals working in these institutions as 'Nazis' or 'racists'.

The German Federal Agency for Civic Education (Bundeszentrale für politische Bildung/ bpb) has prepared a dossier on institutional racism in the German criminal justice system.

Institutional racism is a form of exclusion that arises through mechanisms and measures in institutions such as the police or public administration, and which usually so far remains undetected and therefore unprocessed. On the part of the institution, there is generally no intent to exclude persons or groups of people. Nevertheless, in practice certain groups of people are treated differently and, in most cases, worse than others.

This dossier offers a definition of institutional racism and provides examples of some of its forms. Since in Germany forms of institutional racism are so far legally punishable only to a limited extent, we try to provide a legal contextualization to illustrate which legal framework could be used. We also exemplify how some forms of institutional racism could be addressed.

In addition, we would like to refer to additional material on this topic. Darüber hinaus verweisen wir auf Material für eine weiterführende Auseinandersetzung mit dem Thema.

### 1. What is institutional racism?

Individual discrimination can be traced back both to individual persons who approve of an inhuman, misanthropic world view and to those who perceive themselves as open-minded

and culturally aware. Derogatory remarks to PoC illustrate a racist attitude. To deny adolescents entry to a nightclub due to their categorisation as Arabs or Turks shows this attitude in a concrete discriminatory act. These exclusions emanating from individuals are therefore referred to as individual racism.

The concept of institutional racism was developed in the United States in the 1960s. This analysis was increasingly taken up in Europe from 1999 onwards.

In 1993, 18-year-old black teenager Stephen Lawrence was stabbed to death at a bus stop in London. The British police had evidence that the act was racially motivated, also testimonies with regard to suspects were available. Nevertheless, the perpetrators were never brought to justice and the victim's family was treated inappropriately and insensitive by police officers. Similar misconduct by the German police occurred in the investigation of nine murders of immigrants, which - as is well known - were murdered by the far-right terrorist group 'National Socialist Underground' (Nationalsozialistischer Untergrund, NSU) and not, as the police suspected for a long time, by other immigrants.

In the US, there were several incidents in quick succession that triggered a new discussion about institutional racism in the police and the judiciary: the shooting of a black teenager and the choking to death of a black man by police officers. In both cases, the officers were not indicted.

In response to the death of Stephen Lawrence, the British Parliament set up a committee of inquiry into police behaviour in the aforementioned murder case. The report, published in 1999, formulated a definition of institutional racism for the first time:

Institutional racism is “[t]he collective failure of an organisation to provide an appropriate and professional services because of their colour, culture, or ethnic origin. It can be seen or detected in processes, attitudes and behaviour which amount to discrimination through unwitting prejudice, ignorance, thoughtlessness and racist stereotyping which disadvantage minority ethnic people.” Targeted policies and measures can counteract this institutional racism.

This definition moves away from the concept of the individual perpetrator, who deliberately excludes and discriminates against others, and focuses on the impact of an institution's internal mechanism. Individual actors are only part of a complex structure that operates in its entirety. Although individual actors have a (positive or negative) influence on the functioning of the institution, they can only change it to a certain extent for the positive or the negative.

Institutional racism is far more difficult to recognize than individual forms of discrimination and requires different approaches to address the issue.

In addition, there are structural forms of racism that are caused by unequal treatment through democratically adopted and state-legitimised legal norms. The lower social security benefit rate for asylum seekers until the summer of 2012 or the mandatory residence (the legal obligation of asylum seekers not to leave the area of their competent authority), which applies

in some federal states, are examples of structural racism. This will not be further dealt with in this dossier.

## 2. Forms of institutional discrimination

In Germany, those affected perceive exclusion in various state institutions, such as police or school. In state or federal police authorities, institutional racism is an increasingly recognized problem.

In education, it was only the results of the PISA study that revealed institutional discrimination, which was discussed in public for the first time due to the fact that children with migration history performed significantly worse in the German school system.

In some publications, authors also speak of institutional racism in governmental and administrative agencies. Unfortunately, no substantiated research has been conducted so far on this matter. Reliable information is therefore not available but would be indispensable in order to recognize this form of institutional racism and to be able to address it. So far, cases of inappropriate behaviour of employees in governmental and administrative agencies towards people with migration history or PoC are known. However, it is not possible to conclusively assess whether these are exclusively individual incidents of discrimination or whether they constitute institutional discrimination.

### 2.1. Institutional discrimination in the police

In the context of policing, various forms of institutional misconduct, which can also be called institutional racism, are becoming increasingly visible.

Identity checks regardless of any suspicion on the basis of §§ 22 (1a) and 23 of the Federal Police Act (Bundespolizeigesetz) should prevent illegal entry. The legal basis itself is initially formulated in a neutral way. However, there is a suspicion that the police are actively selecting people by traits such as skin colour or ethnic affiliation to carry out identity checks for suspected illegal entry. Even German as a mother tongue or a German passport of a PoC does not seem to prevent officials from carrying out an identity check, allegedly without any suspicion, in which the passport is checked, or a data query is carried out. Institutional mechanisms and practices within the Federal Police seem to lead to unequal treatment in these cases. This could be avoided through other mechanisms and practices. Hence, this practice could be referred to as institutional discrimination.

On 5 and 6 May 2015, the Federal Government of Germany presented its report on racism in Germany to the UN Committee on the Elimination of Racial Discrimination. The Committee has critically noted the problem of racial profiling. For more information, see the closing remarks of the Committee.

the asylum-seeker Oury Jalloh from Sierra Leone was arrested by the police in Dessau in 2005 and left alone in a cell, hand and feet bound. Shortly thereafter, a fire broke out in the cell in which he burned. Until today it could not be clarified how it came to his death.

Statistical surveys on the control practice by the Federal Police have not been carried out so far. The extent of possible unequal treatment is therefore not quantifiable. Since 2012, affected persons increasingly filed lawsuits against the Federal Police for such control practices. The Büro zur Umsetzung der von Gleichbehandlung e.V. (BUG) supports plaintiffs in doing so and has compiled a dossier on the phenomenon of racial profiling, which can be accessed [here](#).

Members of the NSU have murdered nine people living in Germany with a migratory background. During the investigation of the murders by various federal and state police authorities, the investigators focused on the family environment to find the perpetrators and the victims were suspected of having committed criminal offences. Indications to the involvement of the right-wing extremist scene were ignored and not pursued. Only by accident the weapon with which the murders were committed could be found. Within the framework of a Bundestag committee, the facts were analysed, and massive misconduct was detected at all levels of the police authorities. The one-sided police investigation in this case constitutes a passive form of institutional discrimination and is also classified that way in the report of the NSU Inquiry Committee of the German parliament. During the investigations, the perpetrators were only looked for in the environment of criminal foreigners. In the eyes of the police, it was clear from the outset "that the perpetrator was located far beyond the system of local norms and values in terms of his behavioural system" and that they could therefore exclude Germans as perpetrators.

## 2.2. Institutional discrimination in school

The 2006 PISA study on educational achievements of 15-year-olds in Germany was coordinated by the OECD and documented highly diverging educational attainments of children with or without a migratory background. Factors influencing the educational attainment are the migration experience, the language acquisition, but also the social background and the individual and institutional discrimination of the students.

Quantitative surveys clearly illustrate the differences between students with or without a migratory background. Further information can be found [here](#).

The "Program for International Student Assessment" (PISA) is the international student achievement study of the OECD. PISA examines the extent to which students, at the end of compulsory school education, have acquired knowledge and skills that enable them to participate in a knowledge-based society.

On the basis of assumed knowledge and language deficits, but also due to a supposedly neutral grading of teachers, the transition from elementary to secondary schools leads to unequal treatment, even though students with and without a migratory background perform equally well. This can be explained by individual misjudgments of respective teachers, but also by institutional discrimination. Forms of unequal treatment in school have so far only been systematically investigated to a very limited extent and therefore they have been hardly dealt with.

### 2.2.1. Data on Education

In Germany the general secondary school system has been divided into three major types of schools: the *Gymnasium*, a grammar school preparing students for higher education and finishing with the final examination *Abitur* after 12th or 13th grade; the *Realschule*, a secondary school focusing on the education of intermediate students and finishing with the final examination *Mittlere Reife* after 10th grade, and the *Hauptschule*, a secondary school preparing students for vocational education and finishing with the final examination *Hauptschulabschluss* after 9th grade.

The Federal Agency for Civic Education has put together a dossier on the educational situation of children and adolescents from migratory families.

According to a Statista survey on the number of students at general education schools in Germany by type of school in the 2014/2015 school year, 2.303.864 students attended a *Gymnasium*, 950.799 attended a *Realschule* and 507.528 went to a *Hauptschule*. However, if one analyses the relative share of children with a migratory background in the different types of schools in the 2013/2014 school year, it becomes clear that 41.4% of them attended an *Abendschule* (evening school), 18.5% attended a *Hauptschule*, 7.4% attended a *Realschule* and only 4.1% attended a *Gymnasium*.

According to a dossier of the Federal Agency for Civic Education, a child without a migratory background has five times greater chances of being proposed for grammar school after fourth grade than a child with a migration history. Even with a comparable social background and reading literacy, the chances of students without a migration background to receive a recommendation for a “*Gymnasium*” are better by a factor of 1.7.

### 2.2.2. Recommendations to secondary schools

At the end of elementary school, the teachers assess whether a child receives a recommendation to attend a *Hauptschule*, *Realschule*, *Gymnasium* or *Gesamtschule* (comprehensive school). Although parents are not bound by this recommendation in most *Länder*, they are usually taken into account in the school selection process.

As shown elsewhere, the number of students with and without a migratory background in the different types of schools differs significantly in some cases. The discrepancy is most noticeable when attending a *Gymnasium*: only 4.1% of the students of a *Gymnasium* have a migratory background. With respect to the assessment of educational attainments not only the social background but also the distance/proximity of a family to education may be considered and therefore may have an effect on the school recommendation. Likewise, language proficiency (native language) influences the recommendation for a secondary school. However, as the school recommendation of children with a migratory background differs to a great extent from that of children from mostly German families, it can be assumed that there also exists a form of discrimination.

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This may possibly be related to the concrete assessment of a child by teachers. Whether this is done intentionally or unintentionally, can in general hardly be determined. However, it leads to the same result: the lower promotion and qualification of students with a migratory background.

Likewise, the predetermined selection process within an institution like school, which leads to an assessment and recommendation, can have an impact on educational achievements.

In addition, the German secondary education system with its threefold structure, which allows only for limited change of school types, has a negative impact on the educational attainments of children with a migratory background.

Here, one would have to speak of an accumulation of individual, institutional and structural discrimination. Unfortunately, there are few studies that take these facts into account and analyze them appropriately. The result is that children with a migratory background are still facing disadvantages in the German education system and their learning achievements are less taken into account.

### **3. Legal contextualisation**

In Germany, a multi-dimensional protection against discrimination exists consisting of obligations under international law, the German Basic Law, European regulations and national legislation based on aforementioned standards.

BUG developed an overview document on aspects that should be considered in case of an AGG amendment. This also includes legal protection against institutional discrimination.

Both the parts of the Basic Law protecting against discrimination and the General Equal Treatment Act (Allgemeines Gleichbehandlungsgesetz, AGG) are national legislation that is theoretically relevant for dealing with institutional racism or institutional discrimination in a broader context. However, as previously mentioned, in Germany the institutional form of racism or discrimination has so far been recognized only to a very limited extent. Discriminatory practices are largely denied by the respective institutions.

At international level, the European Convention on Human Rights (ECHR), the Universal Declaration of Human Rights and the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD) play a role in protecting against (institutional) discrimination.

### 3.1. National standards

Article 3 of the Basic Law and the principle of equal treatment contained therein provide for general protection against discrimination. This constitutionally stipulated protection against discrimination constitutes a rule of law principle and is valid in all areas of law. It operates vertically between state and citizen. However, claiming this principle of equal treatment by way of court procedures is tedious and extremely difficult.

The General Equal Treatment Act (AGG), which is based on European Equal Treatment Directives, offers comprehensive protection against discrimination in private law. This will make it possible to sanction discrimination by private actors against other private actors based on ethnic origin, religion, gender, age, disability or sexual orientation. However, the AGG does not cover state action unless it affects labour laws.

Although education is listed in the AGG 's scope of application, no sanctioning possibilities are provided for the AGG. However, the education laws of the Länder contain different forms of the principle of equal treatment. For the police, the principle of equal treatment of the Basic Law is binding.

In both areas, there is no directly applicable legal framework that could address cases of institutional discrimination. BUG promotes strengthening the protection against discrimination also in the field of public law and therefore it has developed a draft of an anti-discrimination law covering public law.

#### 3.1.1. In education

At the national level, equality guarantees in Article 3 of the Basic Law ensure equal participation in education and protection against discrimination during schooling. In principle, students are protected against direct and indirect discrimination by the school or its representatives. In addition, the state should guarantee the freedom of discrimination between the students. Protection against discrimination should be exercised not only in concrete incidents but also through preventive measures.

Although the AGG lists public education in its scope of application (§ 2 (1) No. 7), this has no legal consequences, as no sanctions are provided for in the AGG with respect to discrimination in schools. The AGG only offers protection in cases of discrimination in private educational institutions with which students have concluded civil law contracts.

Article 1 (1) Basic Law

Human dignity shall be inviolable.

To respect and protect it shall be the duty of all state authority.

Article 3 Basic Law

(1) All persons are equal before the law.

(3) No person shall be favoured or disfavoured because of sex, parentage, race, language, homeland and origin, faith, or religious or political opinions. No person shall be disfavoured because of disability.

Since education in Germany, falls within the competence of the Länder, each Land has its own state school law. Some state school laws contain an article on equal treatment. However, rights and prohibitions are relatively undifferentiated/ underdeveloped? In most of the Länder, unequal treatment based on sex and religion/belief are forbidden. Bremen also adds ethnic origin. Conversely, in Schleswig-Holstein the principle of equal treatment is disregarded. In Rhineland-Palatinate, a broad promotion approach is laid down. In Berlin, Brandenburg, Bremen, Hesse, North Rhine-Westphalia, Rhineland-Palatinate and Saxony-Anhalt, social interaction with people of different origins is formulated as an educational goal. According to a study by the Federal Anti-Discrimination Agency a large group of Länder (Baden-Wuerttemberg, North Rhine-Westphalia, Saarland, Saxony, Saxony-Anhalt and Thuringia) do not classify anti-discrimination protection as a principles for the realisation their educational mission. Only Berlin and Rhineland-Palatinate explicitly stipulate intercultural perspectives and Brandenburg has even issued a comprehensive prohibition of discrimination. Despite some exemplary legal precautions, however, a corresponding exercise of rights within the framework of administrative law has so far barely materialised. In addition, administrative law provides possibilities to reverse the burden of proof or to seek assistance from associations, as permitted by the AGG, only to a very limited extent.

"No student may be influenced one-sidedly. No student may be favored or disadvantaged because of race, descent, nationality, language, gender, sexual identity, social origin or status, disability, or religious, ideological or political beliefs. Discrimination against girls and women must be actively counteracted ",

§ 4 (4) sentences 2 and 3 of the Brandenburg School Law.

Regrettably, no extrajudicial complaint mechanisms or structures are available in schools, no matter which Land. Only in Berlin there are initiatives for complaints bodies in cases of discrimination.

### 3.1.2. Police law

All police action is subject to the principle of equal treatment of the Basic Law. Only on the basis of the powers to intervene can the police carry out measures such as arrests, bag examinations or personal checks without suspicion. For the Federal Police this basis is the Federal Police Law (BPolG) and for the police of the Länder the respective Länder police laws.

"Border checks are carried out by border guards. When performing their duties, border guards must fully respect human dignity and may not discriminate against persons on grounds of sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation." –

Schengen Borders Code.

In addition, in the context of border security, for example, the Federal Police is also bound by European legal norms such as the Schengen Borders Code. There, too, protection against discrimination is enshrined.

As the AGG does not apply with respect to state action - as already mentioned elsewhere - forms of discrimination by the police cannot be dealt with by the AGG. In cases of racial profiling, therefore, one also has to rely on administrative law. Racial profiling refers to the discriminatory practice to use



the appearance of a person, such as the skin color, phenotypic characteristics, their attributed ethnic / religious affiliation or national origin, as a basis for decision-making for police measures - e.g. traffic checks, identity checks or searches - although there is no evidence of a criminal offense.

### 3.2. International standards

So far, the European Union, the Council of Europe and the United Nations have not developed a common definition of institutional discrimination. The European Convention on Human Rights (ECHR), the Charter of Fundamental Rights of the European Union, the Universal Declaration of Human Rights and the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD) nevertheless contain a number of principles, which prohibit discriminatory practice by institutions.

*„An unfortunate lack of trust is fostered if minorities feel that the police are a tool of the State and not of the community“,*

Quote by Thomas Hammarberg, Former Commissioner for Human Rights of the Council of Europe.

#### 3.2.1. Council of Europe

In the context of racial profiling, Article 8 (right to respect for private and family life) and Article 14 (prohibition of discrimination) of the European Convention on Human Rights (ECHR) are of particular importance. Article 8 guarantees protection against encroachments through coercive measures by the state. In addition, there is a claim to the protection of the good reputation of a person. Therefore, state interference with private life of an individual citizens must be based on an enabling clause and the actual implementation has to be adequately justified. In the context of personal checks without suspicion, this means that they may only be carried out on a legal basis (here usually because of possible illegal entry) and not on the basis of external characteristics such as skin colour (racial profiling).

"The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground, such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status ", Art. 14 ECHR

The problem is that Article 14 can only be applied with respect to the “enjoyment of the rights and freedoms set forth in” the Convention. Only after the Additional Protocol No. 12 has been ratified, Article 14 can be used as the only legal basis. However, Germany has not ratified this Additional Protocol. Therefore, it is not available to German citizens.

The European Court of Human Rights (ECtHR), which analyses complaints on the basis of the European Convention on Human Rights, has rendered judgments against discriminatory state measures. These judgements provide guidance for national courts in assessing similar cases.

For example, in one case involving two Hungarian Roma children who have been misdiagnosed with a disability and thus have been denied access to primary education, the

ECtHR has decided that the state is required to prevent direct or indirect discrimination - in this case also institutional discrimination - in the field of education:

„The applicants alleged under Article 2 of Protocol No. 1 read in conjunction with Article 14 of the Convention that their education in a remedial school had amounted to direct and/or indirect discrimination in the enjoyment of their right to education, on the basis of their Roma origin, in that their schooling assessments had been paper-based and culturally biased, their parents could not exercise their participatory rights, they had been placed in schools designed for the mentally disabled whose curriculum had been limited, and they had been stigmatised in consequence”.

The judgement can be found here.

With regard to discrimination - as in cases of racial profiling - the ECtHR found that measures or laws which are not directly aimed at discriminating against a particular group, but which in fact disproportionately affect it, should be considered as discriminatory. In addition, discrimination must not be based on discriminatory laws but can be generated by a de facto discriminatory situation.

The Committee on Equality und Non-Discrimination of the Council of Europe published a report on racism in the police in January 2014, which also deals with 'institutional racism':

“Racism does not spare any part of society and the police is no exception. Racism can be present in the attitudes or behavior of police officers, in their interaction with the population or with other officers. It can also be found in rules and regulations applied by the police, which would in that case qualify as institutional racism. Among these, racial profiling is a special concern”.

The Committee therefore recommends in its report:

“Council of Europe member States should have the courage to acknowledge and address the existence of racism in the police. They should set up independent complaints mechanisms and ensure that racist crimes by police officers are promptly investigated and adequately sanctioned, with a view to avoiding impunity, maintaining trust in the police and encouraging reporting. Member States should also review existing legislation and practices of the police with a view to identifying and modifying those that might have a racist connotation.”

### 3.2.2 EU

Since the entry into force of the Treaty of Lisbon in 2009, the fundamental rights of the European Union are enshrined in the Charter of Fundamental Rights, including among other the principle of equal treatment. EU institutions are obliged to respect these rights.

The Court of Justice of the European Union should ensure that European law is interpreted and applied in the same way in all Member States. The decisions of the European Court of Justice (ECJ) are binding on all courts and all citizens in the EU. This means that all national laws and court rulings must be adapted to the case law of the ECJ. For the treatment of institutional discrimination in the police the "Melki" judgment is of particular significance.

The Court of Justice of the European Union is the judicial authority of the European Union and, in cooperation with the courts and tribunals of the Member States, it ensures the uniform application and interpretation of EU law.

#### 3.2.2.1. Charter of Fundamental Rights of the European Union

The EU Charter of Fundamental Rights defines the rights and freedoms of people living in the European Union. These rights are to be guaranteed by the institutions and bodies of the Union as well as by the Member States when they implement EU law. The Charter of Fundamental Rights of the European Union contains a general prohibition of discrimination (Article 21). The groups to be protected against discrimination are more broadly defined than in the European Convention on Human Rights. However, like the whole body of EU law, the Charter of Fundamental Rights can only be applied to matters falling within the competences of the EU.

Article 21 (1) Charter of Fundamental Rights - Non-discrimination:

“Any discrimination based on any ground such as sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age or sexual orientation shall be prohibited. “

#### 3.2.2.2. 'Melki' judgment

In the so-called "Melki" judgment of 22 June 2010, the European Court of Justice ruled on the compatibility of a national rule with EU law at the request of the Court of Cassation.

Two Algerian nationals who were irregularly residing in France were checked by the police near the Belgian border in accordance with a national law and subsequently placed in detention pending deportation.

In its judgment the ECJ found that Article 67 (2) of the Treaty on the Functioning of the European Union (TFEU) and Articles 20 and 21 of the Schengen Borders Code preclude national legislation authorizing the police authorities of a Member State to carry out identity checks in a given area along the (internal) border regardless of the behaviour of the affected persons or other special circumstances giving rise to the risk of disturbance of the public order. With the decision, the ECJ has specified a principle codified in Article 67 (2) TFEU and Article 20 and 21 of the Schengen Borders Code and which is to be implemented by the Member States in the Schengen area. Accordingly, in the light of the requirement of legal certainty, EU law requires Member States not to provide powers to police authorities when it is not ensured that the actual exercise of power has the same effect as border checks. The Court also complained that the relevant (French) power "with regard to the intensity and frequency" of the controls "contained neither detailed rules nor restrictions" which prevented this.

### 3.2.3. United Nations

The Universal Declaration of Human Rights of the UN also includes a prohibition of discrimination with respect to rights and freedoms. In addition, Article 7 guarantees equality before the law and the indiscriminate entitlement to protection by the law.

Furthermore, Article 26 of the UN Covenant on Civil and Political Rights postulates equality before the law in a general principle of equality, which is laid down in Article 3 of the Basic Law on the national level. It reproduces in its first part Article 7, first sentence, of the Universal Declaration of Human Rights.

It is possible to derive the principle of non-discrimination in education and a right to participation in non-discriminatory access to educational institutions from various international agreements. The UN Convention on the Rights of the Child (CRC) also contains various obligations for the protection of children, including educational objectives to avoid discrimination as for example in Article 29 CRC.

"Article 67 (2) TFEU, and Articles 20 and 21 of Regulation No 562/2006 [of the European Parliament and of the Council], preclude national legislation which grants to the police authorities of the Member State in question the power to check, solely within an area of 20 kilometres from the land border of that State [...], the identity of any person, irrespective of his behaviour and of specific circumstances giving rise to a risk of breach of public order[...]",

quotation from the "Melki" judgment (in Joined Cases C-188/10 and C-189/10). Rechtssachen C-188/10 und C-189/10)

The International Conventions on the Elimination of All Forms of Racial Discrimination (ICERD) of the UN formulates a far-reaching prohibition of discrimination in Article 2. Thus, States Parties undertake to refrain from acts and practices of 'racial discrimination' against persons, groups of persons or entities. In addition, it should be ensured that state and local authorities as well as public institutions act in accordance with this obligation. Furthermore, States Parties undertake to establish effective measures to evaluate the actions of public authorities and to amend, repeal or annul laws and regulations that constitute 'racial discrimination'.

Consequently, ICERD takes a step further than other international treaties by including authorities and their laws and regulations in the statement.

On 5 and 6 May 2015, the German government presented its report on racism in Germany to the UN Committee on the Elimination of Racial Discrimination. The concluding observations of the Committee also address the concept of institutional racism:

“While noting the delegation’s acknowledgment of the State party’s difficulty in effectively investigating the series of murders committed by NSU, the Committee remains concerned at the State party’s continued failure to recognize its systemic shortcomings in identifying and handling the racial motivation behind such acts, which may mask institutional racism.”, 86th session.

#### **4. Possible handling of institutional discrimination**

So far, the topic of institutional discrimination in Germany remains largely unaddressed.

Institutional discrimination in the police, for example, manifests itself in the systematic negation of a racist motivation behind acts such as those subject to the NSU murders investigation. In another dossier, you will find recommendations on how institutional discrimination can be dealt with by the police.

The Macpherson Inquiry Report analysed the behaviour of the British police during the investigation of the racially motivated murder of Stephen Lawrence and formulated 70 recommendations for the British police.

Article 2 (1a) International Conventions on the Elimination of All Forms of Racial Discrimination (ICERD):

“Each State Party undertakes to engage in no act or practice of racial discrimination against persons, groups of persons or institutions and to ensure that all public authorities and public institutions, national and local, shall act in conformity with this obligation”.

Art. 2, Abs. 1 a,  
Internationales Übereinkommen zur Beseitigung jeder Form von Rassen-  
diskriminierung (ICERD)

State institutions in the UK have equal treatment obligations. These are obligations imposed on state institutions to examine how their decisions affect people protected under the Equality Act. This is a strategy for the prevention of discrimination.

So far, institutional discrimination is hardly recognized at school. In order to better deal with institutional discrimination in school, in Spring 2016 the model project 'complaint management' has started to offer complaint possibilities to persons who experience discrimination in school.

#### **4.1. Addressing institutional discrimination in the police**

Insufficient attention to the racist motivation of a series of murders illustrated institutional racism in the German police force.

The NSU Committee of Inquiry has produced various recommendations aimed at addressing institutional discrimination within the police.

Good examples on how institutional discrimination can be prevented in the police force can be found in the UK. After the assassination of a young black Brit, various recommendations were made. These recommendations have been formulated very clearly in the Macpherson Inquiry Report and were also implemented. Here you will find more information about the implementation of the recommendations in Great Britain.

Strategic lawsuits against racial profiling are an individual means to deal with institutional discrimination by the police or to question police practice.

*"As all forms of oppression in our society are interrelated because they are sustained by similar institutional and social structures, one system cannot be eliminated while all others remain intact,"*

- bell hooks 1984: "Feminist Theory: from Margin to Center", p 37.

„Member States shall ensure that judicial and/or administrative procedures, including where they deem it appropriate conciliation procedures, for the enforcement of obligations under this Directive are available to all persons who consider themselves wronged by failure to apply the principle of equal treatment to them [...]”,

Article 7 (1) Race Equality Directive 2000/43 / EC

#### 4.1.1. Implementation of the recommendations of the NSU Inquiry Committee

In 2013, the NSU Committee of Inquiry of the German Bundestag adopted recommendations for the police, judiciary, constitution protection authority and the confidants of the security services. The recommendations of the NSU Committee of Inquiry provide important impulses for improvements in the work of state authorities and their cooperation regarding the fight against right-wing extremism, terrorism and politically motivated violence, and therefore also indirectly for the investigation work on hate crime.

The Federal Government has worked to implement these recommendations. The German Bundestag has passed the law on the implementation of the recommendations of the NSU Committee of Inquiry, which entered into force on 1 August 2015. Already in 2008, an "EU Framework Decision on combating certain forms and expressions of racism and xenophobia by means of criminal law" has been approved. Since the existing legislation in Germany was considered sufficient for the sanctioning of hate crime by the Federal Government, nothing was changed until the NSU Inquiry Committee issued its report with the recommendations.

The changes in the law are intended to provide a basis for a more targeted fight against hate crime. From now on the courts are obliged to expressly take into account racist, xenophobic or other inhumane motives of an offender as aggravating factors for the purpose of sentencing. In addition, the police and prosecutors should pay attention in their investigations to the motivation of the suspects in order to detect hate crime.

The law also provides for the Attorney General to be involved in ongoing investigations at an earlier stage. This is one of the consequences of the parliamentary committee of inquiry on the failures of the security authorities in the murder series of the NSU terror cell.

#### 4.1.2. Implementation of the Macpherson Inquiry report

Since the publication of the Macpherson Inquiry Report in 1999, the British police service has undergone significant changes in many areas. The police service improved its investigations and responses to crimes, including murder and hate crime, to curb institutional forms of discrimination.

Since the implementation of the Macpherson Inquiry Report, in murder investigations 90% of murders have been solved. Members of ethnic minorities have increasingly found the courage and confidence to report hate crimes.

In its determination [of the sentence] the court shall counterbalance the circumstances which speak for and against the perpetrator. In doing so consideration shall be given in particular to: the motives and aims of the perpetrator, especially racist, xenophobic or other inhuman motives [...]

Extract § 46 (2) sentence 2 German Criminal Code.

Particularly significant is the progress made in the field of recruitment, training and employment in the police services. As a result of a series of measures and initiatives, there are now around 9% of PoCs and members of ethnic minorities in the British police service (for comparison, in 1999 only 3% of police officers were PoC or members of ethnic minorities). A more diverse structure of the workforce has furthered the connection between the police and the local communities they work with.

In recent years, according to the UK Department of Home Affairs, 90% of its employees have undergone training on equality, diversity and inclusion. The feedback from employees who have completed the workshops "Diversity and Respect" shows that they have more self-confidence in dealing with inappropriate behaviour. They have developed a better understanding of what bullying and harassment is all about and the negative effects of bullying and harassment on colleagues and clients.

More about the progress of the British police can be found in this dossier.

#### **4.1.3. Legal actions against racial profiling**

The BUG supports legal actions against discrimination of a precedent value, including complaints against racial profiling, which the BUG considers to be cases of institutional discrimination. Our current lawsuits against racial profiling can be found here.

The creation of precedents supports legal certainty in the area of non-discrimination and highlights loopholes in the law. To litigate cases which might lead to a decision which will constitute a legal precedent usually takes time and patience, requires extensive legal experience and, if necessary, funding to cover the legal costs.

If lawsuits are settled in favor of the plaintiffs, the judgments can be trailblazing for future legal actions. Ideally, they enable discriminatory patterns and mechanisms to be processed and contained in the long term or even stopped.

“We therefore need to fully incorporate equality into the way we do business, making every effort to eliminate discrimination, promote equal opportunities and help our staff to be the best they can be. It is essential we create a culture of respect and treat each other, our stakeholders, and the people we come into contact with, fairly and justly”

Diversity Strategy 2013-2016, Making the Most of Our Diversity, page 5.

"The identity check by Federal Police officers was unlawful. The defendant [Federal Police] could not effectively base measures of identification on the provision of § 23 (1) No. 3 BPolG, because the provision it is not in conformity with EU law and cannot be construed in conformity with EU law",

Quotation from the Stuttgart administrative Court judgement – Az. 1 K 5060/13.



## 4.2. Equal treatment obligations of state institutions

In the UK and Northern Ireland, there is the duty of equal treatment of state institutions that obliges them to always take into account how certain decisions or measures will affect persons that fall under the equality laws. This means that public institutions always have to consider the following aspects in their work: the elimination the possibilities of unlawful discrimination; the promotion of equal opportunities of persons, who have a protected characteristic, in comparison to others and the enhancement of social interaction between different persons.

More on the equality obligations of state institutions can be found later in a dossier we are currently working on

## 4.3. Addressing institutional discrimination in school

Institutional forms of discrimination can also be found in schools. According to a study by the Federal Anti-Discrimination Agency, a quarter of students with a migratory background feel discriminated against in school. These are not just individual discrimination cases, but also constitute forms of institutional discrimination. An example of such discriminatory practices are cases of lower recommendations to secondary schools for children with a migratory background despite similar performance in comparison to their peers. In order to guarantee a non-discriminatory school life, the organization LIFE e.V. offers within the framework of a model project an independent contact point and complaints office for affected persons in Berlin.

More information with regard to the Anlaufstelle für Diskriminierungsschutz an Schulen (ADAS), the contact point for the protection against discrimination, can be found here.

In addition to individual exclusion, it has to be observed how institutional forms of discrimination in school can be perceived, analysed and dealt with in an adequate and sustainable way. At this point in time how to address institutional discrimination is still largely unclear in Germany.

“The general equality duty is intended to accelerate progress towards equality for all, by placing a responsibility on bodies subject to the duty to consider how they can work to tackle systemic discrimination and disadvantage affecting people with particular protected characteristics”,

Non- discrimination obligations in the public service sector, according to the 2010 Equality Act.

"The model project is looking for ways to detect forms of discrimination and to develop recommendations for action. Through the project, there is a great opportunity to increase awareness with respect to existing approaches for protection against discrimination and to develop needs-based solution strategies",

Quote by Education Senator Sandra Scheeres.

### 4.3.1. Addressing institutional discrimination in school

The educational organization LIFE e.V. launched the model project "Anlaufstelle für Diskriminierungsschutz und Diversity an Schulen" (ADAS) with the objective of developing and entrenching effective anti-discrimination work in Berlin schools through an independent contact point as well as internal school complaint mechanisms.

As part of the model project, ADAS offers a low-threshold and confidential complaint option for people experiencing individual or institutional forms of discrimination in schools in Berlin: affected students, parents and teachers can turn to the contact point ADAS operating throughout Berlin from Spring 2016 onwards.

The following results can be expected:

- Qualified and independent complaint management for schools
- Valid data on discrimination experiences (extent, type of school, age, characteristics, how often, etc.) and successful interventions to reduce discrimination
- Recommendations for action for Berlin politicians

"An independent contact point offers low-threshold access for those affected, intervenes in case of conflict, cooperates closely with the individual schools, advises and supports them in setting up a comprehensive complaints management system and can provide further education programs in schools if necessary."

Discrimination-free schools - an educational necessity, Policy Brief, October 2013, page 12

## 5. Additional material

Below you will find more information about the topic. To access relevant websites, we recommend the online version of the dossier.

### A) Institutional discrimination in the police

#### a) NSU Committee of Inquiry

- 1) Deutscher Bundestag: Recommendations of the NSU Committee of Inquiry (German only)
- 2) Deutscher Bundestag, 17th electoral term, Bundestag Journal (Drucksache) 17/14600: Recommendations and Report of the 2nd NSU Committee of Inquiry according to Article 44 of the Basic Law, 22.08.2013 (German only)
- 3) Deutscher Bundestag, 18th electoral term, Bundestag Journal (Drucksache) 18/558: Affirmation of Recommendations of the Final Report of the 2nd NSU Committee of Inquiry of the 17<sup>th</sup> electoral period, 19.02.2014 (German only)
- 4) Deutscher Bundestag: Law on the Implementation of Recommendations of the NSU. Committee of Inquiry of the German Bundestag, 01.08.2015 (German only)
- 5) Federal Ministry of the Interior and Federal Ministry of Justice and for Consumer Protection: Report of the Federal Government on the State of Implementation of the Recommendations of the 2nd NSU Committee of Inquiry of the German Bundestag in the 17<sup>th</sup> electoral period (German only)

#### b) Metropolitan Police (Großbritannien)

- 1) House of Commons: Stephen Lawrence Inquiry Report - ten years on, 2009
- 2) Home Office: Diversity Strategy 2013-2016. Making the Most of Our Diversity, 2013
- 3) Home Office: 3 Year Diversity Strategy 2010-13 Progress Report, 2013

#### c) Miscellaneous

- 1) Commission against Racism and Intolerance – ECRI: Committee on Equality and Non-Discrimination: Tackling racism in the police, Doc. 13384, 10 Januar 2014
- 2) CERD Report on Germany, 15.05.2015

3) Deutsches Institut für Menschenrechte (German Institute for Human Rights): Study on racial profiling – Personal checks according to § 22 (1a) Federal Police Law 2013 (German only)

4) Judgment of the Stuttgart Administrative Court on personal checks without any suspicion (Az. 1 K 5060/13), 22.10.2015 (German only)

5) Decision of the European Court of Justice in der "Melki" and "Abdeli" case (C-188/10 und C-189/10), 22.06.2010

6) Migrationsrecht.net: Decision of the ECJ in the "Melki" und "Abdeli" case (C-188/10 und C-189/10), 22.06.2010 (German only)

## **B) Institutional discrimination in education**

1) Heinrich Böll Foundation: School with migration background, 2008 (German/English)

2) Antidiskriminierungsstelle des Bundes (Federal Anti- Discrimination Agency): Discrimination in education and working life, 2nd joint report of the Federal Anti-Discrimination Agency and the concerned Federal Government and Parliamentary Commissioners, July 2013 (German only)

3) Life e.V., ADAS - Anlaufstelle für Antidiskriminierung und Diversity an Schulen (contact point for protection against discrimination and diversity in schools)

4) Federal Ministry of Education and Research: Transition from primary to elementary school, equal performance assessment and regional, social and ethno-cultural disparities, Mai 2010 (German only)

5) German PISA consortium: Pisa 2006 in Germany. The competences of adolescents  
Kompetenzen der Jugendlichen in the third inter-country comparison (German only)

6) RAA Berlin/RomnoKher/Madhouse: Bildungsaufbruch! Für die gleichberechtigte Teilhabe von Sinti und Roma in Deutschland (German only)

## **C) Public Sector Equality Duties**

1) citizensadvice.org.uk: What's the public sector equality duty?

2) Equality and Human Rights Commission: What is the Equality Duty?