

International Migration Papers 7

**Labour market discrimination against
foreign workers in Germany**

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Foreword

The following two studies form part of a research series elaborated under the auspices of the Migration for Employment Branch of the International Labour Organization. The study by A. Goldberg and D. Mourinho which was carried out under the direction of Professor Dr. F. Sen of the Centre for Turkish Studies, is aimed at documenting whether foreigners are discriminated against when they apply for advertised job vacancies. The research in this matter was carried out in two highly industrialized regions of Germany, in the Rhine-Ruhr region and in Berlin. They covered both job vacancies situated at the lower end of the scale of qualifications and also positions with higher requirements such as for example nurse, remedial gymnast, construction draftsman and computer assistant. This study demonstrates, as has done earlier parallel research in the Netherlands,* in an irrefutable manner that there is discrimination in access to the labour market, which should not, however, occur in view of the existing legal situation.

The study by U. Kulke examines the scope and the effectiveness of German legislation, with particular reference to how this legislation can hold down discrimination against migrant workers and how it permits persons discriminated against to sue for their rights. It comes to the conclusion that a special anti-discrimination law would be significantly more effective than the existing general provisions which are scattered across a series of acts and ordinances.

I should like to extend my warm thanks not only to the researchers who have carried out this arduous and demanding task but also the institutions which, through their financial support, have made these studies possible, namely the Hans-Böckler Stiftung in Düsseldorf and Dr. Barbara John, Commissioner for Foreigners' Affairs, Senate Department for Social Affairs in Berlin.

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* F. Bovenkerk et al.: *Discrimination against migrant workers and ethnic minorities in access to employment in the Netherlands*, International Migration Papers 4, Geneva, ILO, 1995.

Empirical proof of discrimination against

A. foreign workers in access to the labour market: Report on Germany

Andreas Goldberg and Dora Mourinho

1. Introduction

1.1. Introduction

The results of the study presented here form part of the project entitled “Combating discrimination against (im)migrant workers and ethnic minorities in the world of work” directed and coordinated by the International Labour Office. *Empirical proof of discrimination against foreign workers in access to the labour market: Report on Germany* is the first major activity in this context, and the Centre for Turkish Studies has assumed the responsibility of carrying out all the research work which relates to empirical findings in the Federal Republic of Germany. The present report brings together the most important findings and results.

The objective of the project was to examine whether and to what extent it was possible to empirically demonstrate discrimination against foreigners in access to the labour market. The research covers both representative sectors of the labour market and varying levels of qualifications.

Reports of the experience of affected persons continue to indicate the existence of discrimination against foreigners and ethnic minorities in access to the labour market; however, no comparative empirical survey has been carried out in the Federal Republic of Germany. What has been available so far is studies primarily on the subject of discrimination at the work place.

On the basis of the same conditions of access, i.e., from the legal point of view, that the applicant from a minority population holds an unrestricted work permit of unlimited duration, and assuming the same training and vocational qualifications, this study has created recruitment situations in which both a member of the majority population and a member of the minority population applied for the same vacancy. In this way, any unequal or discriminatory treatment on the part of the employer can be attributed to a maximum extent to the differing national origin of the applicants. Since Turks form the largest foreign minority in the Federal Republic of Germany, the study was carried out using Turks as representatives of the minority population.

1.2. Start-out situation

Discrimination against foreign workers on the German labour market must be seen against the background of the recent history of migration in which it has been primarily workers with low educational and vocational qualifications that have arrived in the Federal Republic of Germany and who have been employed in particular in production jobs doing dangerous and poorly paid work. The situation of the “second generation”, i.e., descendants who have grown up or who were born in the Federal Republic of Germany, is another matter and further efforts are required of German society and politics to provide equality of opportunity on the educational, training and labour market. The question that needs to be asked in this context is what opportunities do foreigners have to rise to higher occupational and social positions?

In addition to these factors, the thesis is also presented here that access to the labour market, even in the presence of equal qualifications, is significantly impeded by direct discrimination. Although from the legal side, residence and work permits provide the great majority of foreigners living in Germany with free access to the labour market, these foreigners will, in seeking employment, regularly be confronted with xenophobia and racism. This may not occur to the same degree in all sectors and can vary depending on level of qualifications, the labour market situation in the sector in question, branch of the economy, or size of undertaking. The task of this study has been to examine scientifically the occurrence of discrimination.

1.2.1. Development of employment of foreigners in the Federal Republic of Germany

As early as the mid 1950's, the demand for foreign employees in the Federal Republic of Germany was high, with agriculture and the building industry in particular displaying a shortage of labour. At the same time, the demand for additional manpower was also increased by accelerated economic growth. The first recruitment agreements were established with Italy in 1955, followed by Spain (1960) and Greece (1960), Turkey (1961), Morocco (1963), Portugal (1964), Tunisia (1965) and ex-Yugoslavia (1968). These were intended to meet the needs of the German economy primarily for unskilled labour. Starting from the initial assumption of limiting the employment of foreign labour in time (rotation principle), over subsequent years a new situation arose which made it necessary to implement the integration of foreigners living in the Federal Republic of Germany not just in the labour market but also at a social, cultural and political level. At the beginning of the 1970s, there was a particular push for the recruitment of Turkish workers; their number rose from 172,400 in 1967 to 910,525 in 1973.¹ In spite of the halt placed on recruitment in 1973, the Turkish population – also as a result of family reunification – continued to rise and now forms the largest foreign minority in Germany.

The number of foreigners living in the Federal Republic of Germany rose from 686,000 in 1960 to approximately 6.9 million at the end of 1993, and this currently amounts to 8.5 per cent of the total population. At the end of June 1993, there were 2,183,579 foreigners in employment subject to social insurance contributions.²

There are many indications that the Federal Republic of Germany has become a country of immigration: nearly all the foreign families have had children, the second generation was born or raised in the country and the third generation is just growing up. Willingness to return to the country of origin has regularly fallen especially among the second generation.

In spite of the fact that approximately 8.5 per cent of the population in Germany is of foreign origin and that this foreign population currently accounts for 9.4 per cent³ of persons employed in jobs subject to social security contributions, the Federal Government denies that, after 39 years of immigration, Germany has become a country of immigration. For years now, the Federal Republic has formulated the three principal goals of its policy on foreigners as: the limitation of immigration, family reunification and integration of the foreigners already living in the country. Instead of an immigration policy, the Government continues to practice a policy on foreigners which implies the negation of the fact that the Federal Republic of Germany has become a country of immigration. The factual situation is that there is a constantly rising number of foreigners in the Federal Republic of Germany as a result of births and new arrivals. This confronts politicians and society with a situation which must necessarily have as a result equality of status and equality of treatment throughout society and in particular in the world of work. This means that, at the same time, foreigners must be recognized as an integral part of Federal German society and no longer be employed as a political tool, as was recently the case in the debates on the right to asylum in 1992, or in relation to the electoral campaigns.

1.2.2. Foreign workers in Germany

¹ Günther Schultze, *Berufliche Integration türkischer Arbeitnehmer. Vergleich der ersten und zweiten Generation*. Bonn 1991. p. 18.

² Statistisches Bundesamt, Wiesbaden.

³ *Amtliche Nachrichten der Bundesanstalt für Arbeit*. Nuremberg, 30 Mar. 1994.

There are currently 6,878,117 foreigners living in Germany. Of these, 1,918,395 are of Turkish nationality, which amounts to 27.9 per cent of the foreign resident population.⁴ In comparison, there are living in Germany 1,535,576 foreigners from Member States of the European Union. Of the 2,183,579 foreign workers employed and subject to social security contributions, as many as 631,837 are Turks. This amounts to 29 per cent of the number of foreigners in employment.⁵

Consequently the Turks form the largest national minority in the Federal Republic of Germany and also the largest group of foreign workers. For this reason, the decision was taken to concentrate the study in the Federal Republic of Germany on Turks as the largest foreign population group.

As a whole, the level of training of the "first generation" of foreign workers is relatively low. Foreign workers are employed primarily on unskilled or low-skill operations; in this context, Italians and Turks have long had the lowest levels of training and qualifications. They are to be found mainly in jobs on conveyor belts, piece work and shift work.

When the migration of workers to the Federal Republic of Germany first began, the structure of their employment was relatively homogeneous. In 1976, over 70 per cent of foreign persons in employment were employed as wage-earning manual workers. In comparison, the percentage for Germans was under 40 per cent. Only just over a quarter of foreign employed persons were salaried employees (in comparison, for Germans, the corresponding figure was over 50 per cent). The remainder were self-employed or worked as working family members. Between 1987 and 1991, the proportion of foreign wage-earning manual workers fell from 70.7 per cent to 66.3 per cent. The number of salaried employees rose from 18.5 per cent to 21.4 per cent. In the case of the Turks, the proportion they accounted for among employees in the processing industry fell from 70.9 per cent in 1976 to 58.5 per cent in 1991. In the services sector, over the same period, their proportion rose from 7.4 per cent to 16.1 per cent.

The professional positions of migrants and their occupational mobility processes should be seen as indicators of their structural integration in the host society. As far as the employment of foreign workers in individual sectors of the economy is concerned, one can see a tendency, over recent years, for a movement from processing industries to services, commerce, transport etc. Nevertheless, this has but little modified the basic distribution and the dominance of certain branches.

As a result of the entry on to the labour market of the second generation, which has a higher level of education and training than their parents, and due to the sharp rise in independence, a number of them have achieved better occupational positions and higher levels of income.⁶

The majority of foreign workers (43.3 per cent as at June 1993) continue to be employed in the processing trades (excluding the building trade); within the processing trades, automobile construction ranks highest with a current number of 133,700 workers employed. A further 25.1 per cent are to be found in the general services sector, 9.8 per cent in commerce and 9.7 per cent in

⁴ Statistisches Bundesamt, Stand 31.12.1993, Weisbaden, Sep. 1994.

⁵ *Amtliche Nachrichten der Bundesanstalt für Arbeit*, 42nd year, No. 3, Nuremberg, 30 Mar. 1994.

⁶ Zentrum für Türkeistudien (Ed.): *Ausländische Betriebsgründungen in Nordrhein-Westfalen. Eine vergleichende Untersuchung der unternehmerischen Selbstständigkeit bei Türken, Italienern, Griechen und Jugoslawen*, Opladen, Oct. 1992.

the building industry. In last position comes the “credit institutes and insurance” sector of the economy with only 1 per cent of foreigners.

Unemployment

There are sharp differences in the extent to which individual nationalities have been hit by unemployment. The impact has been particularly high for the Turks, followed by Italians and Greeks. Since the beginning of the 1970s, the unemployment rate for foreign workers has, as a whole, been significantly higher than the figure for workers who are Federal German nationals. In 1991, the unemployment rate for foreigners was 10.7 per cent whereas that for Germans was only 6.3 per cent. In 1994, the unemployment rate for foreigners rose as high as 15.9 per cent, a factor which is directly related to the social status of the majority of foreigners. This is because 66.5 per cent of all those hit by unemployment are wage-earning manual workers.⁷ At the end of June 1994, the unemployment rate for Turks was 19.6 per cent and was, consequently, above the average for all foreigners.

In the case of the regions examined in this study, the figures are as follows: at the end of January 1994, North Rhine-Westphalia had a total unemployment rate of 11.1 per cent, whereas that for foreigners was 22.0 per cent. In Berlin-Brandenburg the picture was similar; there, the unemployment rate at that time was 13.2 per cent, whereas the rate amongst foreigners was 23.2 per cent.

Pay differences

Foreign workers continue to perform primarily “blue-collar” jobs and many of these entail very high physical workloads.⁸ In particular, high percentages of foreigners are to be found in those sectors of the economy affected by the crisis. As has already been indicated, the predominant part of the foreign labour force is still employed in the processing trades. The situation of the foreign work force (see table 1) is reflected in pay levels. Calculations indicate that Turks earn 73 per cent of German average pay levels and other foreigners 76 per cent.

Table 1. Pay differentials between Germans and foreigners

Country of origin	Pay in DM	% of average German pay
German	4.189	100
Turkey	3.064	73
ex-Yugoslavia	3.386	81
Greece	3.190	76
Italy	3.077	73
Spain	3.127	75
Foreigners excluding Turks	3.195	76

⁷ *Amtliche Nachrichten der Bundesanstalt für Arbeit*, 42nd year, No. 3, Nuremberg, 30 Mar. 1994.

⁸ Barabas, György et al., “Gesamtwirtschaftliche Effekte der Zuwanderung 1988 bis 1991”, in: *RWI-Mitteilungen, Zeitschrift für Wirtschaftsforschung*, 43rd year (1992), Vol. 2, p. 142.

Source: Rürup, Bert, Sesselmeier, Werner, "Zu den wichtigsten Auswirkungen von Einwanderung auf Arbeitsmarkt und Sozialversicherungen, in: *Forum Demographie und Politik*, published by: Klose, Hans-Ulrich, Vol. 5, Bonn, Feb. 1994, p. 81.

1.2.3. Foreign young persons – with special reference to Turks

At the present moment, there are over 2 million foreign children and young persons of up to 25 years of age living in the Federal Republic of Germany, and these include over 730,000 Turks. In this way, Turkish children and young persons are numerically the largest group of young foreigners in the Federal Republic of Germany.

As a rule, the education and training situation of foreign young persons in general and of Turkish young persons in particular has improved over recent years. The majority of Turks aged between 20 and 30 years do, however, in the same way as their fathers, still belong to the working class, even though their opportunities of getting into a more skilled job have been increased by vocational training and better school results.

Schooling situation

In the Federal Republic (previous Federal region) there were in 1992 a total of around 837,000 foreign students. In 1992, foreign students accounted for 9 per cent of all students in general education schools. The predominant part of them (86 per cent of foreign students) came from the following main countries of origin: Greece, Italy, ex-Yugoslavia, Portugal, Spain and Turkey. Among these nationalities, once again, Turkish students were the most numerous, accounting for 53 per cent of this student population.⁹ Foreign children who arrive in the Federal Republic of Germany after they have already reached compulsory school age, the so-called "mid-course arrivals" experience special problems.¹⁰

Although the situation of foreign children and young people has improved over recent years as a result of numerous supporting measures, there are still more than 17 per cent who have no school diploma and are consequently classified for labour market purposes under the category of "difficult to place". The portion of foreign students who have passed their school leaving examination (Abitur) has also risen but is still not as high as the rate for German students.

Table 2. Breakdown of foreign students among the most important types of schooling (general education schools) in % in comparison with the Federal average

	1985 All students	1985 Foreign students	1992 All students	1992 Foreign students
Secondary modern schools	38.0	28.6	25.9	26.0
Secondary schools	29.2	7.5	25.7	9.2
Grammar schools	27.5	8.4	31.1	10.1
Comprehensive schools	4.8	5.2	8.9	9.2

Note: Statistische Veröffentlichungen der Kultusministerkonferenz, No. 126, December 1993, and No. 128, Jan. 1994.

⁹ Statistische Veröffentlichungen der Kultusministerkonferenz: *Ausländische Schüler und Schulabsolventen 1983 bis 1992. Dokumentation No. 128.*

¹⁰ Zentrum für Türkeistudien (eds.): *Ausländer in der Bundesrepublik Deutschland – ein Handbuch.* Leske und Budrich Verlag, Opladen 1994, p. 205 ff.

As can be seen from table 2, the proportion of foreign students especially in grammar schools (Gymnasien) and also secondary schools (Realschule) is still below the level of German students.

Basically, it should also be borne in mind that greater awareness on the part of teachers is also required for this group since not only is there a lack of knowledge about the situation of the foreign population but also there is the risk of misunderstandings due to cultural factors and the fact that the teaching staff does not give the students the necessary motivation. Reports on experience in this area provide evidence that foreign students are encouraged to continue their schooling only up to a certain level and, thereafter, they are advised to hold only limited professional ambitions.¹¹

Training situation

In the Federal Republic of Germany, vocational training is a virtually essential condition for successful integration into the labour market and therefore constitutes a major factor in the process of social integration. In spite of their increasing scholastic achievements over recent years, young foreigners in the Federal Republic of Germany still have particular difficulties in finding a training opening. In spite of the existence of a partial excess supply of training posts, the training rate for all nationalities is low, and in the case of Turkish youths, it is as low as half that for German youths.¹² Alongside economic difficulties, in certain regions and sectors both the selection criteria imposed by undertakings and also the occupational choices that foreign youths make for themselves, also play a role. Although the demand for training places is on the whole higher than the supply, there are still exceptions, as for example in the caring professions.

Another exception in this context is the craft work sector which – according to information provided by the profession – is widely concerned about foreign upcoming generations.¹³ Nevertheless, in this sector only 7.4 per cent of the Federal German training posts are currently filled by foreigners. According to statements by the German craft professions, many migrants are against the vocational training of their children especially in professions for which there are no major prospects in their own country. Consequently, only 37 per cent of foreign youths aged between 15 and 18 years enter in-plant training in Germany. Among German youths, the corresponding figure is 70 per cent. Amongst foreign girls, the proportion is even lower at around one quarter. Foreign youths continue to take training primarily in business and technical sectors. They are also poorly represented in commercial professions. This may be attributable, on the one hand, to the fact that they have little knowledge of, or have been given little information about, this sector, and on the other hand, to the fact that they perceive few prospects for themselves in these sectors.

According to the most recent reports of the Federal Ministry for Education and Science the number of training places on offer in 1993 in the New Federal Länder rose by approximately 4.4 per cent whereas, in the old Federal Länder, it fell by 5.8 per cent. Furthermore, the money available for continuing and advanced training courses has fallen continuously. In the same way, it has, in the meantime, to a large extent become the rule that training is not followed up by employment within the undertaking. According to data from the Federal Institute for Vocational Training,¹⁴ three years after the conclusion of vocational training, only 42 per cent of young males were working in the profession they had learnt. In the case of young girls, the corresponding figure is 66 per cent. The

¹¹ *ibid.*

¹² Ursula Boss-Nünning, "Jugendliche ausländischer Herkunft: Arbeitslosigkeit und Zugang zum Arbeitsmarkt", in: Leo Montada (ed.): *Arbeitslosigkeit und soziale Gerechtigkeit*, Frankfurt/New York 1994, p. 154.

¹³ *Report*, Organ des Zentralverbandes des deutschen Handwerks, Vol. No. 6, Düsseldorf, June 1994.

¹⁴ *Neue Ruhr Zeitung*, 19 Jan. 1994.

others are either employed in another profession, are undergoing advanced training or are unemployed or working on a fixed term contract.

Both German and foreign youths are affected equally by the general shortage of training facilities, such as for example by imbalances in the market for training posts due to the concentration of demand for training on certain professions or the fact that ever increasing numbers of students who have passed their school leaving examination are wanting to enter training in the dual system of because of other factors (for example, regional disparities). Foreigners trying to find a training post are faced with additional problems.

“Undertakings put forward a multitude of reasons – either overtly or covertly – to grant or not to grant to foreign youths the training place quotas made available to them.”¹⁵ A questionnaire survey¹⁶ carried out among 2,831 training establishments in Lower Saxony on the “Attitudes of undertakings to the training of foreign youths” produced the following results from the total of 294 questionnaires that were answered:

- 28.8 per cent were prepared to take on a foreign youth
- 69.5 per cent were not prepared to do so
- 1.7 per cent gave a “yes” and “no” answer.

In this context, the arguments given by large undertakings were different from those of small undertakings. Whereas large undertakings drew attention to the “alleged” deficiencies amongst foreign youths, small undertakings, primarily craft firms and trades, put forward additional concerns. In addition to the problems of language difficulties and inadequate education, they also feared conflicts with the other employees.

In formulating the difficulties put forward by the undertakings, the survey produced the following ranking:

- because there is already an excess supply of German applicants for training vacancies (45.9 per cent);
- because the educational level of foreign youths is inadequate (35 per cent);
- because they have an inadequate knowledge of German (35.7 per cent);
- because there might be problems with clients (21.6 per cent);
- because it is difficult for foreigners to integrate into the undertaking (18.4 per cent);
- because, after they have been trained, foreign youths will probably return to their own country (16.4 per cent);
- because we do not, on principle, take on foreigners (15.2 per cent);
- because we more or less no longer provide training.¹⁷

Undertakings which had already expressed their willingness to give training to foreigners, put forward the following positive aspects:

- because this is a task for the future in social policy (20.4 per cent);

¹⁵ Projektgruppe AFA (Red.), *Sozialpädagogische Arbeit mit türkischen Jugendlichen*, Berufswahl, 1987.

¹⁶ Beiderwieden, K. (1984): *Einstellung von Betrieben zur Ausbildung ausländischer Jugendlicher, eine regional differenzierte Analyse* (vervielfältigtes Manuskript, ed. by Institut für Entwicklungsplanung und Strukturforchung GmbH an der Universität Hannover), p. 47 ff.

¹⁷ *ibid.*, p. 3.

- because foreigners are willing to work harder and have a greater awareness of duty (9.9 per cent);
- because, otherwise, there would be the danger of a shortage of skilled workers (6.3 per cent);
- because there are too few German applicants for training posts (4.2 per cent).

Over recent years, the situation has changed especially as far as the language shortcomings of foreign school leavers and trainees are concerned. In addition, among the younger generation there is very little desire to return to the home country.¹⁸ Consequently, the majority of the reasons that were given here would not be in line with reality. However, the continuing existence of many of the above-mentioned prejudices is also confirmed by new studies on this matter.¹⁹

Problems encountered in seeking work

Even where foreign youths have received skilled vocational training, they often still do not find a job. In September 1993, 30.3 per cent of unemployed foreigners were aged between 20 and 30 years, which means that this group of young foreigners has been particularly hard hit by unemployment. The share of 20-25 year old unemployed foreigners accounted for by women was 15.3 per cent and that by men 15 per cent of all unemployed foreigners; consequently, in this respect, one may speak of a relatively equal distribution.

When one considers only the 20-24 year old group, then the picture obtained is as follows: in September 1991, there were 27,493 foreign youths aged between 20 and 24 years who were unemployed (13.3 per cent of all foreign unemployed persons). Two years later, in September 1993, there were 52,651 unemployed youths in the same age group, which gives a share of 15.2 per cent of all unemployed foreigners. In view of the increase in the number of foreigners due to births and immigration, particular thought should be given to this rise in numbers.

Table 3. Unemployed foreign youths in 1993, broken down by sex

Age	Male	%	Female	%
Under 20 years of age	10 260	4.5	8 382	7.0
20 to 24 years of age	34 264	15.0	18 387	15.3
25 to 29 years of age	37 385	16.4	16 791	13.9
Total	228 495	100	120 523	100

Note: Statistisches Bundesamt, Sept. 1993.

The proportion of unemployed Turkish youths is the highest of all. These young people are those who have the greatest difficulties in all social, educational and occupational sectors.

Mid-course arrivals are also particularly hard hit by unemployment in their search for jobs. When looking for a training place or job, they are subject to greater disadvantages because they have

¹⁸ A representative questionnaire survey carried out by the Federal Institute for Vocational Training in 1988-89 with foreign young people showed that only around 5 per cent of the age group between 15 and 30 years wanted to return to their country of origin; nearly 30 per cent still wish to remain in Germany and around 40 per cent have not made up their minds. The others want to either stay on for a few more years or move to another country. Bundesministerium für Bildung und Wissenschaft, *Berufsbildungsbericht*, Bonn 1993, p. 68.

¹⁹ See also Wolfgang Nieke, Ursula Boos-Nünning (eds.), *Ausländische Jugendliche in der Berufsausbildung. Auf dem Weg zur Chancengleichheit*, Opladen 1991.

considerable linguistic difficulties, have little knowledge about the training system and are still new in the process of integration.

1.3. Definition of discrimination

In line with the policy of the International Labour Organization, the present study will speak of *direct discrimination* when a migrant is disadvantaged because he or she is assumed to be a non-national or of foreign origin.²⁰

In contrast, the term *indirect discrimination* is employed “when the policies of an institution do not use formal distinctions but in practice discriminate against a particular group by the use of selection criteria, test requirements, etc. that disadvantage that particular group”.²¹

In the following text, the term discrimination will be used in the direct discrimination sense.

1.4. The basis for German regulations

In the Federal Republic of Germany, article 3, section 1.2 of the Basic Law stipulates the equality of minorities before the law. Admittedly, article 3, section 3 does not forbid differentiation of persons on account of their nationality; however, this does not mean that such differentiation is permissible. In the case of regulations which treat groups of persons in a differentiated way, the Federal Constitutional Court examines in detail whether there are reasons of such a nature and such a weight for the differentiation that they can justify unequal results in law.²²

A number of fundamental rights are reserved solely for Germans; for example, article 33, section 2 lays down that:

Every German shall, according to his suitability, aptitude and expertise have equal access to every public authority.

On the basis of article 33, section 3GG, religious minorities enjoy additional protection.

A competent source has recently expressed the following opinion:

German basic constitutional rights are binding on legislation, executive power and jurisprudence as directly applicable law. However, private persons are not in principle bound to these constitutional rights. These basic constitutional rights also indirectly affect the relations of private individuals to each other; this is because private law regulations have to be interpreted in the light of these constitutional rights. The protection of minorities provided by constitutional rights is not applicable to private persons in all cases where there are no regulations that can be interpreted in conformity with constitutional rights.²³

²⁰ R. Zegers de Beijl: *Although equal before the law ... The scope of anti-discrimination legislation and its effects on labour market discrimination against migrant workers in the United Kingdom, the Netherlands and Sweden*, World Employment Programme working paper No. 56, Geneva, 1992, p. 3.

²¹ *ibid.*

²² See for example, BVerfG, Beschluß vom 26.1.93 – 1BvL 38/92 u.a. –, NJW 1993, 1517.

²³ Dr. Ninon Colneric: (President of the Schleswig-Holstein LAG) as part of the “Hearing” of the Lower Saxony Minister for Federal and European Affairs on the subject of “What should an anti-discrimination act to protect minorities in the Federal Republic look like?”, on 23.2.1994 in Bonn.

Over and above this there are a series of international conventions which contain equality or non-discrimination clauses.

As far as supra-national law is concerned, in the Federal Republic of Germany, due regard should be given to the prohibitions on discrimination contained in the European Community Treaty (Article 6, Section 1 and Article 48). With respect to equality of treatment for citizens of the European Union, of particular importance are EEC Directive No. 1612/68 of the Council on the free movement of workers within the Community and the EEC Directive No. 1404/71 on the application of social security systems.

Obligations concerning equality of treatment may, however, also result from Treaties of Accession to the European Community. As far as Turks living in Germany are concerned, of particular interest is Article 10 of Decision 1/80 of the EC-Turkey Association Council. This states that:

- (1) The Member States of the Community shall grant Turkish workers that belong to the Community's regular labour market, a ruling which shall exclude any discrimination based on nationality in comparison with workers from the Community in respect of pay and other conditions of employment.
- (2) Subject to Articles 6 and 7, the Turkish workers referred to in Section 1 and their family dependents shall, in the same manner as workers from the Community, be entitled to the support of labour authorities in obtaining an employment.

This means that, in job placement by the labour authority, Turks who have been integrated into the labour market in Germany, i.e., they have, in accordance with Article 6 held a regular employment for at least one year, are treated on terms of equality with other union citizens. The condition to be met here is that their residence and work permit situation is in order – which is as a general rule guaranteed in the case of second generation immigrants.

The European Court of Justice has given its assent to the direct application of this discrimination prohibition to private persons as well.²⁴ Although this forms, alongside national provisions concerning residence and work permits, an important legal basis, it cannot however exclude any *de facto* discrimination in view of the lack of provisions for sanctions.

In addition to this, the labour legislation contains numerous Acts which are relevant in this matter such as the Works Constitution Act (BetrVG) and the Law on the Representation Rights of Federal Government Employees (BPersVG). These concern however discrimination at the workplace and not access to the labour market, and are consequently not of direct interest to the questions to be dealt with in this study.

2. Empirical study: Semi-skilled jobs – Telephone vacancy applications

2.1. Introduction

The tests in Germany concerning discrimination in access to the labour market were carried out in relation to semi-skilled jobs for second-generation Turkish workers. The second-generation individuals considered were the children of first generation immigrants into the Federal Republic

²⁴ *ibid.*, p. 3.

of Germany, who had been born or had grown up there and had, in the majority of cases, passed through the German education and training system. The study did not cover first-generation immigrants since, due to a number of specific problems and in particular language difficulties, they were not considered suitable for a comparison with German workers on the basis of “practice tests”.

In view of its extensive industrial requirements and its traditional high level of foreign employees, the Rhine-Ruhr region was selected for the survey on semi-skilled jobs.

2.2. Method

The study as to whether Turkish job applicants were subject to discrimination was carried out by means of “practice tests” which, from the methodology point of view, are in line with the guidelines drawn up by Prof. F. Bovenkerk of the University of Utrecht for studying discrimination against foreigners and ethnic minorities.²⁵ According to this methodology, a vacancy application situation is simulated employing one member of the majority population and one member of the minority population who, with a background of the same formal qualifications, make an application for the same job vacancy. With the exception of nationality, all the other features, or factors such as school qualifications, occupational experience and age are the same or similar. In this way, it is possible to determine whether there is any discrimination, unequal or poorer treatment on the part of the employer.

Unskilled jobs were excluded from the study since job applicants without any qualifications scarcely have any prospects of success in view of the increased requirements being stipulated in the labour market. The terms “unskilled” or “skilled” apply to the applicant’s level of qualifications and not to the job itself.

The tests for semi-skilled jobs were carried out in Germany and exclusively by telephone. Since the usual practice in the Federal Republic of Germany, even in the case of jobs calling for lower skill requirements, is to present diplomas, job references and, where appropriate, other documents on the occasion of an application, it did not prove possible here to go beyond the first telephone conversation contact.

2.2.1. Selection of test subjects

The German and Turkish test subjects were required to be between 20 and 25 years of age. Potential job vacancy applicants, details of whom had been obtained from University job placement offices, teachers and acquaintances, were invited to the Centre for Turkish Studies for an initial interview which preceded the final selection of the test subjects. Two Turkish and two German male test subjects were selected. These had similar characteristics and were interchangeable for the actual test situations.

The main criteria for the selection were, in addition to average phenotype, the ability to express themselves and improvise, the ability to give a plausible performance. It was stipulated that the applicants should not differ considerably from each other in their language, i.e., they should not speak a dialectic and the tone of their speech should be polite and convincing. It was required that the Turkish test subjects should have a command of the German language and that, to the extent

²⁵ See Bovenkerk, F.: *A manual for international comparative research on discrimination on the grounds of “race” and ethnic origin*, Geneva, ILO, 1992.

possible, their foreign origin should not be distinguishable from their speech. Their foreign origin was made apparent by their name only.

2.2.2. Training the test subjects

The test persons available were two Germans and two Turks; all four were students aged between 20 and 25 years and they were interchangeable at will. Prior to the study, the test subjects were appropriately initiated into the project and acquainted with their roles. They were given instructions as to the possible questions that might occur during a job application interview and how to react to them. In addition, it was necessary to discuss in depth the individual professions, the tasks usually involved in individual jobs and what were the specialist areas. In order to properly prepare the applicants in this field, information on individual professions was obtained from the local labour office and job counseling centres.

The tests were carried out alternatively with two persons of different nationality. The Turkish applicants belonged to the second generation of migrants, i.e., they are fluent in German and have been through the German education or training system. Also, from the legal point of view, they possessed a work permit for an unlimited duration and without restrictions, and had free access to the labour market. Both applicants had the same qualifications and the same age. The only factor distinguishing them from the German co-applicants was their foreign nationality. The test persons were instructed in such a way as to ensure that their presentation and their behaviour over the telephone could not have any influence on the outcome. This aspect was checked once again by means of validity checks.

2.2.3. Selecting the test situations

Following a prior review of job vacancy advertisements in the region, a first impression was gathered of the job market situation in the area. In accordance with the requirements of the methodology, the jobs were broken down roughly into three categories: services, building trades and light industrial work. For the service sector in particular, due to the high number of job offers available, a more detailed classification was made. The jobs involved in particular: sales, vehicle driving and the catering sector. In selecting the job vacancy advertisements, the project team was guided by the quantitative specifications given in the methodology:²⁶ 75 applications in the building trade, 50 in light industrial work and 50 in catering. It did not prove possible to stick to the figure of 75 applications in the building industry. This is attributable in particular to a seasonal fall-off in demand. Furthermore, it did not prove possible to reach the stipulated level for the catering sector since there was not a sufficient proportion of vacant posts advertised for this branch of the economy.

Following a first review of the jobs on offer, the project team decided to limit itself to applications in the private sector since there were virtually no jobs advertised from employers in the public sector.

2.2.4. Job-finding methods

²⁶ *ibid.*

Over a period of one month, job advertisements were collected from seven different regional newspapers.²⁷ The Wednesday or Saturday editions of these newspapers contained a comprehensive collection of job offers. The job vacancy advertisements were glued onto a questionnaire prepared specifically for the test. At the same time the corresponding applicant's profile was drawn up. The telephone calls took place on the day following publication of the newspaper. The advertisements from the Saturday edition were used for the tests organized on Monday and the advertisements from the Wednesday edition for the tests on Thursday.

In addition, at the beginning, telephone calls were made also to temporary employment agencies. After a short time, however, this procedure was dropped since these conversations nearly always commenced with the request to phone back later and were of such short duration that they permitted no qualitative evaluations. Targeted application for job offers in newspapers proved to be the most time-saving and effective way of collecting data. The selected jobs were both full-time and part-time work as well as sideline activities or stand-in jobs.

2.2.5. Fictitious curriculum vitae for the test subjects

Depending on the job offer, profiles for the applicants were drawn up prior to the telephone conversation. This entailed the development of fictitious names and dates of birth. In the case of the Turkish applicants, a "typically Turkish" name was selected so that the nationality was immediately apparent to the potential employer. Data about education, vocational training and occupational experience varied depending on the requirement profile for the job in question. Accordingly, there were three combinations possible, all of which were defined as semi-skilled:

- completion of secondary modern school and completion of vocational training with work experience
- completion of secondary modern school and completion of vocational training without work experience
- completion of secondary school and interrupted vocational training with work experience.

On each occasion, the profiles were drafted, or adapted accordingly, to meet the requirements specified in the printed job advertisement. The intention here was to increase the likelihood of a positive reaction. Depending on the course of the conversation, a positive response was given about skills which was not possible to determine in advance. This related, for example, to requests for information about specialization in a given field of activity, and to knowledge about special techniques or the capability of working with wood or metals. In the actual discussion of the job application, the test subjects demonstrated their improvisation capabilities and their flexibility.

All applicants indicated that they were available to start work immediately and without limitations of time or place.

2.2.6 Recording the results – Questionnaires

The supervisor was present during the discussions and, by means of a conference connection, was able to follow the content and, where necessary, give instructions. The results and the course of the conversation were recorded in writing. In each case, the other test person was also in the room. In this way, he was also able to observe the course of the conversation and prepare himself

²⁷ *Westdeutsche Allgemeine Zeitung, Neue Ruhr Zeitung, Ruhrnachrichten, Nord-Anzeiger, Gladbecker Stadtspiegel, Westfälische Rundschau and Rheinische Post.*

appropriately for his own call. This did not impair the equality of the calls. The presence of the other applicant also helped to eliminate where necessary any obtrusive repetitions.

The calls always took place in a standardized form:

Good day, I am calling about your advertisement in the ... of ... You are offering a job as ... and I would like to apply for it.

In the event of the employer giving a negative reply, it was asked whether another job was available.

In order to record the detailed results as accurately as possible, a questionnaire was drawn up in which was compiled all the information about the advertised job vacancy, the undertaking in question, the applicant and the results.

The questionnaire consisted of three basic parts. The first part contained information about the firm, i.e., name, size, branch and headquarters address. In cases in which it was not possible to determine the size of the firm during the tests, telephone requests were made for this information after the tests had been concluded. Only private firms were covered by the study since the number of job positions advertised by public employers was only marginal. This part of the questionnaire was filled out by the supervisor prior to the start of the test series.

The second part contained information about the applicant, i.e., nationality, school education, training and professional experience. These data were employed to draw up the “profile” in line with the requirements specified in the published job advertisement.

Finally, the third part contained the results of the various application conversations, i.e., the reaction of the employers or the type of feedback received.

2.2.7. Study procedure

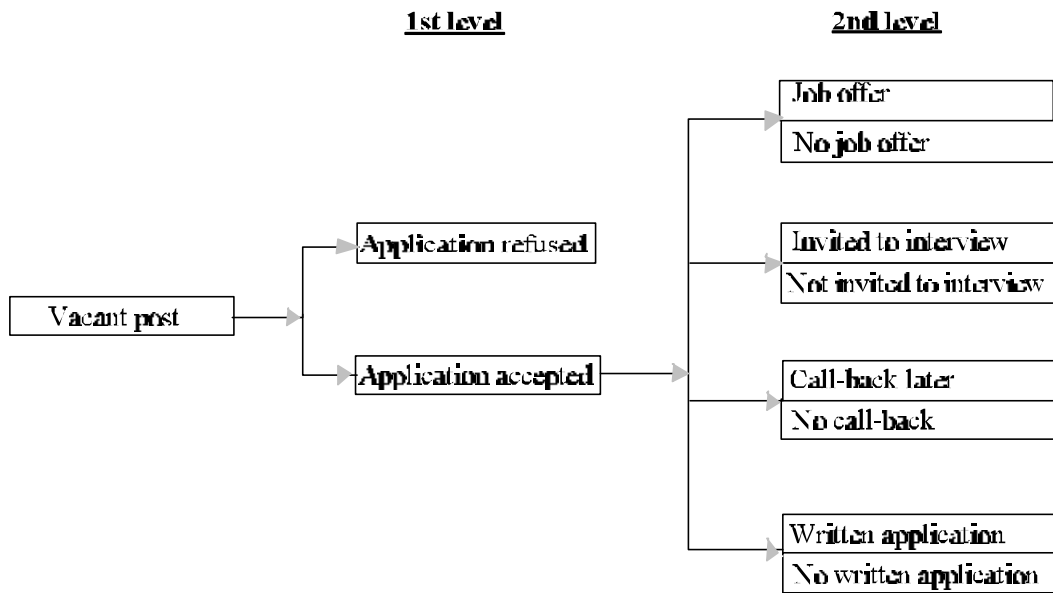
Study levels

The semi-skilled job tests in Germany were conducted exclusively by telephone. This had the advantages of making it possible to exclude such factors as appearance, first impression, gait and comparable subjective decision-influencing factors, and of ensuring that any discrimination could be to the maximum extent attributable to nationality. This was also the purpose behind the selection of the various typical nationality-specific names (Stefan Niemeyer, Yılmaz Öztürk). Since the Turkish applicant spoke accent-free German, the nationality was apparent only through the name. Both test subjects were told to state their names clearly in each telephone contact and, where necessary, to repeat this so as to ensure that it was understood by the telephone correspondent. This was of special importance in particular for the Turkish applicant.

As is shown by the following figure, a distinction may be made here between two study levels.

For any given job offer, the application could be either accepted immediately or refused with the statement that there was no vacancy. This was the first level of study. Within the applications that were accepted, a further distinction was made, namely whether the applicant received directly a job offer, was invited to present himself for interview, or was requested to call back later or whether a written application was requested. This was the second level of study. It was possible to observe and interpret discrimination at both levels as can be seen under 3.1.

In view of the variety of the professions and the geographical distribution of the jobs, it did not prove possible to find two applicants each with the same professional qualifications, work experience, similarity in appearance and presentation and of the same age. A complicating factor in Germany in comparison with other countries was the fact that applicants for even semi-skilled jobs would have to present themselves and submit any documents, and consequently it would not have been possible to simulate an application situation of this type.

Figure 1.

Even at the semi-skilled jobs level, isolated instances occurred in which a written application was requested. These instances have, nevertheless, been treated as usable situations since they demonstrated interest on the part of the employer and can therefore be evaluated as a positive reaction. The submission of written documents is a Länder-specific difficulty in Germany which takes on even greater importance in the case of higher qualified jobs.

The calls took place at approximately 10 minute intervals and commenced alternatively with the German or the Turkish applicant. In cases in which there was inequality of treatment, this was once again checked out by multiple calls. In this way it proved possible to exclude the possibility that the apparent discrimination resulted from a actual fall in demand. In the present study, this occurred only if the German applicant, who had previously received a positive answer, after the Turkish applicant had been turned down, called anew and once again received an invitation. In this phase of the study, no case of discrimination against the German applicant was encountered.

Difficulties occurred in instances in which the employer wished to contact the applicant by telephone and this was not possible. In such cases, either a false number or no number at all was given. What was recorded was the intention to call back and not the actual call taking place.

After each working session (twice per week) a session report was drawn up in which the preliminary results and any difficulties encountered were recorded.

2.2.8. Measuring discrimination

Where there was direct discrimination, i.e., the Turkish applicant was turned down, it cannot be concluded that the employer had overall acted in a racist manner. Factors such as the tone of voice or the momentary mood of the employer at the time of the call, together with any preference structures, may play a role. It is not possible to verify the motivation of the person in question in

the individual case. Nevertheless, the tone of voice, based on the selection of the test subjects and the fact that they played their roles in differing consultations, cannot significantly have affected the outcome of the study. The momentary mood of the employer is, in this context, a chance variable which may affect all applicants to a similar degree and can here, in view of the high number of instances, be neglected as an influencing factor. What was recorded was the fact that discrimination occurred de facto.

Nevertheless, in order to exclude to the maximum degree external influencing factors, the test situations were repeated or verified in any case of doubt. If the Turkish applicant was the second to phone (after the German applicant had received a positive response) and was turned down, the German applicant telephoned again immediately afterwards under another name. If he once again received an affirmative reply or was invited to a presentation interview, it was clear that the discrimination that had occurred was attributable solely to the difference in nationality.

Neither have factors such as the geographical proximity of the workplace played a role. In addition to declaring that they were ready for geographical mobility, the test subjects always indicated that they lived in the direct vicinity of the work place, i.e., in the town in question itself or in a neighbouring town.

2.2.9. Unequal treatment or equal, but different, treatment

In addition to being broken down in a rough fashion between equal and unequal treatment, the results can be further divided up. The study encountered various instances of unequal treatment. Overall, there are eight constellations which can be imagined and actually occurred:

- (a) the German applicant is invited to present himself for an interview whereas the Turk is turned down;
- (b) the German applicant receives the job, but the Turk is in contrast turned down;
- (c) the German applicant receives the job, the Turk in contrast is requested to apply again at a later date;
- (d) the German applicant is invited to present himself for an interview, the Turk in contrast is requested to apply again at a later date;
- (e) the German applicant is invited to present himself for an interview, the Turk in contrast is requested to make an application in writing;
- (f) the German applicant is requested to apply again at a later date or to call once again, the Turk in contrast is turned down;
- (g) the German applicant is requested to make an application in writing, the Turk in contrast is turned down;
- (h) the German applicant is requested to apply again at a later date, the Turk in contrast is requested to make an application in writing.

In these instances, it is to be seen that there is inequality of treatment between applicants. At the same time, one may speak of discrimination against the Turkish applicant.

The sole instance in which there is a basis for discussion, is the last one. The German applicant is required to apply once again, whereas the Turk is required to submit a written application. At first sight, one cannot necessarily deduce that one of the applicants was treated worse than the other. This situation was encountered only once in the present study, and the qualitative evaluation of the course of the conversation makes it possible to conclude that in this actual case one may actually talk of lower level of treatment. When presented with the German application, the

employer expressed considerable interest and asked numerous questions about the applicant's professional career; however, he stated that he could not make an immediate decision concerning an appointment. With the Turkish applicant, his tone was more detached, verging on the distrustful, and he subsequently asked questions about residence and working permits.

It is possible to speak of equal, but in some way different treatment, if one applicant is, for example, engaged in a long, detailed discussion whereas the other is asked for only a few items of information. The intonation may also be different in this context. However, in such a case, the outcome may be the same, for example an invitation to come for a presentation interview. Over and above this, there may be cases in which both applicants obtain a job but under different pay and working-hour conditions.

Cases in which the Turkish applicant was noticeably treated in a different manner, were not found to occur to any notable extent in this study. The differences in the duration of the conversation cannot be used to draw any conclusions on the basis of the content.

In contrast however, a striking feature is the frequently asked question about residence and work permits, which was frequently put in a distrustful tone. Although the Turkish applicant provided information about his schooling and vocational training in Germany or indicated that he had already been living in Germany for many years, this question repeatedly came to the fore in relation with the refusal of this applicant. At the best, one may conclude that the employer has little knowledge about the legislation governing foreigners.

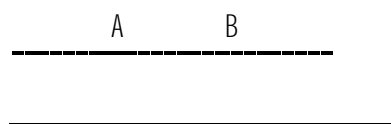
2.2.10. Validity checks

A total of 175 usable tests were carried out. A case was considered usable if:

- the employer asked one or both applicants to call back at a later date,
- the employer announced his intention to call back at a later date, and
- the employer requested a written application from either one or both of the applicants.

In order to exclude the possibility that the individual applicants might perhaps through a different tone of voice have an influence on the results of the study, additional validity checks were carried out.²⁸ In this context, A and B are German test subjects; C and D are Turkish applicants. With the calculated net discrimination rate of 19 per cent, one would arrive at the following calculation. Depending on the frequency of the individual combinations then, with a 19 per cent discrimination rate, the expected proportion of cases of discrimination per combination would occur as under Diagram 2b. In actual fact, the proportions were those to be found in Diagram 2c. Using the Chi²-test, it is possible to calculate to what extent the deviations between the expected and the actual values are significant. The deviations would be significant if the Chi²-value were higher than 3.84 for the difference between the expected and the actually measured value. In this case, one would have to argue the case for the existence of additional influencing factors and it would not be possible to conclude on nationality being the sole criterion for discrimination.

Figure 2a. Successful test situations (total of 175)



²⁸ See Bovenkerk, op. cit., p. 30.

C	75	35
D	40	25

Figure 2b. Expected percentage of instances of discrimination (19%)

	A	B
C	14.25	6.65
D	7.6	4.75

Figure 2c. Actually occurring number of instances of discrimination

	A	B
C	12	8
D	10	3

$$\begin{aligned}
 \text{Chi}^2 &= \sum \frac{(O-E)^2}{E} \\
 &= \frac{(12 - 14,25)^2}{14,25} + \frac{(10 - 7,6)^2}{7,6} + \frac{(8 - 6,65)^2}{6,65} + \frac{(3 - 4,75)^2}{4,75} \\
 &= \mathbf{2,032}
 \end{aligned}$$

Since this Chi²-value is 2.032, and consequently below the 3.84 level, then there is no significance to be seen regarding the applicant combinations. This means that there were no combinations in which one test person, through his voice and style of speech, influenced the result to a significant degree. This therefore allows us to conclude that nationality is the sole criterion for unequal treatment.

2.2.11. Statistical calculation of the results

In order to be able to talk of statistically significant discrimination, then one must arrive at a minimum value or a specific net discrimination rate must be present. This is dependent on the extent of random sampling N and the confidence interval (M).

In the study, a figure of at least N=175 usable application situations should be achieved. According to the Bernoulli normal distribution and with a confidence interval of 5 per cent, then it is necessary to reach a net discrimination rate of 15 per cent if one is to be able to speak of a significant result.²⁹ This 15 per cent is consequently the critical rate or the threshold rate starting from which one can speak of discrimination.

This provides the following basic formula:

$$\text{CR} = \frac{1.96}{M \% N} = 14.8\%$$

²⁹ *ibid.*

3. Results: Semi-skilled jobs

In the period from 29 November 1993 to 20 January 1994, in the course of 13 sessions, a total of 333 telephone tests were carried out, of which 175 were considered usable for the study. This is a success rate of 52 per cent. We considered as usable those instances in which:

- the employer requested one or both of the applicants to call back at a later time; or
- the employer himself indicated that he would phone back to one or both of the applicants at a later time; or
- the employer requested a written application from one or both of the applicants.

Among the 175 usable tests, there were 33 instances in which the Turkish applicant was discriminated against. This is a discrimination rate of 19 per cent. If one bases oneself on the experience of other studies, one must assume that this quota would have been far higher if the applicants had actually accepted the invitation to a face-to-face interview. As is shown by the results from the Netherlands, there was in that country at the first level, namely the telephone contact, a net discrimination rate of 23.4 per cent; at the face-to-face interview level, this rate rose to 32 per cent and, finally at the third level, i.e., the actual allocation of the post, the rate encountered was 36.6 per cent.³⁰ In this way, the net discrimination rate rose in proportion to the binding nature of the application. The telephone study is merely the first phase, in which there is only a preselection. Had the applicants actually attended the presentation meetings, supplementary selection mechanisms would have entered into play and would probably have demonstrated greater discrimination.

Item 3.1 below is an overview of the total results on discrimination at the semi-skilled jobs level. Item 3.2 considers this result from the point of view of the branch of the economy involved, with a study being made as to whether discrimination varies between the individual branches. Item 3.3 looks at the cases of discrimination in relation to the size of the undertaking. In this context, the question is asked as to whether and to what extent discrimination varies depending on the size of the undertaking. The size of the undertaking here depends on the number of employees. Finally section 3.4 is a comprehensive look at both categories, with the various sizes categories being linked and considered together with the various branches.

3.1. Inequality of treatment

Inequality of treatment was found to occur in 33 of the 175 cases. This is a proportion of 19 per cent. At the first level, there were 22 cases, which is the equivalent of 13 per cent of the usable cases. At the second level, we observed 11 cases of inequality of treatment – 6 per cent of the usable cases. In total, in 142 of the 175 usable cases, it was possible to observe equal treatment of both applicants. In 97 of the cases, an invitation was received to attend a personal interview. In 21 cases, the applicant was requested to call back at a later time. In these cases, there was the development of an interesting exchange of information which was to be considered as a positive reaction to the application. The applicants gave information about their background and their previous areas of employment. In 16 instances, both applicants were requested to submit written documents, in particular work references. Even at the semi-skilled jobs level, one can see the

³⁰ See results obtained in the Netherlands, F. Bovenkerk, M. Gras, D. Ramsøedh: *Discrimination against migrant workers and ethnic minorities in access to employment in the Netherlands*, International Migration Papers 4 (ILO, Geneva, 1995).

importance of written applications in the German context. The requests for additional documents occurred both in the building trade and for sales work and other sectors.

In three cases, both applicants received directly by telephone the promise of a job, and the date for starting work was also fixed. In two cases, the applicant arranged to pass by the work place in order to fill out a personal form and take part in an information presentation. In all these discussions, interest in possible employment was clearly expressed which provides justification for why these instances were considered usable. Finally, there was one case in which both applicants were invited to a day of probationary work. Here too, there was equality of treatment for both the Turkish and the German applicant.

Yet Turkish applicants were discriminated against in 33 instances. This occurred in spite of their fluent knowledge of German and the fact that they had received their school education and their training in Germany. Discrimination is therefore attributable solely to their foreign names. At the first and second levels, i.e., during telephone job applications, a net discrimination rate of 19 per cent was ascertained. In the continuation of the application process up as far as personal interviews and further on to definitive acceptance, there would have been additional selection mechanisms that would have resulted in a higher net discrimination rate at these levels.

3.2. Example cases

Example 1: Application for work in an external service (delivery of catalogues to private households):

The German applicant received an appointment to appear personally. Ten minutes later, the Turk telephoned and was turned down since all the jobs had already been taken. Immediately afterwards, the German telephoned again under another name and once again received an appointment for an interview.

Example 2: Application for work as a photographic model:

The Turk called up first and stated that he was 1.82 m tall. He was turned down because he was too short and the minimum height was 1.85 m. Subsequently the German called in and stated that he was 1.84 m tall and received a positive reply. He then asked whether 1.82 m would be all right and was told "Yes".

Example 3: Application for work as a driver's mate/production assistant:

The Turk telephoned in first and received a very short answer, "Everything has already been filled". The German then telephoned and a long and detailed conversation ensued with, finally, agreement being reached on the date of a meeting.

As is shown in table 4, the cases of discrimination did not always occur in the same way, and consequently they cannot be merely divided up into acceptances and refusals. Nevertheless, it can for example be seen from cases in which the German applicant was requested to send in written documents and the Turkish applicant was turned down, that there clearly was discrimination. At the first level of the study which related solely to the acceptance of the application, we found a net discrimination rate of 13 per cent against the Turkish applicant. This means that, in contrast to the German applicant, in 22 out of 175 cases of first contact, the Turkish applicant was immediately turned down and consequently did not even have the opportunity of presenting himself. This indicates that even where he had potentially higher qualifications than the German applicant, he would have had no chance of getting this job.

At the second level, we recorded 142 instances in which there was equality of treatment. Specifically, these were cases in which both applicants were invited to a presentation interview

(97 cases), they would be given a call later (21 cases), they were requested to make a written application (16 cases), they were requested to fill in a personal form beforehand (2 cases). In two further cases, they were invited to attend an information session. In three cases, both applicants received an immediate acceptance and, in one case, were invited to pass by for a day of probationary work.

Apart from those cases in which one can talk of equality of treatment, the German applicant was once again, at the second application level, given favourable treatment 11 times in comparison with the Turkish applicant. In addition to this, there were a total of 33 cases in which the Turkish applicant was discriminated against, and there was cumulatively a net discrimination rate of 19 per cent.

According to Bernoulli normal distribution calculations, in the case of a random sample of $N=175$, it is necessary to achieve a minimum discrimination rate of 15 per cent before one can speak of significant discrimination. Since, in the empirical demonstration of discrimination at the semi-skilled jobs level, we have been able to find a net discrimination rate of 19 per cent, then it is possible here to speak of statistically significant discrimination against the Turkish applicant.

Table 4. Results of the telephone interviews: Rate of discrimination against the Turkish applicants in comparison to the German applicants

1. Telephone applications	
Valid applications	333
Both were turned down	158
Usable applications	175
Both applications were accepted	153
Only German applications were accepted	22
Only Turkish applications were accepted	0
Net discrimination against Turkish applicants	22
Net discrimination against Turkish applicants in per cent (22:175x100)	13%
2. Positive reactions	
Both applications were accepted	153
Both applicants received the same positive reaction (equality of treatment)	142
Only German applications received a positive response	11
Only Turkish applications received a positive response	0
<i>In detail:</i>	
The German received a job; the Turk was told to call back later	1
The German was invited to be interviewed; the Turk was told to call back later	7
The German was invited to be interviewed; the Turk was requested to make a written application	2
The German was requested to call back later; the Turk was told to send in a written application	1
3. Cases of unequal treatment	
Net discrimination against Turkish applicants	11
Cumulative net discrimination after two levels	33
Cumulative net discrimination in per cent (33:175x100)	19%

3.3. Overview by sectors and branches

Of the 175 usable tests, 28 were carried out in the building trade, 30 in the light industrial work sector and a total of 117 in the services sector. It can be seen from table 5 that there is a clear over-weighting of usable cases in the service sector. The small number of usable cases in the building trades may be explained by the seasonal fall-off in demand during the winter.

It has been found that, in the services sector, discrimination is not only higher but also significant in this sector. Basing oneself on the formula given on page 22, it is found that, with 117 usable cases (in the services sector), there must be a discrimination rate of at least 18 per cent, for the result to be significant and so that it is possible to speak of discrimination. In actual fact, in the services sector alone, the net discrimination rate is 23 per cent (27 out of 117) and is consequently above the necessary figure. In the other branches, the respective figures are below the significance value (see Appendix, table A1).

Table 5. Results by sector

	Building trade	Industry	Services
Usable cases	28	30	117
Both given invitation	26	26	90
Only Germans	2	4	27
Only Turks	0	0	0
Net discrimination against Turks	2	4	27

In view of the high number of usable cases in the service sector, it will be necessary here to once again undertake a fine distinction (table 6).

Within the service sector, a breakdown may be made according to a number of branches:

Catering: 18 tests and usable cases
 Sales: 48 tests, of which there were 22 usable cases in the external services branch alone
 Drivers: 17 tests and usable cases
 Miscellaneous: 34 tests and usable cases.

In the services sector, sales work, and in particular external activities, account for the lion's share. During the study, it became apparent that discrimination within the service sector occurred primarily where the sales work would place the employee in direct contact with the client.

The question as to whether the employer himself turned down the employment of a Turk or whether he adopted this attitude on the basis of the assumption that his client would not want this, is in this context irrelevant. It may also be that such assumptions occur as a result of the employers' own negative attitude in this respect or that his concerns about the economic price that would have to be paid as a result of the employment of Turkish workers are the dominant ones. What has to be remembered is the result that, in particular in external services activities, the Turkish applicant is discriminated against. In this context, one might point to the fact that foreigners in general and Turks in particular are in most cases underrated as a consumer group. For example, the consumption tendency of Turkish households lies below the Federal German average.³¹

Finally, using the Chi²-test, an attempt should be made to determine whether the presence of a significant degree of discrimination depends on the sector of the economy in which the application was made. With 2 degrees of freedom (df=2) and a confidence interval of 5 per cent, the corresponding Chi²-test value is 5.99. Since the figure here is lower, namely 3.59, it is not possible to speak of a significant relationship between the sector of the economy and the occurrence of discrimination.

Table 6. Results by branch

	Catering	Sales (of which external services)	Drivers	Miscellaneous*
Usable cases	18	48 (22)	17	34
Both given invitation	17	36 (13)	13	24
Only Germans	1	12 (9)	4	10
Only Turks	0	0	0	0
Net discrimination against Turks	1	12 (9)	4	10

* Miscellaneous: This groups together, *inter alia*, occupations such as escort services, butchers, bakers, photographic models and casual jobs of all types.

3.4. Overview by size of undertaking

³¹ See in this context, the results of studies by the Centre for Turkish Studies. ZfT aktuell No. 4: *Konsumgewohnheiten und wirtschaftliche Situation der Türkischen Bevölkerung in der Bundesrepublik Deutschland*, Essen 1993.

As an indicator for differentiating undertakings by size, the number of employees was taken as a basis;³²

Number of employees:

- Small undertakings – 1 to 49 employees
- Medium-sized undertakings – 50 to 499 employees
- Large undertakings – 500 and more employees

The following table presents the results by size of undertaking. By far the largest number of usable cases related to small undertakings (a total of 125). A total of 46 medium-sized firms and only four large firms were represented in the sample. Once the corresponding significance values had been calculated, it was found that small undertakings had a significant result, with a 20 per cent net discrimination rate.

The discrimination in this part of the study was encountered primarily among small undertakings. The net discrimination rate here was 20 per cent. With 125 cases, discrimination would have been significant at a level of 16.6 per cent. One may therefore speak of statistically significant discrimination in the case of small undertakings. Among the medium-sized undertakings, the net discrimination rate was below the significance value and consequently no significant discrimination against Turks occurred here. In the case of large undertakings, since the number of cases was small, it is not possible to make any pronouncement in this respect (see Appendix, table A2).

In addition, using the Chi²-test, it is possible to check whether the occurrence of discrimination is related, to a significant degree, to the size of undertaking. With one degree of freedom (df=2) and a confidence interval of 5 per cent, the Chi²-value is 3.84. The Chi²-value here is in fact 0.12, and is therefore below the threshold figure. Consequently, it may be said that the occurrence of discrimination is not dependent to any significant degree on the size of the undertaking.

Table 7. Results by size of undertaking

Size of undertaking	Small	Medium-sized	Large	Total
Usable cases	125	46	4	175
Discrimination against Turks	25	8	–	33
Discrimination against Germans	–	–	–	–
Net discrimination against Turks	25	8	–	33
Net discrimination rate against Turks	20%	17%	–	19%

3.5. Overview by sector and size of undertaking

The following section looks at the combined results by branch of the economy to which the firms belong and the size of the undertaking. As can be seen from tables 8 and 9, the majority of usable cases were in small undertakings in the services sector. In contrast to this, there were no cases in large undertakings in the building sector and in industry. In these two branches as well, it was mainly smaller undertakings which were covered by the study.

³² Based on the definition, in Dieter Bögenhold: *Neue Unternehmer auf dem Vormarsch. Kleingewerbetreibende zwischen Macht und Ohnmacht*, Oct. 1987, p. 22.

A look at the absolute figures shows that the majority of discrimination cases, namely 22 in all, occurred in small undertakings in the services sector.

If one looks at the statistical significance of the results, in this context too, it will be found that it is exactly here where there is a combination of services and small undertakings that discrimination occurs to a statistically significant degree. With 92 usable cases (small service firms) the threshold significance value would be 20.4 per cent ($CR=1.96/\%92=20,4$). In actual fact, the net discrimination rate here is 23.9 per cent (22 out of 92) and is consequently above the threshold (see Appendix, table A3).

3.6. Summary

In total there were 33 cases in which there was discrimination or inequality of treatment against Turkish applicants. This gives a net discrimination rate of 19 per cent. This figure of 19 per cent is higher than the calculated threshold value of 15 per cent, and consequently the study may be said to have found discrimination at the semi-skilled job level.

In view of the fact that, in this first application phase, which was carried out exclusively over the telephone, selection mechanisms such as appearance, first impression, attractiveness and other factors were excluded, it is possible to attribute the discrimination here to the difference in nationality. This is further confirmed by the validity checks that were carried out.

The German applicants had, in 175 usable cases, the opportunity to obtain a job whereas in contrast, the Turkish applicants had prospects of success in only 142 instances. Due to the fact that the Turks were discriminated against in 33 out of 175 instances, it may not nevertheless be deduced that they would have obtained a job in the remaining 142 cases. If a personal interview had taken place, additional selection criteria would have come into play. It may therefore be assumed that the net discrimination rate would have been higher had the application process been pursued. Furthermore, the binding nature of a promise of a job in this phase, i.e., at the personal level, is higher than when a date is fixed for an interview by telephone, or the submission of written documents has been requested.

Table 8. Results by sector and size of undertaking – all usable cases

Size of undertaking	Building trade	Industry	Services	Total
Small undertakings	19	14	92	125
Medium-sized undertakings	9	16	21	46
Large undertakings	–	–	4	4
Total	28	30	117	175

Table 9. Results by sector and size of undertaking – all cases in which there was discrimination

Size of undertaking/branch	Building trade	Industry	Services	Total
Small undertakings	1	2	22	25
Medium-sized undertakings	1	2	5	8
Large undertakings	–	–	–	–
Total	2	4	27	33

When one looks at only those cases in which the applicant was actually invited to attend a personal interview, then we have a total of 121 invitations for the German applicants and only 97 invitations for the Turkish applicants; these being the cases in which both applicants were similarly invited. It may be assumed that, in these 97 cases in which both applicants would have attended a

presentation interview, one would have seen the occurrence of cases in which the German applicant would have been favoured over the Turk who had the same qualifications. It may be deduced from this that, with the continuation of the application process up until the point of acceptance, there would have been an increase in the net discrimination rate against Turkish applicants. Unfortunately, the study carried out in Germany did not go beyond the telephone contact stage. Nevertheless, even at this level, we found a net discrimination rate of 19 per cent at a confidence interval of 5 per cent.

Among the job vacancy announcements available for the study, there was a clear excess supply of service sector jobs, with a particular predominance of sales and external service jobs. In addition, the cases in which discrimination was noted were, for the most part, located in this sector. The discrimination rate for external service jobs in comparison with all cases in the sales sector in which there was discrimination, amounted to 75 per cent (9/12); however among the usable tests in the sales sector, it accounted for 45.8 per cent (22/48).

A noticeable feature was the frequently asked question about residence and work permits, which were often expressed in a distrustful tone. At the best, one may conclude that there is a low level of knowledge about questions concerning foreigners' rights among employers. The lack of knowledge about the legal status of foreign workers and the resultant uncertainties may lead to discriminating behaviour. It cannot be excluded, at this level of the study, that this was cause for a refusal.

Discrimination occurred in a particularly significant degree in service and small undertakings. A direct relationship between the occurrence of discrimination and the branch to which the firm belongs, or a relationship between the occurrence of discrimination and firm's size could not however be assessed by means of the Chi²-test.

This means that the net discrimination rate of 19 per cent that was found for semi-skilled jobs in general, was to be found independent of the branch and size of the undertaking. Since in this phase, the study addressed itself solely to private employers, it is necessary to view the result of 19 per cent discrimination in this context too.

4. Empirical study: Higher qualified jobs –Written applications

4.1 Introduction

The study on discrimination against Turkish workers was also carried out at the level of higher qualified jobs. What are meant here are jobs involving a moderate educational background, such as for example nurse, technical draughtsman, bank employee, administration employee. This definition was also decided upon in agreement with Professor F. Bovenkerk, the author of the methodology handbook for these studies, so as to ensure comparability with the procedures used in other countries participating in this project. Applications were made blind to various institutions and establishments in the Rhine-Ruhr region and in Berlin.

The test subjects were once again German and Turkish job applicants aged between 20 and 25 years. Their fictitious but realistic identities differed only by their nationality. As far as school education, training and work experience were concerned, they both had the same or equivalent qualifications.

4.2 Method

4.2.1 Selection of test situations

In the Federal Republic of Germany there is the problem that job applications which are not for unskilled activities, auxiliary and subsidiary-professional activities, usually have to be made in writing and accompanied by comprehensive documentation. A complete job application will normally include, in addition to a curriculum vitae and a photograph, school education and vocational training certificates and diplomas about achievements. A procedure such as this would have made it necessary to find several applicants who had the corresponding training and other formal criteria and who were furthermore prepared to submit an application under their own real identity. It would not have been possible to carry out such an arrangement in view of the high number of application situations and the variety of professions.

Another, and in our opinion, more practical way was blind applications consisting of a letter and a curriculum vitae. This procedure was discussed with Professor F. Bovenkerk and had, moreover, the advantage of creating an application situation in which it was possible to exclude certain subjective influencing factors such as appearance (since it was decided not to submit an accompanying photograph).

The advantage of “practice tests” is that all the variables such as age, sex, school education and vocational training as well as work experience are the same and the applicants differ solely on account of their differing national origin. This was made clear primarily by the applicants name. In the written applications, only the place of birth had to be added. The Turkish applicant was presented as being born in Turkey but having arrived in the Federal Republic of Germany as a small child and as being equally fluent in German.

4.2.2 Method of finding jobs/selection of professions

In order to achieve differentiation by branch in the case of higher-qualified jobs as well, the study was carried out in three previously selected occupational sectors. With this objective in mind, the following professions were selected for the two study phases:

- caring professions: nurse, medical gymnast;
- commercial professions: foreign-language correspondent, sales assistant, industrial merchant, banking salesman;
- technical professions: construction draughtsman, designer, lay-out worker, assistant computer worker.

A suitable selection of addresses was made from branch directories and handbooks. A total of 1,557 firms/institutes in the Rhine-Ruhr region were written to; 992 to of these could be considered as valid applications. With the exception of hospitals, medical gymnast practices and banks, the relevant firms were primarily sorted by size, with small and medium-sized undertakings being placed together on the one side and large undertakings on the other. In Berlin, letters were addressed to 1,076 firms. Of these 471 resulted in valid applications. The total number of valid applications thus added up to 1,393. Where Turkish firms were found to exist, they were also sent applications. This took place in Berlin in the case of printing shops, building companies and credit institutes. A total of 2,633 undertakings and establishments were sent applications, of which 299 became usable cases. The success rate here of 11.4 per cent is, as had been expected, lower than in the case of semi-skilled jobs (52 per cent). The reaction to blind applications did however vary considerably according to the profession.

4.2.3 Fictitious curriculum vitae/application letters

Starting in early February 1994, curriculum vitae for eight different professions were drawn up and grouped together with corresponding addresses. The applications consisted of a letter and an accompanying curriculum vitae. Curriculum vitae were drafted for both the Turkish and the German applicant, who did not differ from each other from the point of view of qualifications and professional suitability. In drawing up the curriculum vitae, the names of schools and undertakings were in part made up, with use being made of common designations. With the exception of the bank clerk, for whom it was agreed that it would not make a good impression to have become unemployed after a short period of work since in this occupational sector it is unusual to frequently change employer, the applicants as a general rule had at least one year professional experience behind them. The bank clerk was applying for a job immediately following his vocational training. In spite of the fact that they had work experience, our applicants were, on account of their age, relative newcomers to the work scene, and difficult to place on the labour market. It may be that this played a role in the low number of usable answers received. On the other hand, the curriculum vitae were flawless and designed in such a way as to ensure the largest possible likelihood of a reply.

In order to exclude the possibility that the training establishments in the individual regions might be known and might arouse suspicion, these were located in other Federal Länder, and in particular in Hessen and Lower Saxony. To the extent possible, the curriculum vitae were swapped alternatively (details of basic military service were maintained). In addition, different type faces (Times Roman/Italic) were used and also interchanged. The letters themselves were also interchangeable and attention was paid to ensuring that each part of the various letter types were the same per town and per region. What was maintained unchanged was merely the address and the telephone number of both applicants. Since many of the calls took place weeks after the dispatch of the letters, it was important to maintain the telephone connections.

In the case of the applications in Berlin, the schools were selected in the districts of Charlottenburg, an extremely good Berlin inner city district and Kreuzberg 61, the bourgeois part of Kreuzberg. The intention was also to simulate, from the social conditions, similar criteria for both applicants. In this context, both applicants came originally from Berlin and it was there that they had carried out their schooling. This earlier connection with Berlin was intended to explain the interest of both applicants for a job in the City and, hopefully, enhance their chances of success.

Given below are two examples of applications (letter and curriculum vitae). The first example (A1 and A2) is the application for a job as a nurse in the Rhine-Ruhr region, and the second example (B1 and B2) is for an application as a sales assistant in Berlin. In both the letters and the curriculum vitae, the fictitious names and addresses have been left out.

Example A1: Application for a post as nurse

I hereby wish to apply for a job as a nurse.

I am a trained nurse and, early this year, for personal reasons, had to move to Bonn. I am, however, prepared to work in another town and now hope to find a new position as soon as possible. I am sending you enclosed my summary curriculum vitae and look forward to an early reply.

Thanking you in advance for your interest, I remain,

Yours truly

Curriculum vitae

Place of birth: Hannover

Family status: Single

Education

August 1974-June 1978 Pestalozzi Primary School, Hanover
 August 1978-June 1984 Geschwister Scholl Secondary School, Hanover
 June 1984 Specialist school leaving examination

Vocational training

August 1984-June 1987 Trained as a nurse in the Bethesda Hospital in Brunswick
 June 1987 Final examination
 September 1987-March 1988 Civilian service in the Marien Hospital/Hanover

Work experience

May 1989-November 1993 Worked as a nurse in the Hanover municipal hospital.

Advanced training

Visited numerous hospitals — in-house courses in psychology.

Example A2: Application for a post as trained nurse

I am hereby applying for a job with you as a nurse in the hope of finding a new position. Recently I was working in the Bethlehem hospital in Stuttgart and would like to continue working in the profession in which I have been trained, preferably in the Rhine-Ruhr region.

You will see all the necessary details in my curriculum vitae. I would be pleased if you would offer me the opportunity of presenting myself in person.

Thanking you in advance for your attention.

Yours truly

Curriculum vitae

Date of birth: 23 February 1968
 Place of birth: Bursa/Turkey
 Nationality: Turkish
 Family status: Single

School Education

August 1974-June 1978 Anne Frank Primary School, Darmstadt
 August 1978-June 1984 Käthe-Kollwitz Grammar School, Darmstadt
 June 1984 School leaving certificate

Practical experience

September 1984-March 1985 Social advice centre for foreigners, Stuttgart

Vocational training

August 1985-May 1988 Training as nurse at the Stuttgart university hospital
 May 1988 Final examination
 June 1988-August 1988 Completion of basic military service in Burdur/Turkey

Work experience

October 1988-October 1993 Practical work as nurse in the Bethlehem Hospital in Stuttgart

Example B1: Application for a post as sales assistant

At the beginning of this year, I successfully completed my training as a sales assistant and am hereby applying for a position with your firm. I would be grateful if you would allow me the opportunity of continuing my professional career with you.

You will see from the attached curriculum vitae my career to date.

In the hope that my application will prove of interest to you, I would like to thank you in advance and remain

Yours truly

Curriculum vitae

Born on: 14 June 1969
 Place of birth: Berlin
 Family status: Single

School education

August 1975-June 1979 Eichendorff Primary School in Berlin
 August 1979-June 1988 Schiller Grammar School in Berlin
 June 1988 General-School Leaving Certificate

Vocational training

August 1988-May 1991 Trained as retail salesman at the Otto Automobile Accessories Centre in Hanover
 October 1991-November 1993 Advanced training as sales assistant at the Olbrisch Furniture Store in Brunswick
 November 1993 Examination at the Retail Sales Vocational Training Centre

Example B2: Application for employment as a sales assistant

I am hereby applying for a permanent post as sales assistant with your firm. Last year I successfully concluded my vocational training and would be pleased to put into practice the knowledge that I had acquired.

I would be grateful to receive an invitation for a personal interview.

I am sending you enclosed my summary curriculum vitae and look forward to receiving your early reply.

Yours truly

Curriculum vitae

Name: Yilmaz Öztürk
 Date of birth: 27 December 1968
 Place of birth: Bursa/Turkey
 Nationality: Turkish
 Family status: Single

School education

August 1975-July 1979 Reinhardswald Primary School, Berlin
 August 1979-July 1988 Leibniz Grammar School, Berlin
 July 1988 School-leaving examination

Vocational training

August 1988-June 1991 Vocational training as a retail salesman in the Pieper Carpet And Furniture Store, Stuttgart
 August 1992-September 1993 In-house advanced training in the same training centre, as a retail sales assistant, with successful completion of the final exam

Other skills

Computer experience, good knowledge of English

4.2.4 Study procedure

In a manner similar to that for the study at the semi-skilled jobs level, here too, job applications were made by a Turk and a German aged between 20 and 25 years. In this phase of the study the areas examined were the Rhine-Ruhr region and the City of Berlin.

The applications were sent in at intervals of one week from two different localities (Bonn and Essen). On day *x*, the Turkish and German applications were each sent to different firms, with particular attention being paid to ensure that the applications were evenly distributed by towns. One week later, on day *y*, applications were sent out once again with the addresses now being swapped between the applicants

Since the applications were made from Essen and Bonn, here too, an attempt was made to remain as inconspicuous as possible. This is of importance since it might seem conspicuous – especially

in the case of small undertakings – if two blind applications were to arrive at the same place virtually simultaneously. With the written applications, attention was also paid to ensuring that different type faces and envelopes were employed.

Since it was, on the whole, expected that the feedback from blind applications would be small, two telephone connections were set up especially for this purpose. The employers had the opportunity to contact the applicants both in writing and by telephone. Numerous employers dispensed with a written follow-up and telephoned directly, or they employed both means of communication. This applied in particular to those who reacted positively to the applications. As far as the nursing applications were concerned, there were multiple telephone calls, which reflects the high level of demand in this sector.

For the purposes of our study, cases were considered acceptable if one or both applicants received a positive or promising response. This also included cases in which the applicant was requested to send in written documentation or where the application was forwarded to other undertakings or colleagues. Also considered usable for the purposes of equality of treatment/discrimination, were cases in which the application documents of only one applicant were retained with a view to later use. Double refusals could not be taken into consideration since here, in spite of the same tone – it was not possible to determine whether the two applicants would be accepted in cases of need.

No account was taken of cases in which one of the applicants received an acceptance and the other no reply; although, under certain circumstances, discrimination could certainly be apparent here, these cases were – on account of the methodology used – neither repeatable nor verifiable.

4.2.5 Measurement of discrimination

Discrimination here was measured as direct discrimination in a manner similar to the procedure used for semi-skilled jobs. In doing this, a distinction was made between refusal and positive reaction, the latter usually concluding with an invitation to an interview. Also seen as “positive reaction” were cases in which the applicant was requested to call back or, as was the case with the lay-out specialist, the submission of samples of his work. It was also considered to be a positive reaction if the applicant was requested to submit additional documents such as employment certificates. Discrimination was considered to have occurred when one applicant received a positive reaction and the other was turned down.

4.2.6 Validity checks

In order to ensure that the different types of letter, their typography and their layout did not have an influence on the outcome of the study, validity checks were also carried out here. The object was to verify whether the refusal occurred in large numbers particularly with one type of letter. All in all, the study revealed 81 cases in which inequality of treatment occurred for the applicant; in 55 cases only the German was invited to an interview, and in 26 cases only the Turk.

The hypothesis is put forward that the different types of letter have no influence on inequality of treatment. With a total of 81 cases of inequality of treatment, it would therefore be necessary for each type of letter to have a 50 per cent share of the representation, i.e., 40 letters in Times Roman format and 40 in Times Italic format. In this context, we have the formula $M = \sqrt{npq}$, where p and q are the probability for each type of letter. In this case we have $M = \sqrt{81 \times 0.5 \times 0.5} = 4.5$. From this it can be seen that each type of letter should not occur more or less than $40 \pm (2 \times 4.5) = 40$

+/- 9 times. This means that not more than 49 or not less than 31 letters of the same format should have received a positive reaction or a refusal. In actual fact, among the 81 cases of inequality of treatment in the study, 35 cases involve the Times Roman type of letter and 46 cases the Times Italic type of letter. Since this lies within the representative interval, then it may subsequently be deduced that the different types of letter have had no influence on the outcome of the study.

4.2.7 Statistical analysis of the results

In the higher-qualified jobs phase of the study there was a total of 299 usable cases for the whole study region. Since N had been changed, then it is necessary to recalculate the threshold value i.e., the value starting from which one may speak of significant discrimination. The formula used for this is:

$$x M = \frac{1.96 M}{\%N}$$

Since we had here $N = 299$ and we are trying to find x , then N has been introduced in the formula with the following result:

$$x M = \frac{1.96 M}{\%299}$$

$$x M = \frac{1.96 M}{\%17.2916}$$

$$x = 0.11335$$

This means that, with $N = 299$, the threshold value is 11 per cent. The conclusion is that it is necessary to have here a net discrimination rate of at least 11 per cent before, at the higher-qualified jobs level, one can speak of statistically significant discrimination.

In addition to this, a Chi²-test was carried out in order to determine statistically significant differences between private and semi-public undertakings, between undertakings of different sizes and between the regions. On the basis of a confidence interval of 5 per cent (probability of error) the Chi²-value with one degree of freedom ($df = 1$) must be greater than 3.84. With two degrees of freedom ($df = 2$), then the value must be greater than 5.99. If this is the case, it may be concluded that the discrimination depends to a significant degree on size of undertaking, region and legal structure (private, semi-public).

5. Results

5.1 Inequality of treatment

Out of a total of 2,633 applications sent out, there were 1,240 that remained unanswered or from which only one of the applicants received an answer. This resulted in a total of 1,393 valid application situations. The cases in which only one of the applicants received an answer occurred

equally for both the German and the Turkish applicant and consequently there is here no reason to assume that any discrimination has occurred. Out of the 1,393 valid answers, there were 299 usable application situations. The high number of refusals is attributable in the majority of the applications to the poor economic situation.

When the two study regions are combined, we have 299 usable application situations from which, in 218 cases both applicants received a positive reaction. With the exception of a few special cases, what actually happened was that an invitation was received to attend an interview. In a few cases, the applicant was requested to submit further documents such as certificates and employer references, or the application was forwarded to another office. In total, the Turkish applicant was subject to inequality of treatment in 55 cases and the German in 26 cases. This gives us a net discrimination rate of 9.7 per cent ($29:299 \times 100$) against the Turkish applicant (see table 10).

Table 10. Overview

Job applications	Rhine/Ruhr	Berlin	Total
1. Valid applications	922	471	1 393
2. Both received a refusal	700	394	1 094
3. Usable applications	222	77	299
4. Equality of treatment/positive reaction	163	55	218
5. Only Germans received an invitation	38	17	55
6. Only Turks received an invitation	21	5	26
7. Net discrimination against Turks	17	12	29
8. Net discrimination (per cent)	7.7	15.6	9.7

5.2 Demonstrated discrimination rate

Since, during the study of the higher-qualified jobs level, the number of usable cases was 299 in contrast to the figure of 175 for semi-skilled jobs, it was necessary to once again recalculate x , i.e., the significance value. We arrive at a figure of 11 per cent. This means that there must be a net discrimination rate of at least 11 per cent if we are, with a figure of 299 usable test situations, to speak of statistically significant discrimination.

Since we have altogether for this phase of the study a net rate of discrimination against the Turkish applicants of 9.7 per cent and since this is below the stipulated figure of 11 per cent, then we can state that the empirically determined discrimination in the area of higher-qualified jobs is not statistically significant. It may be assumed that if the selection interviews had been carried out, the discrimination rate would have proved higher.

Although the discrimination rates in Berlin and in the Rhine-Ruhr region differ, these rates need to be seen in relation to the underlying value of N . ($CR = 1.96 / \% N$). This means that, with $N = 222$ in the Rhine-Ruhr region there would have to be a 13 per cent net discrimination rate for it to be significant; for Berlin with $N = 77$, this rate would need to be as high as 22 per cent.

Both Berlin with a net discrimination rate of 15.6 per cent, and the Rhine-Ruhr region with 7.7 per cent fall below the corresponding significance values. Consequently, it can already be stated here that, in the case of higher-qualified jobs, according to the available study results, it is not possible to speak of a statistically significant discrimination against the Turkish applicant. However, it should not be overlooked here that we have combined together in this instance various professions for which the individual results vary sharply (in this context, see table 11). It should also be mentioned that there is justification for the assumption that, had the interviews taken place, the demonstrated discrimination rate would have been higher.

5.3 Overview by region

In the Rhine-Ruhr region, out of the 1,557 institutions, firms and establishments to which letters were sent, there were 635 addressees which were not reached or which were only partially reached; consequently, one may speak of only 922 valid cases, resulting in 222 usable cases. This is the equivalent of an average success rate of 14 per cent. The success rate varies, however, considerably depending on profession: it was the highest in the case of nurses at 78 per cent and lowest with foreign language correspondents for which there were 0 usable cases. Overall, the net discrimination rate found for the Rhine-Ruhr region was 7.7 per cent.

Table 11. Overview by profession

Profession	Usable cases	Net discrimination against Turks	Net discrimination against Turks (per cent)
Nurse	218	8	3.7
Medical gymnast	21	2	9.5
Foreign language correspondent	2	0	–
Sales assistant	14	5	35.7
Industrial merchant	2	1	50.0
Computer assistant	6	2	33.3
Graphic designer/layout specialist	6	-1	-16.6
Construction draughtsman	11	2	18.2
Bank clerk	19	10	52.6
Total	299	29	9.7

For Berlin, a total of twice (German and Turkish) times 1,076 applications were sent out. Out of these, 471 applications were answered for both applicants, and were therefore valid for the study. The following data will already indicate a number of trends. Out of the total of 471 answers, there were 394 cases of refusals: so that, in accordance with our methodology criteria, only 77 application situations were usable. This means that in 77 cases both applicants or only one applicant received a positive reaction. This is equivalent of an average success rate of 7 per cent. Here too the nursing profession was the one with a significantly higher result.

As far as discrimination against the Turkish applicant is concerned, the discrimination rate for Berlin was 15.6 per cent. However, since the number of usable cases was low, this figure must be interpreted with some reservation. Nevertheless, here too, the situation with the nursing profession was somewhat different, since the Turk was discriminated against here in 11 (net) out of 60 cases. This would give a discrimination rate of around 18 per cent. In this context, applications were sent to a total of 191 hospitals, clinics and old-age and care establishments, 46 of which were located in the eastern part of the City. A total of 94 applications were valid; the remainder either received no reply or did not reach their destination. As was expected, the reaction in this profession was the highest, and this can be seen from the success rate of around 63 per cent. Nevertheless, the number of refusals for applications for work as a nurse was relatively high in Berlin at 36 per cent (34 out of 94).

The generally high number of refusals in Berlin was, according to our own data, attributable to the fact that the parent companies of many firms from the old Federal Länder (excluding Berlin) are to be found there. Numerous publishing houses also indicated that it was the editorial work in particular which was carried out in Berlin. It was difficult to make a distinction between Eastern and Western Berlin since many firms from the ex-German Democratic Republic have been bought out by Western undertakings or taken over by them and the individual cases are therefore difficult to follow up in view of the ever-changing situation.

Overall, the net discrimination rate determined for the study region as a whole was 9.7 per cent. If one looks at the two study regions separately, it can be found that this rate differs depending on the region. As can be seen from table 10, the net discrimination rate in Berlin is 15.6 per cent and is therefore higher than the rate in the Rhine-Ruhr region (7.7 per cent).

To check out these discrepancies in net discrimination rates from the point of view of statistical significance, a Chi²-test was carried out. If the Chi²-test is higher than 3.86 (df = 1; M = 5%), then it could be said that the occurrence of discrimination is dependent on the area. The Chi² value here was 3.702 and consequently lies below this value. This means that the net discrimination rate of 9.7 per cent, without statistical objections, can be confirmed for the whole study area, since the difference between the two regions is not significant.

5.4 Overview by profession

In spite of the initial fear that the feedback from blind applications would be low, it turned out that a total of 222 usable application situations was arrived at for the Rhine-Ruhr region alone. This is attributable in particular to the high level of reaction from the nursing professions. Out of these 222 usable cases, 158 alone came from the caring sector. In Berlin, the relationship was similar: here, 60 out of a total of 77 usable cases were located in the care sector.

The demand on the labour market for trained manpower in the health care sector was, according to economic reports, particularly large and consequently, in this sector, a relatively high reaction on the part of employers had already been foreseen in the preparatory work for the study. As can be seen from table 11, the profession of nurse, with a total of 218 cases, offered the highest number of usable cases for the whole study.

The following paragraphs will present in detail the results by profession. Cases where it has proved possible to go beyond the acceptance/refusal categorization will be the subject of additional comments below.

As had been expected, the most positive feedback was received for applications as a **nurse**. Here too, a high number of positive answers is to be reported. In addition, in this sector, the net discrimination rate against the Turkish applicant, at 3.7 per cent, was relatively low. Overall, in this context, the Turkish applicant was subject to inequality of treatment in 24 cases and the German applicant in 16 cases; and this gives us a net discrimination against the Turkish applicant of eight cases. Of note here was the high number of cases of discrimination against the German applicant.

In of the other professions, the German applicant was – with one exception – favourably tested. Only in the case of the layout specialist/graphics designer was the Turk discriminated against once and the German discriminated against twice; this gave a net discrimination against the Turk of -1.

The high level of demand for nurses was and continues to be attributable to the understaffing in hospitals in particular and this is once again due in turn to a large extent to the poor pay and bad conditions of work. Another reason for the high interest in Turkish nurses may also be attributable to the increase in the number of Turkish hospital patients. The acceptances of the applications of nurses did not always occur in the same manner. In some cases, the applicant was requested to call in by telephone and in other cases he was instead requested to provide his documentation. However, since this occurred to the same extent for both applicants, it does in no way influence the result.

In those cases in which the application was forwarded to other care establishments, this was recorded as a refusal for the original addressee although one can consider the forwarding of the application document as a fully positive reaction. The establishments in question, i.e., those to which the application was sent indirectly, did for their part give a response and the reaction to the application was then, at that point, marked as being positive. In this context, no consideration was given to cases in which one of the applicants was accepted and the other received no answer although discrimination might have been under certain circumstances present; as has already been mentioned, these cases nevertheless have to be considered as non-usable due to the methodology employed.

Also recorded as positive replies for the application for a post as **medical gymnast** were those in which the documents were kept for a later occasion and where both in writing and by telephone interest was expressed about working together in the future. Classified under the same heading are also cases in which the applications were forwarded to a colleague and this person also made contact. In one of the two cases in which the Turkish applicant was discriminated against, the discrimination was blatant. In this case, both replies were received from the same staff member on the same day; in the letter to the German applicant, it was stated that the employer wished first to invite all applicants to an interview to get to know them, whereas the letter sent to the Turk stated that a decision had already been taken in favour of another applicant.

In the field of **foreign-language correspondents**, it is difficult to make any binding statements since here – with the exception of two applicable cases – the replies were almost all refusals. The justification given for the refusals was that, in the undertakings in question, there was basically – but also for temporary reasons – no demand for foreign-language correspondents. In some cases, it was also stated that, for translators and interpreters, preference would be given to candidates with a high school leaving certificate. It was not possible to detect any discrimination in this profession.

In the case of **retail sales assistants** and **industrial merchants**, the high number of refusals should be seen in particular in the context of the poor economic situation and the related fall in turnover, which does not allow for additional staff take-ons. Among the refusals given to industrial merchants there was a case in which the German nevertheless, in the same way as the Turkish applicant, received a refusal but was at the same time given a list of the firm's subsidiary companies with an indication that there might be vacancies in these companies and that he should submit an application to them. All in all, the Turkish applicant was discriminated against here in two usable situations. The reply letter was signed by the same staff member. This case was nevertheless recorded as a refusal. One of the two situations relating to industrial merchants, in which there was positive equality of treatment, was one in which there was no direct acceptance; rather, the documents of both applicants were retained "for later purposes". From this it may be concluded that there was in this case no basic tendency to inequality of treatment. In the case of sales assistants, the Turk was discriminated against in five out of 14 cases.

Another striking feature is the relatively high net discrimination for **bank clerks** where the Turkish applicant was discriminated against in 10 out of 19 cases. For bank clerks, the main situation was one in which the German applicant was requested to make contact with the personnel department in order to set a date for an interview, or was told his documents would be retained and forwarded to the central administration. In contrast, the Turkish applicant received a refusal. In one case, the German applicant was offered an external work job since there was no vacant position as a bank clerk. The Turkish applicant received a refusal here too. Nevertheless, in this profession, there were two cases in which the Turkish applicant received a positive reaction and the German a refusal.

As has already been mentioned what was recorded as “positive reaction” was not solely invitations to an interview but also cases in which the applicant was requested to submit additional documents and cases in which it was stated that the employer would come back to the applicant at a specific point in time. For the **lay-out specialists/graphics designers** for example, an applicant was requested to submit samples of his work which was also recorded as a positive reaction. In the three cases in which there was inequality of treatment in this sector, the German applicant was discriminated against on two occasions: both applicants were told that there were opportunities only for freelance workers whilst the Turk – in contrast to the German – was expressly requested to make contact if he were interested. In this case, an additional opportunity was offered to the Turkish applicant; however, for the German applicant, the freelance work was considered grounds for a refusal. A further case of inequality of treatment occurred when, although both candidates received a refusal, the Turk was, however, requested to send in samples of his work. In the case in which the Turk was discriminated against, he received a direct refusal whereas the documents of the German were retained so that, should the necessary circumstances arrive, they could be referred to at a later date. The only profession in which discrimination against the German was higher (by one case) was in that of lay-out specialist/graphics designer.

In the **construction draughtsman** profession, a total of four cases of inequality of treatment were recorded. The Turkish applicant received on three occasions a refusal, whereas the German applicant was requested by multiple phone calls to phone back to set up an interview. In one case, the German received a refusal and the Turk was requested to send in copies of his certificates. Here, the net discrimination against the Turkish applicant was of two cases.

5.5 Overview by branch

The grouping of professions by branch or by professional sector throws further light on the results in another context. The professions are grouped together as follows by professional sector: care sector (nurse and medical gymnast); commercial sector (foreign-language correspondent, sales assistant, industry merchant and bank clerk) and the technical sector (computer assistant, graphics designer/lay-out specialist and construction draughtsman). The calculations of the net discrimination rate show that this rate was highest in the commercial sector, at around 43.2 per cent, in comparison to 13 per cent for the technical sector and 4.2 per cent in the care sector. These results must also be viewed in relation to the labour market situation in the corresponding sector.

What is statistically significant here is the result in the commercial professions sector. Here, the net discrimination rate, at 43.2 per cent, was above the corresponding significance value of 32.2 per cent ($CR = 1.96/\%37$) (see Appendix, table A4).

It can be seen from table 12 that discrimination was more pronounced in the commercial sector, followed by the technical and care sectors. In order to determine whether the occurrence of

discrimination was related to the branch of the economy in question, statistical verification was once again made using the Chi²-test. With a confidence interval of 5 per cent and two degrees of freedom ($df = 2$), the Chi²-value would have to be higher than 5.99 in order to confirm a relationship between the economic branch involved and the occurrence of discrimination. In this area, the Chi²-value is 50.658 and consequently far above the threshold. This means that the occurrence of discrimination is related to a pronounced degree to the branch of the economy in question.

Table 12. Overview by branch

Branch	Caring professions	Commercial professions	Technical professions	Total
Usable cases	239	37	23	299
Discrimination against Turks	26	21	8	55
Discrimination against Germans	16	5	5	26
Net discrimination against Turks	10	16	3	29
Net discrimination rate against Turks	4.2	43.2	13.0	9.7

Table 13. Overview by size of undertaking

Size of undertaking	Small	Medium-sized	Large	Total
Valid applications	386	660	347	1 393
Usable cases	65	124	110	299
Discrimination against Turks	12	21	22	55
Discrimination against Germans	6	11	9	26
Net discrimination against Turks	6	10	13	29
Net discrimination rate against Turks	9.2	8.1	11.8	9.7

5.6 Overview by size of undertaking

The study results for the higher-qualified jobs level showed that net discrimination is more pronounced in large undertakings, namely in 13 of the 110 usable cases. In this phase of the study, as can be seen from table 13, it is at its lowest in medium-sized firms where a net discrimination rate of 8.1 per cent was found.

With respect to size of undertaking, verification was once again carried out using the Chi²-test to determine whether the occurrence of discrimination is related to a significant degree to the size of the undertaking. The Chi²-value here is 0.863. With two degrees of freedom ($df = 2$) and a confidence interval of 5 per cent, the Chi²-value would have to be 5.99 in order to indicate a significant relationship. This is not the case here. This means that the occurrence of discrimination here is not related to a significant degree to the size of the undertaking in question.

Although it remains apparent that discrimination against Turkish applicants is more pronounced in large undertakings, the difference between the actual values and the expected values (9.7 per cent net discrimination rate in undertakings of all sizes), it is not, however, large enough to speak of a significant relationship from the statistical point of view in this context for (see Appendix, table A 5).

5.7 Private and semi-public sector

The majority of the firms and establishments involved in the study are private ones. Nevertheless, in the care establishment sector (a total of 218 usable cases), with the exception of a few private clinics and old-people's homes (three usable cases), it may be stated that this area is a semi-public one. What we have here, alongside the private establishments, is public service hospitals or municipal old-people's establishments. Although numerous hospitals and other health-care establishments do have private operators, such as for example the various religious communities, they are subsidized from public funds and form part of the public health-care structure. We may therefore make a distinction between private and semi-public undertakings. Along this line, the total of 299 usable test situations are made up of 215 semi-public establishments and 84 private establishments (see table 14).

In order to verify whether there is a significant difference in inequality of treatment between private and semi-public undertakings, a Chi²-test was once again carried out here. With a confidence interval of 5 per cent (df = 1), the Chi²-value was 28.18. This value is far higher than the threshold of 3.86. It may be concluded from this that the discrimination is to a significant manner the outcome of the undertaking's legal form, or in other words, that discrimination is, to a significant degree, encountered in more pronounced manner in private undertakings than in

Table 14. Overview by legal structure: Private and semi-public undertakings

	Private	Semi-public	Total
Valid applications	1 114	279	1 393
Both were refused	1 030	64	1 094
Usable applications	84	215	299
Equal treatment/positive reaction	41	177	218
Discrimination against Turks	32	23	55
Discrimination against Germans	11	15	26
Net discrimination against Turks	21	8	29
Net discrimination rate against Turks	25.0	3.7	9.7

semi-public establishments. In this context, it should nevertheless be pointed out that the semi-public employees are exclusively hospitals and other health-care and old-age care establishments in which the demand for qualified staff is currently particularly high. In the other professions included in this study, the employers are exclusively private. Once again, attention should be drawn to the fact that the majority of the usable cases were to be found in the nursing sector. It is not therefore possible to draw conclusions relating to the behaviour of other semi-public or public employees in other professional sectors. This relates equally to private employers who, under different economic conditions, with a healthier order book and higher demand for manpower, might also have acted in a different manner. It is to be presumed that with a downturn in the order book situation, there will be an increase in discrimination against foreign workers. On the other

hand, consideration might also be given to whether the high discrimination in the commercial sector, which is a private one, is not also related to the fact that foreign young persons have only limited participation in the related vocational training facilities. The results presented here should therefore, also be looked at in relation to the economic situation in the individual branches and professional sectors. However, as far as the sectors studied here are concerned, it can be stated unequivocally that discrimination against Turkish applicants is to a significant degree more pronounced in private undertakings.

5.8 Summary

In the higher-qualified jobs test phase, the applications were made exclusively in writing and consequently it must be assumed that, if the application process were to have been pursued by means of actual contacts including interviews, the results would have shown the development of a higher discrimination rate. In this phase, 1,393 of the 2,633 applications were valid. Out of these valid cases, 299 were usable, which is the equivalent of a success rate of 11.4 per cent in relation to all the applications.

It was found that there was a net discrimination rate against the Turkish applicants of 9.7 per cent. Since this rate was below the significance value of 11 per cent, it may be said that the empirically determined discrimination in this part of the labour market is not statistically significant. This applies both to the Rhine-Ruhr region and to Berlin. As far as the appreciation by branch of the economy is concerned, it was found that statistically significant discrimination occurred in the case of the commercial professions. The size of the undertaking had no significant influence on discrimination. It was found that discrimination was significantly related to the legal structure of the undertakings involved. Discrimination was encountered to a significantly more pronounced degree in private undertakings than in semi-public establishments.

Moreover, the test phase included Berlin since, especially for higher-qualified jobs, a higher willingness for mobility and personal flexibility is expected. In 1993, a total of 138,457³³ Turks were living in Berlin alone. This accounts for 34 per cent of the 146,637 registered foreigners in Berlin. The fact that these two regions which also have a very high foreign population were selected, means that conclusions may be made from these findings for the situation in Germany as a whole. These are also areas in which the majority of Turkish young people reside, live and work.

The initial fear that the employer to whom the application was submitted would contact the previous employer about the applicant and might thus discover the nature of the study, did not occur in practice. Unpleasant aspects of this study were multiple telephone calls from interested parties which could not be responded to. Any invitations to personal interviews were not taken up. In addition, no return calls were made since this might have led to the development of technical discussions in which the applicant would not have been in possession of the necessary specialist knowledge.

Another point to be noted is that the name "Yilmaz" was in several cases erroneously taken to be a woman's name. This occurred only in cases in which both applicants received a refusal. These were taken out of the usable cases. In individual cases, it was more frequent that the letters

³³ Statistisches Landesamt Berlin, reference date 31 Dec. 1993.

addressed to the Turks requested documents such as residence and work permits, although it was clear from the curriculum vitae that there were no problems in this respect.

There is no doubting that the labour market situation in the individual professional sectors had an influence on the outcome of the study. It should not be overlooked here that the profession of nurse accounted for a large proportion of the usable cases, and this leads to the finding that the manpower demand – independent of nationality – is at the highest here.

In view of the fact that in other professions the number of usable cases proved low, it is correspondingly difficult to draw conclusions concerning discrimination. Similar statements are applicable to the case of nurses and, under certain circumstances, also to medical gymnasts, bank clerks and lay-out specialists/designers. In the other professions, the number of usable cases is too small. In any case, efforts were made to ensure that the applications, in particular the curriculum vitae, were put together in the most attractive way in order to enhance the chance of success.

The fact that, in this study, the selected age range was between 20 and 25 years of age and that the curriculum vitae were exemplary but nevertheless realistic, provided all the conditions needed to achieve the highest possible reaction. Young people who are just starting their professional career and whose professional history contains no gaps, such as would happen for example with older applicants who may in some cases have long periods of unemployment behind them, have the best chance of finding a job on the labour market. Nevertheless, it must be recorded that we received a high number of refusals.

In the case of Berlin, many of the refusals are attributable to the fact that the parent companies or the main offices of a firm are located in Western Germany and, consequently, the Berlin establishment frequently has to refer back to them. Publishing houses in many cases referred back to the parent companies which are located on the territory of the old Federal Republic. According to the information they supplied, the work done in Berlin is mainly of an editorial type. Several publishers, in the same way as firms in which applications were made for jobs as industrial merchant or sales assistant, are currently in the process of restructuring, which does not allow new staff to be taken on. In several cases, especially in relation to jobs for industrial merchant and sales assistants, the firms in question are small or family operations which do not have the means to take on additional staff. In general, both for industrial merchant and sales assistant applications, reference was made to the poor economic situation and the resultant fall in turnover as justification for a refusal.

6. General overview

A comparison of the test results, which are distinguished by a range of qualification grades, is offered below at the general significance level, as can be seen under section 6.1. Furthermore, the comparison from the point of view of size of undertaking will be found under section 6.2. A comparison by branch of the economy involved is not possible due to the variability of the professions studied in the two study phases. Moreover, in the case of semi-skilled jobs the employers were exclusively private, whereas in the case of the higher qualified jobs a distinction may be made between private and semi-public employees. Similarly, for the same reason, no comparison by legal structure of the undertaking is possible.

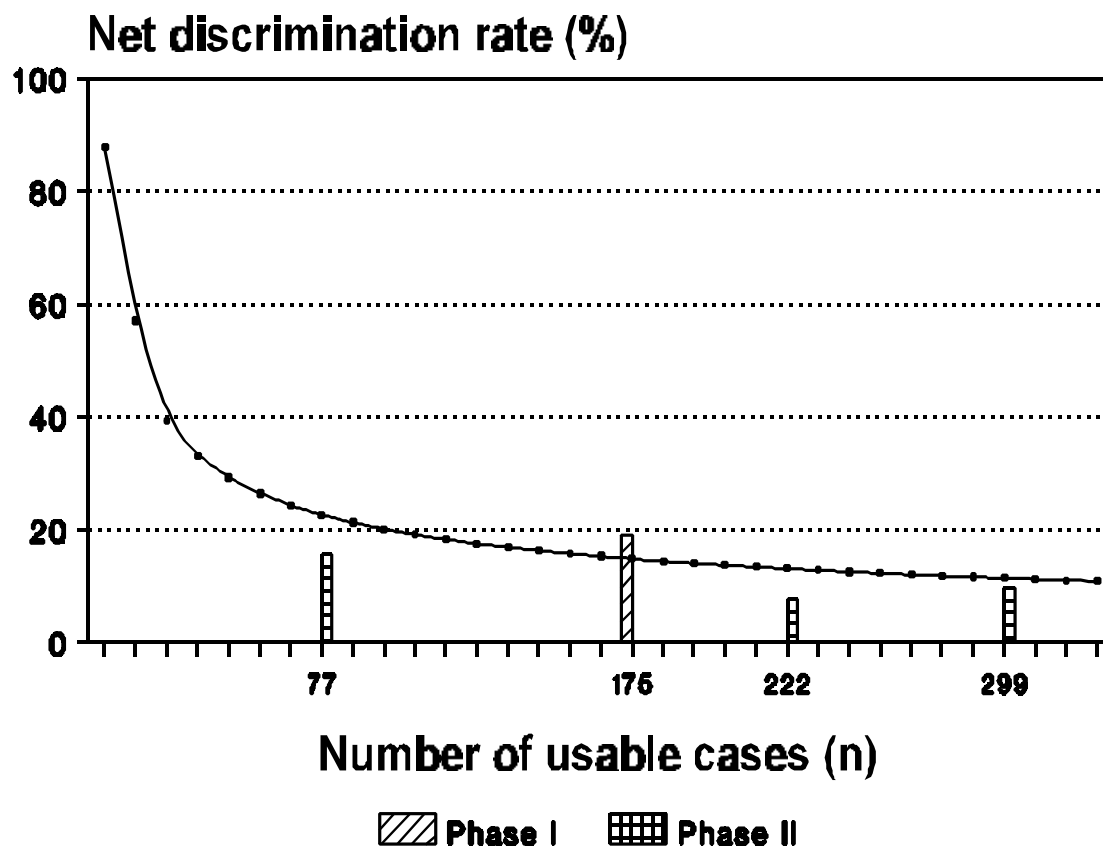
6.1 The results and their significance

In the following paragraphs, the results will be considered from the point of view of their significance with the help of Bernoulli normal distribution, and then presented in graph form. In the following figure, the net discrimination rates for both study levels are presented. At the higher qualified jobs level, the rates are also presented separately for the Rhine-Ruhr region and the City of Berlin. This shows clearly that, especially as far as semi-skilled jobs are concerned, there is, according to this statistical procedure, a significant degree of discrimination.

If we present the actual net discrimination rate graphically and relate this to the Bernoulli normal distribution which reflects the distribution of these values, it becomes clear the only in the case of semi-skilled jobs is the discrimination rate, at 19 per cent, higher than the indicated 15 per cent threshold. In this case, discrimination against the Turkish job applicants should be considered significant. In the case of higher qualified jobs, the net discrimination rate is below the threshold value. This applies to the overall result (9.7 per cent in comparison with 11 per cent) and also to the individual results for the Rhine-Ruhr region and in the City of Berlin.

It was found that the net discrimination rate of 19 per cent for semi-skilled jobs is significant. This can be perceived from diagram 3 where this value is above the Bernoulli normal distribution. The net discrimination rate of 9.7 per cent for the higher qualified jobs on the other hand is below this level and should therefore not be considered significant. It may be concluded from this that there is in fact discrimination against Turkish applicants in semi-skilled jobs. According to the figures we have mentioned in our study, it is not possible to speak of significant discrimination in the case of higher qualified jobs. Nevertheless, there is within the higher qualified jobs, a striking result: in the commercial sector, discrimination is significant. Here, the figure of 43.2 per cent that was actually recorded was above the corresponding figure on the Bernoulli curve (32.2 per cent). As has already been mentioned in the introduction, it is in these sectors, and above all in credit institutes and insurance professions, that foreign employees have the lowest representation. On the other hand, in the health-care professions and in the technical sector, it is not possible to speak of discrimination.

Figure 3.

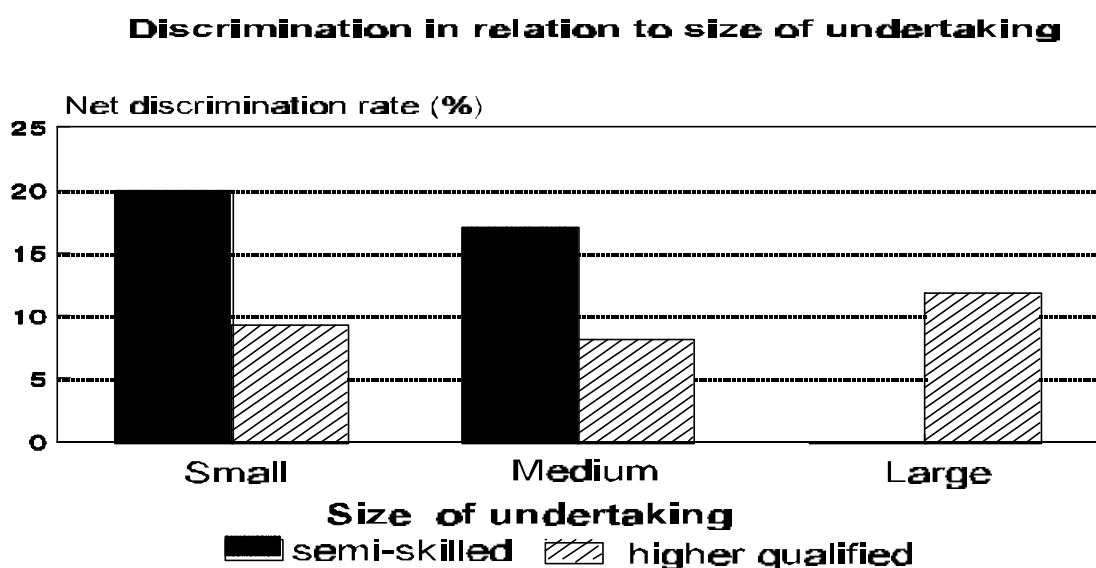


6.2 Discrimination in relation to size of undertaking

In the case of discrimination in relation to size of undertaking too, it is possible to make a graphic presentation of the results for semi-skilled jobs and higher qualified jobs.

The test results for semi-skilled jobs demonstrate that the highest discrimination rate is to be found in small undertakings. Nevertheless, this does not allow us to draw conclusions about large-sized undertakings since their small number (4) does not permit valid deductions to be made. As far as higher qualified jobs are concerned, the distinction is somewhat different. The study shows here that the highest discrimination rate occurred in large undertakings. If the large undertakings are excluded, it can be seen for both degrees of skills that the discrimination for both is more pronounced among small undertakings than amongst medium-sized undertakings. This is once again shown graphically in figure 4 below.

Figure 4.



6.3 Summary

To summarize, attention should be drawn to the fact that even though in 19 per cent of cases of semi-skilled jobs there has been discrimination against the Turk, one should not draw the conclusion from this that the Turk under other circumstances would have got the job. The above figure for semi-skilled jobs represents the absolute empirical minimum of discrimination. Probably, the discrimination would have been higher if the actual interview had taken place, whereas this was not possible in Germany due to organizational factors. This study was devoted solely to initial contacts which were made either by telephone or in writing. These first contacts give no indication as to which decision would have been taken during the subsequent application procedure. In the personal interviews, there are always additional selection mechanisms which come into play.

With respect to the higher qualified jobs, a total of 1,393 of the 2,633 applications were valid. Out of these valid cases, there were 299 which were usable. This was a success rate of 11.4 per cent in relation to all applications. The net discrimination rate against the Turkish applicant was found to be 9.7 per cent, which was below the significance value of 11 per cent. Consequently, no statistically significant discrimination was found on an empirical basis. This applies to both the Rhine-Ruhr region and to Berlin. However, in the commercial professions, it was possible to identify statistically significant discrimination. Yet, the size of the undertaking does not play a significant role in discrimination. It was also shown that discrimination is to a significant degree dependent on the legal structure of the undertakings in question. Discrimination in private undertakings was significantly more pronounced than in semi-public establishments.

Furthermore, it is necessary to view the reactions in each case in relation to the actual demand for manpower in the branch in question. For example, the demand for nurses is very high. Also, in

numerous craft sectors, there are very few trained craftsmen available on the labour market, and consequently employers are more on the look out for foreign craftsmen and even for trainees. It is also necessary to take into consideration here the fact that the Turkish applicants are of the so-called “second generation” who have a higher level of integration into German society. The results contain no insight into the behaviour of employers with respect to first generation migrants. In addition, it is not possible to make any judgment on possible discrimination against Turkish women. If one had included this group, it is highly probable that the results would have been different. This is something which is also shown by the study from the Netherlands.³⁴

In the case of semi-skilled jobs it was found that discrimination occurred to a significant degree in small undertakings. It was shown that discrimination occurred in the service sector and within the skilled jobs area in the commercial professions especially where sales work calls for direct contact with the client.

In contrast, there is no other profession studied in which human contact is so intense as in nursing – and this is a profession in which we once again found the lowest level of discrimination against Turkish applicants. This puts numerous justifications, such as: foreign workers contacting clients would impair or endanger the business, *ad absurdum*. Perhaps the explanation here lies in the fact that the argument that foreigners would scare off the customers is not relevant in a hospital environment since hospitals do not have to concern themselves about profit calculations. This leads to the reflection that foreign workers have been working in large numbers in Federal German hospitals for decades, they have proved their value and we can no longer dispense with them.

6.4 Final comments

The pros and cons of anti-discrimination legislation have already been discussed in many arenas. Mention should be made here of the hearing of the Lower Saxony Minister for Federal and European Affairs on 23 February 1994 in Bonn on the subject: “What should an anti-discrimination act to protect minorities in the Federal Republic look like?”.

In contrast to the Federal Republic, other countries such as the Netherlands, Great Britain, the United States and Canada already have rights protection systems that are directed against racial discrimination. Part B of this International Migration Paper deals with the current legal situation in Germany and also discusses the need for an anti-discrimination law.

In our era which is marked by daily violence against foreigners, racism in its multi-faceted form and increased activity on the part of extreme-right organizations,³⁵ an anti-discrimination law would be a positive political sign. Any anti-discrimination law would have to include the widely varying fields of social life, and the labour market would form only one aspect, even though one of the most important. Discrimination at the work place would be part of this, as would also discrimination in access to training facilities. If one refers to reports on experience, discrimination against foreigners is currently to be found primarily and markedly in the accommodation market and consequently, this sector would also have to be given due consideration within an anti-discrimination act.

³⁴ See F. Bovenkerk, M.J. Gras and D. Ramsøedh, *op. cit.*

³⁵ In 1992-93 in the Federal Republic of Germany, the same extreme right-wing spectrum was estimated by the Federal Ministry for Constitutional Protection to comprise 42,700 persons.

The fact that discrimination in access to the labour market actually occurs is confirmed by the present study. In interpreting the results that have been obtained, it is important to bear in mind both the socio-political situation in Germany and the actual or presumed opinion of society. It should also be noted that a part of German society has a certain sensitivity towards foreigners in general and Turks in particular. This is probably the outcome of numerous xenophobic attacks and deaths, as for example in Mölln and Solingen. One might therefore speculate whether this study, if it had been carried out two years earlier, might not have produced a different result. Whether these factors have played a role in the outcome of this study is, in the final analysis, impossible to say.

When making a comparison with other countries, it is first necessary to bear in mind the fact that racism or xenophobia express themselves in a different manner in different countries or cultural environments, and this may be explained primarily by cultural and historical factors. In Germany, one may encounter every form of occult racism and consequently a formal letter can give no insight into the processes that take place in a person's mind. However, making a more profound interpretation of this was not the object of the present study. Nevertheless it is of great social value that, for the first time in the Federal Republic of Germany, this scientific study shows empirically that there is de facto discrimination against foreign workers.

However the next step to be taken would be, on the basis of the results obtained, to have adequate measures taken and to initiate the necessary political actions.

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Appendix

Significance-tables: x = Significance value; t = actual value

Table A1. Semi-skilled jobs by branch/service (per cent)

	Building trades	Light industry	Services	of which			
				Catering	Sales/external services	Driving	Other
x	38.0	34.0	18.1	46.2	28.3/41.8	47.5	62.0
t	7.7	12.5	23.1	5.6	25.0/40.9	23.5	29.4

Table A2. Semi-skilled jobs by size of undertaking

	Small	Medium-sized	Large
x	16.6	28.9	98.0
t	20.0	17.0	No data

Table A3. Semi-skilled jobs by size of undertaking and branch (excluding large firms) (per cent)

	Building trades	Light industry	Services
Small	x = 46.2 t = 05.5	x = 50.6 t = 13.3	x = 20.4 t = 23.9
Medium-sized	x = 69.3 t = 12.5	x = 47.5 t = 11.8	x = 42.8 t = 23.8

Table A4. Higher qualified jobs by professional sector (per cent)

	Caring professions	Commercial professions	Technical professions
x	12.7	32.2	40.9
t	4.2	43.2	13.0

Table A5. Higher qualified jobs by size of undertaking (per cent)

	Small	Medium-sized	Large
x	10.0	7.6	10.5
t	1.6	1.5	3.8

B. Employment protection of migrant workers: Legal facilities and their improvement*

Ursula Kulke

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1. Introduction

The question of employment is taking on a decisive place in the policy of integration of migrant workers.¹ No integration policy has any prospect of success if the people concerned are not employed or are not promoted to positions which are in line with their capabilities. It has been shown in a number of research studies that migrant workers are confronted with numerous problems on the labour market and – when compared with indigenous employees – are, from many points of view, at a disadvantage. Several of these problems may be attributed to objective handicaps, such as for example, inadequate training, non-recognition of foreign diplomas and unsatisfactory knowledge of the language of the country of immigration. In addition to this, migrant workers may, however, find themselves exposed to discrimination on the basis of their nationality, the colour of their skin, their race and their national characteristics. This discrimination is a serious impediment to the integration of migrant workers into the labour market of the country of immigration and consequently to society as a whole (Zegers de Beijl, 1993, p. 29).

A priority objective of the policy on migrants in the Federal Republic of Germany is a reduction in the arrival of further migrants, on the one hand, and the integration of those migrants legally resident in the Federal Republic, on the other. By ratifying International Labour Organization Conventions (No. 97) concerning migration for employment (Revised 1949) and (No. 111) concerning discrimination in respect of employment and occupation, and by signing the International Convention on the Elimination of all Forms of Racial Discrimination, the Federal Republic has undertaken to oppose any inequality of treatment of migrant workers and their dependents in employment, which is contrary to the provisions of these instruments. In addition, the Federal Republic, as a result of its ratification of the European Community Treaty of 1957 and European Community Directive No. 1612/68 respecting the free movement of workers within the Community, forbids any discrimination against citizens of the European Community on the basis of their nationality.

Chapter 2 of this study presents the legal provisions in the Federal Republic of Germany for the protection of migrants against discrimination in employment and what further measures the Federal Republic has taken in order to comply with the requirements of international and supra-national agreements. Chapter 3 looks at whether these statutory provisions are adequate and, in particular, whether the enforcement of the laws is guaranteed and whether the additional measures actually bring about protection of migrant workers. Finally, attention is drawn to what facilities there are for improving the legal situation and which measures seem necessary to bring about equality of treatment. Chapter 4 discusses the need for and the statutory possibilities of a special anti-discrimination law that has been called for by various political parties and non-governmental organizations for the protection of migrant workers. In this context, the study looks at the measures taken by other countries to protect migrant workers in order to determine the most effective means of combating discrimination.

Finally, mention should be made of the fact that the study takes into account only regulations and measures that relate to migrant workers who are legally living in the Federal Republic of Germany with a valid labour permit, and their offspring. The term “migrant workers” as used below comprises both the migrant workers themselves and their offspring independent of whether they have obtained German nationality or not.

¹ The male nouns and pronouns used in the text do, of course, include women. There is as yet no generally accepted linguistic alternative by which women would not be discriminated against.

2. International, supranational and national regulations for the protection of migrant workers

This part of the study indicates which international and supranational treaties for the prevention of discrimination against migrants in the field of employment have been signed by the Federal Republic, together with the way in which they work. In addition, an account is given of those national regulations and other instruments already existing in the Federal Republic or which can be applied for the protection of migrant workers.

In order to provide a better understanding of the following chapters, a short survey will first be given of the history of migrant workers in the Federal Republic.

2.1. Historical development of labour migration

Germany has a long tradition as a country of immigration. As early as the end of the nineteenth century, as the outcome of a pronounced shortage of labour, the first foreign workers were recruited. In view of the strongly expanding economy following the Second World War, shortages once again developed in the labour market which could not be filled by the local workforce. In the middle of the 1950s and up to the end of the 1960s, the Federal Republic therefore established recruitment agreements on foreign workers with various southern European countries and Turkey. During this period, the number of foreign workers rose continuously and, by 1973, had reached a first peak with a total of 2.6 million foreign workers in a total foreign population of 4 million.

With the halt to recruitment of foreign labour brought about by the oil crisis in 1972, the number of gainfully employed foreigners fell; nevertheless, the size of the foreign population continued to grow due to the continuing permission given for family reunification and the high rate of birth. Although it was foreseen that the workers who had arrived in the Federal Republic as the result of recruitment agreements would once again return to their home countries after a few years, the majority of these migrant workers remained in the Federal Republic and they may now be considered as a permanent component of the population. Around 60 per cent of migrant workers have already been living for ten years or more in the Federal Republic and around 70 per cent of their offspring under the age of 16 were born in the Federal Republic (Forbes, Mead, 1992, p. 38). With German reunification and the political collapse of the Eastern and south Eastern European States, the Federal Republic was confronted with a new flow of migrants. Here, however, these were mainly persons of German origin who are placed on an equal footing with German nationals, and consequently are not subject to the legislation on foreign nationals, together with asylum seekers and war refugees from the one-time communist countries of Eastern and south Eastern Europe (Wollenschläger, 1994, p. 194).

On account of the strict legal requirements for naturalization, the majority of migrant workers living in the Federal Republic do not have German nationality. There is only limited incentive for migrant workers to become naturalized since, due to the Federal German legislation naturalization entails the loss of one's original nationality. In the opinion of those concerned, the legal advantages of naturalization do not outweigh the disadvantages of losing their original nationality since, for example, under Turkish law only Turkish nationals are allowed to own landed property in Turkey (Forbes, Mead, 1992, p. 38). This regulation was recently amended so that one of the reasons for not acquiring German nationality has now been removed. Consequently, there is some apprehension as to whether this amendment of the legislation will lead to increased naturalization amongst Turkish migrant workers.

In 1993, the total size of the foreign population had risen to around 6.9 million which is the equivalent of some 8 per cent of the Federal German population. A total of 64.3 per cent of the foreign population comes from the earlier recruitment countries. Around 2.1 million of the foreign population in the old federal Länder in 1993 were employed in jobs subject to compulsory social security payments, and thus accounted for 9.2 per cent of the total population of Western Germany.

2.2. International regulations for protecting migrant workers from discrimination

In order to protect migrant workers from discrimination, the Federal Republic has ratified a series of international treaties which contain equality or non-discrimination provisions. To ensure that workers from the European Union are not subject to discrimination, the relevant supranational treaties contain corresponding provisions on equality of treatment.

In order to become binding legislation in the Federal Republic of Germany, international conventions must be ratified and transformed in accordance with article 59, paragraph 2 of the Basic Law. By means of the Federal Parliament's Act of Assent (Treaty Act), the convention in question is accorded the status of a simple act which addresses itself to the individual constitutional bodies. The Conventions of the International Labour Organization and the United Nations are not usually "self-executing" (see Birk, 1992, p. 196) and consequently a worker who has been discriminated against cannot derive any subjective rights therefrom i.e., cannot appeal against the infringement of these treaties under international law. The standards contained in the Conventions must first be converted into national law by legislation, administrative decision or jurisprudence before they can have a direct effect in domestic law. In contrast, however, the prohibitions on discrimination under the EC Treaty and the related regulations are under the permanent jurisprudence of the European Court of Justice; they have direct effect in the Member States and consequently a worker belonging to a State in the European Community, who has been discriminated against, can institute court proceedings directly for unlawful discrimination.

The most important treaties for the protection of migrant workers from discrimination in employment and the duties that result from their ratification are listed below.

2.2.1. International Labour Organization standards

The International Labour Organization, which has among its principal tasks the protection of migrant workers, has issued a series of Conventions and Recommendations for the purpose of achieving this objective. The Conventions for the protection of migrant workers relevant to this study on protection against discrimination are Convention (No. 97) concerning migration for employment (revised), 1949, and Convention (No. 111) concerning discrimination in respect of employment and occupation, 1958. Convention No. 97 was ratified by the Federal Republic in 1959 (BGBl.1959 II, p. 87), and Convention No. 111 was ratified in 1961 (BGBl.1961 II, p. 98).

Convention (No. 143) concerning migrant workers (supplementary prohibitions), 1975, has not been ratified by the Federal Republic.

We will not here go into the matter of Convention (No. 118) concerning the equality of treatment of nationals and non-nationals in social security, 1962, and Convention (No. 157) concerning maintenance of social security rights, 1982, which relate to discrimination against migrant workers in the field of social security, since the question of social security is not relevant to this study.

Convention No. 97

Convention No. 97 is, according to its Article 6, aimed at combating discrimination in respect of nationality, race, religion or sex in the areas of remuneration, membership of trade unions, accommodation, social security and other matters which relate to employment and which are regulated on a statutory basis by the contracting state or which are subject to supervision by the administrative authorities. For the purposes of this Convention, the term “migrant for employment” signifies all regularly immigrant foreign workers within the competence of the contracting party, with the exception of frontier workers, short-term entry of members of the liberal professions and artistes, seamen and labour contract workers. Under Article 6 of the Convention, the contracting States are required to provide migrant workers in the above-mentioned sectors and for the above-mentioned reasons with treatment no less favourable than that which it applies to its own nationals.

Convention No. 111

Convention No. 111 relates to discrimination of national workers in respect of employment and occupation. Under Article 1, paragraph 1 of this Convention, the term “discrimination” is defined as “any distinction, exclusion or preference made on the basis of race, colour, sex, religion, political opinion, national extraction or social origin, which has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation”. Under Article 1, paragraph 2, any distinction, exclusion or preference in respect of a particular job based on the inherent requirements thereof shall not be deemed to be discrimination. Under Article 1, paragraph 3, of the Convention, the terms “employment” and “occupation” include access to vocational training, access to employment and to particular occupations, and terms and conditions of employment.

This Convention covers nationals, naturalized previous non-nationals and nationals from earlier colonies of the immigrant State in question. Nationality is not considered as prohibition of discrimination within the meaning of this Convention and consequently discrimination on the basis of nationality is considered permissible whilst, at the same time, discrimination against a foreign national on the basis of one of the above-mentioned characteristics, such as for example race, is prohibited. Under Article 2 of this Convention, “each Member for which this Convention is in force undertakes to declare and pursue a national policy designed to promote, by methods appropriate to national conditions and practice, equality of opportunity and treatment in respect of employment and occupation, with a view to eliminating any discrimination in respect thereof.”

Convention No. 143

Convention No. 143, which is of similar importance for the protection of migrant workers against discrimination, requires signatory States to declare and pursue a national policy designed to promote equality of opportunity and treatment. The Federal Republic refrained from signing this Convention on the grounds that the requirements for equality of treatment and equality of opportunity contained in the Convention and better rights for migrant workers in the work permit procedure were in contradiction to the existing principles of domestic German law, in particular with respect to work permit legislation and the standard German privilege under section 19, paragraph 1, sentence 2, of the Employment Promotion Act (Wollenschläger, 1994, p. 196).

2.2.2. United Nations international Conventions

Also of importance for equality of opportunity and equality of treatment for migrant workers is the 1965 United Nations Convention on the Elimination of all Forms of Racial Discrimination. This Convention was ratified by the Federal Republic in 1969 (BGBI.1969 II, p. 961). An additional

international Convention is that on the Protection of the Rights of all Migrant Workers and Members of their Families, which was adopted by the United Nation's General Assembly in 1990.

International Convention on the Elimination of All Forms of Racial Discrimination

Under article 1, paragraph 1, of 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". According to article 1, paragraph 2, non-citizens are expressly excluded from the scope of this convention. To this extent, the Convention, in the same way as Convention No. 111 of the International Labour Organization is of significance in the protection of "national migrants" against discrimination. Nevertheless, here too, discrimination against a foreign national on the basis of the above-mentioned characteristics is also forbidden. Moreover, under Article 2, the States Parties to the Convention are required to condemn racial discrimination and to pursue and prevent it by all appropriate means including legislation. Article 14 of the Convention, which was not signed by the Federal Republic, requires States Party to the Convention to allow individual complaints which are based on the prohibition of discrimination in the Convention, to be brought before the Committee on the Elimination of Racial Discrimination.

International Convention on the Protection of the Rights of all Migrant Workers and Members of their Families

This Convention, which was adopted by the United Nations General Assembly in 1990, stipulates under its article 25 that migrant workers shall enjoy treatment not less favourable than that which applies to nationals of the State of employment in respect of conditions of work and employment. However, the Convention contains no general, comprehensive non-discrimination clause. The protection against discrimination extends only to the rights comprised in the Convention (Zegers de Beijl, 1992, p. 2).

2.2.3. Supranational regulations

The items of supranational legislation relevant in the Federal Republic of Germany are the anti-discrimination provisions of the European Community Treaty and the European Community Regulations No. 1612/68. Furthermore, another item of importance is the 1990 declaration against racism and xenophobia.

EC Treaty, EC Directive No. 1612/68

Article 6, paragraph 1, of the EC Treaty forbids Member States of the European Community, without prejudice to certain provisions of this Treaty, to discriminate against citizens of a Member State on the grounds of nationality. Under article 408 of the EC Regulations, EC citizens enjoy freedom of movement within the Community. Freedom of movement entails, in addition to freedom of travel, the right to free access to an employment in another Member State and the right to equality of treatment in the practice of this employment. This special prohibition of discrimination guarantees equality of treatment between foreign workers from the Member States and national workers (Birk, 1992, pp. 237-238). The principle of equality of treatment is made more specific in Directive No. 1612/68 of the Council on the free movement of workers within the community. In this context, articles 1-6 regulate equality of access by Community citizens to existing jobs in

Member States and also prohibit quota restrictions on EC nationals. Articles 7-10 regulate the equality of treatment of Community citizens who have found a job in a Member State.

Declaration against racism and xenophobia

Also of relevance to this study is the Declaration issued by the Council of the European Community and the representatives of Member States in 1990 against racism and xenophobia; in this declaration, Member States undertook, in the fight against racism and xenophobia, to take the measures necessary to implement this declaration. In paragraph 2, the declaration gives examples of legal and institutional measures which the Member States should employ in the fight against racism and xenophobia. Of considerable importance in this context are paragraphs 2(c) which proposes the promulgation of legislation for protection from racism and xenophobia and paragraph 2(e) which proposes that an appropriate measure would be for Member States to grant special agencies set up to deal with xenophobia and racism the right of legal action and the right to provide support for persons who take legal action on account of the discrimination they have suffered. In addition to this, under paragraph 2(b), those Member States which have not signed article 14 of the International Convention on the Elimination of all Forms of Racial Discrimination, should repair this omission and, in accordance with the requirements of article 14, permit individual complaints to be laid before the Committee set up under this Convention.

**2.3. National regulations on discrimination
against migrant workers**

In contrast to the situation in the United Kingdom and the Netherlands, in Germany there is no special legislation on the protection of migrant workers from discrimination. This is attributable in particular to the fact that the Federal Republic of Germany – in spite of the high percentage of foreigners in the total population and the long period of stay of migrant workers – does not officially consider itself as a country of immigration. Consequently, until now, the Federal Republic has not considered it necessary to promulgate a special anti-discrimination law. Even ratification of the International Convention on the Elimination of all Forms of Racial Discrimination and Convention No. 97 of the International Labour Organization, under which the Federal Republic assumed the obligation of preventing discrimination against migrant workers by all suitable means including the necessary legal measures, has not induced the Federal Republic to promulgate a special discrimination law for the protection of migrant workers. The attitude in the Federal Republic is rather that of meeting its obligations under international conventions by means of the national regulations that already exist (Mager, 1992, p. 171). As a result of this, the provisions granting migrant workers protection against discrimination are to be found scattered around in different places in the Federal German legislation.

German legislation is applicable to foreign workers in the same way that it is applicable to German workers. The application of German law currently stems from article 30, paragraph 2, No. 1, of the Introductory Act to the Civil Code, under which the applicable law is that of the usual place of work. Since full autonomy of the parties applies in labour law, it was regularly agreed in the treaties with the countries of recruitment that German law should apply. Furthermore, under the Treaty of Unification of 31 August 1990, the Basic Law and all regulations that have been promulgated subsequently thereto, are applicable in the previous German Democratic Republic.

The following extracts give an overview of the regulations which are to be found in Federal German law and which may be called upon in protecting migrant workers from or against discrimination in the field of employment. Furthermore, indications of the conditions required for enforcing relevant claims before the courts are also presented. No reference is made here to

regulations relating to social security since these regulations are linked to employment relations as such and consequently contain no special prohibition of discrimination.

2.3.1. Article 3, paragraph 1 and article 3, paragraph 3, of the Basic Law

Article 3, paragraph 1, and article 3, paragraph 3, of the Basic Law contain key provisions for the protection of migrant workers against discrimination. These basic rights give the German Constitution an amenability towards minorities which, in the last analysis, is certainly to be traced back to German experience under the totalitarian system of the Third Reich.

Article 3, paragraph 1, of the Basic Law stipulates that all are equal before the law. This statement of equality of treatment is substantiated by the prohibition on differentiation or prejudicial treatment that is to be found in article 3, paragraph 3, of the Basic Law which forbids preferential or prejudicial treatment of individuals on account of their sex, descent, race, language, home and origin, beliefs and their religious or political convictions. Article 3, paragraph 3, of the Basic Law is, to this extent *lex specialis* in relation to the general clause about equality found in article 3, paragraph 1, of the Basic Law; consequently it is possible to revert to this general clause on the subject of equality as a catch-all law only in cases in which none of the factors of discrimination specified in article 3, paragraph 3, of the Basic Law can be taken as a final point of reference for preferential or prejudicial treatment (Dürig, 1994, p. 289). In contrast to a number of other basic rights, which are reserved solely for German citizens, the contents of article 3 of the Basic Law are so-called “basic rights for all and sundry”, i.e. anybody – no matter what his or her nationality – can invoke infringement of these basic rights.

Scope of the protection offered by article 3, paragraph 3, of the Basic Law

The criteria enumerated under article 3, paragraph 3, of the Basic Law are intended to offer protection primarily for ethnic minorities (“language”, “national extraction”, “race”). Furthermore, nobody may be the subject of unequal treatment on account of his or her ancestry (“descent”), membership of a social class (“origin”) or membership of a religious community.

The criterion of “nationality” is not one of the unlawful factors of discrimination listed here. There is no agreement in the jurisprudence and literature as to whether nationality may be subsumed under the criteria of differentiation enumerated within article 3, paragraph 3, of the Basic Law. According to the decisions of the Federal Administrative Court (BVerwGE 22, 66, 70) and the Federal Constitutional Court (BVerfGE 51, 1, 30) the enumeration of the individual criteria is of a conclusive nature and consequently nationality is not covered by these criteria of differentiation. As a result, any judgement as to any discrimination against foreigners must be guided by the criteria contained in article 3, paragraph 3, of the Basic Law. In contrast to this, the Labour Court of Hamm (LAG Hamm 16 Sa 1612/92) was of the opinion that, through the differentiation criteria of “origin” and “descent”, nationality is also included in the scope of article 3, paragraph 3, of the Basic Law. In the legal literature too, the opinion is sometimes put forward that foreigners can be guaranteed effective Basic Law protection because nationality is an unlawful criterion of differentiation in article 3 3 of the Basic Law. According to this point of view, nationality is usually based on the criterion “descent” and “national extraction”.

What is more, under article 3, paragraph 3, of the Basic Law, discrimination can occur only if one of the criteria mentioned in article 3, paragraph 3, of the Basic Law has been a causative factor in a prejudicial act, and the discrimination was directly intended. This means that the

discrimination must have been brought about on account of and solely on account of one of the causes in article 3, paragraph 3, of the Basic Law if infringement of this basic right is to be assumed. If, in addition to one of the criteria specified in article 3, paragraph 3, of the Basic Law, there are other criteria, not mentioned in article 3, paragraph 3, of the Basic Law, which are causative in the inequality of treatment, then according to the jurisprudence (see BVerfGE 39, 368) there is not unlawful discrimination within the meaning of article 3, paragraph 3, of the Basic Law.

Scope of the protection offered by article 3, paragraph 1, of the Basic Law

Nevertheless, in the opinion of the Federal Administrative Court and the Federal Constitutional Court, the general equality clause under article 3, paragraph 1, of the Basic Law does in fact offer protection against inequality of treatment on the grounds of nationality. The general equality clause, which lays down that all men are equal before the law, does today – according to generally accepted opinion – give not just entitlement to equal administration of justice but also a subjective public entitlement to equality of treatment. It follows from this that, under article 3, paragraph 1, of the Basic Law, it is unlawful to arbitrarily treat as unequal what is essentially equal and arbitrarily treat as unequal what is essentially equal (BVerfGE 3, 58, 135). In the event of a complaint invoking infringement of the general equality clause under article 3, paragraph 1, of the Basic Law, the Federal Constitutional Court (BVerfGE 75, 40, 70) verifies whether there are grounds for the said differential behaviour of such a nature and of such weight that these grounds justify the unequal legal consequences. Differentiations on the basis of nationality are consequently lawful only if the inequality of treatment is justified. Whether such justification is present must be decided by the courts taking into consideration the facts as submitted.

Binding effect of article 3, paragraph 3, of the Basic Law and article 3, paragraph 1, of the Basic Law

According to article 3, paragraph 1, of the Basic Law, the equality clause of article 3, paragraph 1, of the Basic Law and the discrimination prohibition of article 3, paragraph 3, of the Basic Law bind legislation, executive power and jurisprudence as directly applicable law. Third party action i.e., indirect effect of the basic rights in private law matters is not implicitly addressed, and consequently any direct impact of the basic rights in private law, and accordingly in labour law is rejected, with the exception of article 9, paragraph 3, of the Basic Law. According to standing Federal Constitutional Court jurisprudence (since BVerfGE 7, 198, 205ff), although the basic rights do not give rise to any direct behavioural obligations, or even any claims by citizens among each other, the basic rights do nevertheless lay down an objective order of values which are valid for all areas of the law, including labour law as well. To this extent, the basic rights must therefore be taken into due account in the interpretation and application of general clauses and miscellaneous non-specific legal concepts. The basic rights therefore exert an indirect effect on labour law (Richardi, 1992, pp. 87-88). After the Federal Labour Court had earlier in standing jurisprudence (BAGE, 1, 185, 191; 4, 240, 242 ff.) started out from the premise of a direct effect of the basic rights in labour law, it is now supporting the opinion that, with the exception of article 9, paragraph 3, of the Basic Law, the basic rights have only an indirect effect on employment relations (see Buchner 1992, pp. 509, 569).

Legal consequences

A worker who has been the subject of discrimination cannot validate claims under article 3, paragraph 1, or paragraph 3 of the Basic Law on the basis of the mere indirect third-party effect of the basic rights. In proceedings before the court, an infringement of article 3, paragraph 1, or paragraph 3 will be taken into consideration only in the application and the interpretation of the private law general clauses or miscellaneous non-specific legal concepts.

2.3.2. Paragraph 75, section 1, of the Works Constitution Act

A special instrument for the protection of migrant workers from ethnic discrimination at the workplace is to be found in paragraph 75, section 1, of the Works Constitution Act.

Under paragraph 75, section 1, of the Works Constitution Act, the employer and the works council shall ensure that “every person employed in the establishment is treated in accordance with the principles of law and equity and in particular that there is no discrimination against persons on account of their race, creed, nationality, origin, political or trade union activity or convictions, or sex”. Paragraph 75, section 1, of the Works Constitution Act is intended to ensure that all employees working in the undertaking are treated justly and equally in relation to all working conditions and related occupational measures, such as for example works agreements, appointments, transfers and dismissals.

Supervisory duty

Paragraph 75, section 1, of the Works Constitution Act places on the employer and the works council the responsibility for supervising equality of treatment. This responsibility for supervision applies both to the relationship between the works council and the employer and to the relationship of the former two to the employee. This means that the works council is required to intervene if the employer infringes the rights of the individual worker and vice versa the employer is required to intervene should the works council commit such an infringement. Finally, both are required to take steps should a third party, in particular other workers, perpetrate such infractions (Löwisch, 1992, p. 224). Furthermore, this supervisory responsibility also means that the employer and the works council themselves may not practice any inequalities of treatment against justice and equity or for reasons stipulated in paragraph 75, section 1, of the Works Constitution Act.

Absolute unlawfulness of differentiation

The principles of justice and equity are specified in paragraph 75, section 1, by means of a series of absolute prohibitions on differentiation. As far as the protection of migrant workers is concerned, it is primarily the prohibition of differentiation relating to “nationality” that is of relevance. Since this criterion relates to an absolute prohibition of differentiation, then a causal relationship between the criterion “nationality” and the differential treatment is sufficient to presume an infringement of paragraph 75, section 1, of the Works Constitution Act. Only when the difference decisively marks the circumstances to such a degree that, alongside this, comparable factors fade into the background, is it lawful and even required to make the differentiation the point of reference for special treatment. In this way, a dismissal that is declared on the basis of nationality is in breach of paragraph 75, section 1, of the Works Constitution Act.

Circle of persons protected

The supervisory duty of the employer and the works council extends to all persons working in the undertaking, i.e., both the core personnel, those working on contracts of limited duration, part-time workers or workers who are on loan (Blank, 1994, p. 288). However, according to general opinion, this regulation applies only to persons already employed in the works or undertaking (e.g., Löwisch, 1989, p. 224; Blank 1994, p. 228); an extension to the pre-contractual area is rejected in view of the regulation’s unambiguous wording of “every person employed in the establishment”. The result of this is that a job applicant who is discriminated against on the basis of one of the criteria enumerated in paragraph 75, section 1, of the Works Constitution Act, does not come under the scope of paragraph 75, section 1, of the Works Constitution Act, and cannot therefore base himself on a breach of this regulation. Nevertheless, in some cases, the opinion is put forward that the prohibitions on discrimination under paragraph 75, section 1, of the Works Constitution Act

would also have to apply to appointments, even though an obligation concerning the appointment of an applicant cannot be derived from this regulation (Blank, 1994, p. 524).

Finally it should be borne in mind that the Works Constitution Act and consequently paragraph 75, section 1, of the Works Constitution Act is not applicable to establishments in which, on the basis of statutory provisions, the formation of a works council is not lawful or in which, although the formation of a works council is lawful, no works council has in fact been established. Under paragraph 1 of the Works Constitution Act works councils shall be elected in all establishments that normally have five or more permanent employees with voting rights, including three who are eligible.

Legal effects

Paragraph 75, section 1, of the Works Constitution Act does not lay down any legal consequences deriving from a breach of the absolute prohibitions of differentiation; instead, it lays down collective legal administrative duties for the employer and works council. Although these administrative duties do not form the basis of a claim to equality of treatment and although a worker who has been discriminated against cannot lodge a claim for benefits or compensation for damages, a breach against the principle laid down in paragraph 75, section 1, of the Works Constitution Act is not without legal consequences.

In this manner, the clauses of a works agreement which are in breach of paragraph 75, section 1, of the Works Constitution Act, are invalid since this regulation constitutes an illegal act within the meaning of the Civil Code. Corresponding arrangements made by the employer are illegal. Consequently, for example, a dismissal based on the grounds that there were too many foreigners in the establishment would also be illegal (LAG Hamm 16 S A 1612/92). The employee who is not required to put into effect arrangements which are illegal (Wlotzke, 1992, p. 193).

Infringement of paragraph 75, section 1, of the Works Constitution Act also provides grounds for the lodging of a complaint on the part of the worker who has been discriminated against, under paragraph 84, section 1, of the Works Constitution Act to the competent authorities in the establishment. The worker may assert grounds for a complaint both where he feels that he has been discriminated against or treated unfairly or otherwise put at a disadvantage by the employer or by supervisors or by other employees of the establishment. Under paragraph 85, section 1, of the Works Constitution Act, the worker who has been discriminated against may also lay his grievance before the works council since here too the prohibition of unfair treatment laid down in paragraph 75, section 1, of the Works Constitution Act is applicable. The works council is then immediately required to induce the employer to remedy the situation. Nevertheless, an infringement against paragraph 75, section 1, of the Works Constitution Act does not give the employee any claim to intervention against the works council.

Moreover, it is generally recognised that a worker who has been discriminated against may lodge claims against an employer for omission and abstraction. Even though claims for benefits or damage compensation cannot be derived directly from paragraph 75, section 1, of the Works Constitution Act, the opinion is held in certain parts (for example Wlotzke, 1992, p. 197; von Hoyningen-Huene, 1993, p. 48) that paragraph 75, section 1, of the Works Constitution Act has the form of a protection law within the meaning of paragraph 823, section 2, of the Civil Code. According to this opinion, an establishment employee who has been discriminated against may submit claims for damage compensation under paragraph 823, section 2, of the German Civil Code in combination with paragraph 75, section 1, of the Works Constitution Act against the employer and individual members of the works council who have been in breach of paragraph 75, section

1, of the Works Constitution Act. Under the view that paragraph 75, section 1, of the Works Constitution Act does not contain the characteristics of a protective law, then the discriminated worker can at the most lodge a claim to compensation for damage on the basis of infringement of contract obligations under an employment contract. The legal consequences that result for the works council in the event of a breach of paragraph 75, section 1, of the Works Constitution Act are presented in Chapter 2.4.

2.3.3. The labour law principle of equality of treatment

Furthermore, one may also cite in the protection of migrant workers the principle of equality of treatment under labour law, which forms part of the basic reference principles of labour law (Schaub, 1992, p. 862). Its dogmatic basis is widely subject to discussion: in some cases it is seen as an order for the implementation of distributional justice (Zöllner, Loritz, 1992, p. 194) whereas in other cases as a direct validation of article 3 of the Basic Law and finally in other cases as a general legal concept which has found its legislative expression, inter alia, in paragraph 75 of the Works Constitution Act (Schaub, 1992, p. 198).

Content and field of application of the principle of equality of treatment

The principle of equality of treatment is to be seen as a prohibition of biased differentiation (Zöllner, Loritz, 1992, p. 198); it forbids arbitrary, i.e., unjustified discrimination against individual workers who are otherwise equal. As a result, foreign workers should not be treated worse on the basis of their nationality than German workers in the same situation.

The principle of equality of treatment is applicable in the case of measures which are in the hands of the unilateral power of the employer. The main area of application is therefore the granting of voluntary, additional social benefits such as gratifications and retirement pensions and other social benefits (see Zöllner, Loritz, 1992, p. 197). In contrast to the prohibitions of differentiation under paragraph 75, section 1, of the Works Constitution Act, the principle of equality of treatment is not applicable in the case of individually allocated conditions of work. The principle of freedom of contract, which is central to German private law, has precedence here.

Circle of persons protected

It is recognised almost without exception that the principle of equality of treatment applies only to members of the joint operation (Buchner, 1992, p. 516). To this extent, the employer is not bound by the principles of equality in appointments. Consequently, a job applicant who is discriminated against on account of his nationality cannot base himself on an infringement of the principle of equality of treatment.

Legal effects

Since the principle of equality of treatment is a central principle in the employment relationship, then non-observance thereof leads to different legal consequences. Employees who, due to the disregard of the principle of equality of treatment, are subject to discrimination, may demand from the employer the benefits which have unlawfully been withheld from them. Nevertheless, the legal construction of this claim is contested; in certain cases, this claim is based on a claim for compensation for damages (for example Schaub, 1992, p. 867), and in other cases the principle of equality is seen as a claim aimed at immediate fulfilment (for example Zöllner, Loritz, 1992,

p. 200). Furthermore, legal acts such as for example dismissals, which, by infringing on the principle of equality of treatment operate to the disadvantage of specific workers, are null and void. (Zöllner, Loritz, 1992, p. 200).

2.3.4. Penal provisions

The Penal Code contains no factual statements that provide express protection of migrants from discrimination in employment. Where discrimination has taken place it is only the following clauses which come into consideration.

Paragraph 185 of the Penal Code: Slander

Slander means the pronouncement of certain statements of contempt or disrespect (BgHSt 1, 288). Paragraph 185 of the Penal Code deals with three forms of perpetration: the expression of an injurious value judgement about the party in question and against a third party, and the affirmation of a defamatory fact about the party in question. Discrimination against foreign workers in the form of value judgments or statements intended to be derogatory such as for example “Turks” therefore fulfil the clause of slander, if they are committed deliberately.

It should be noted here that under paragraph 194, section 1, of the Penal Code, slander is prosecuted as a criminal tort, i.e. will be prosecuted only at the behest of the injured party under paragraph 77, section 1, of the Penal Code.

Paragraph 130, section 1, of the Penal Code:

Incitation to racial hatred

Paragraph 130, section 1, of the Penal Code provides protection not only for public freedom but also for individual dignity. Protected are also groups that can be isolated off from the population as a whole on the basis of internal or external features, such as is the case for example with foreign workers. The act of violence consists in goading people on to hatred, in instigating people to commit violence and arbitrary actions against these groups or in abuse, malicious scorn or defamation of these groups. Furthermore, the act must be aimed directly at undermining the human dignity of these groups, i.e. the aggression must be directed at the heart of the injured party's personality (Lackner, 1989, pp. 577-578). In view of the narrow definition of these actions and the narrow interpretation of legal concepts by the courts, this regulation has actually been applied only in the most serious cases of group discrimination.

2.4. The works council

The works council has at its disposal a number of different means of participation and influence deriving from the law to support it in its efforts to protect migrant workers from discrimination.

Under paragraph 80, section 1, No. 7, of the Works Constitution Act, the works council has the duty to promote the integration of foreign workers in the establishment and to further understanding between them and their German colleagues. In this context, in the event of a breach of paragraph 75, section 1, of the Works Constitution Act, the works council is required to take the necessary steps to induce the employer to remedy the situation. Should the employer not remedy the situation, then the works council may appeal to the conciliation committee in accordance with paragraph 85, section 2, of the Works Constitution Act and further paragraph 76, section 5, of the same Act which replaces conciliation between the employer and the works Council. As a result, the worker who has been discriminated against then has an individual claim for redress against the employer and in proportion to the outcome of the conciliation under paragraph 84, section 2, of the Works

Constitution Act together with paragraph 85, section 3, sentence 2, of the Works Constitution Act (Korinth, 1993, p. 110). Under paragraph 104 of the Works Constitution Act, the works council must in addition verify that the employees also observe the principles laid down in paragraph 75, section 1, of the Works Constitution Act and may enjoin the employer to dismiss or transfer an employee who has been in gross violation of these principles. If the said employer does not react to serious infringements or if he himself infringes the provisions of paragraph 75, section 1, of the Works Constitution Act, the works council may, under paragraph 23, section 3, of the Works Constitution Act, apply to the labour court to have the employer carry out certain measures under threat of payment of a fine.

Individual personnel measures such as for example dismissals on the grounds of nationality, which are in breach of paragraph 75, section 1, of the Works Constitution Act may be refused the consent of the works council under the provisions of paragraph 99, section 1, No. 1, of the Works Constitution Act. The measures covered do not however include selection and hiring of personnel since these come neither within the scope of paragraph 75, section 1, of the Works Constitution Act nor within the scope of the principle of equality of treatment in labour law; consequently, discrimination in appointments on the grounds of nationality must be considered as lawful. Furthermore, the works council may, under paragraph 102, section 3, No. 1, of the Works Constitution Act, oppose a routine dismissal if the employer in selecting the employee to be dismissed does not take sufficient account of social considerations, and the dismissal of the employee therefore causes undue hardship. These social considerations include, inter alia, the possibility of finding a job on the labour market. Consequently the works council has the right of refusal in the event of the dismissal of a foreign worker with a restricted work and residence permit since a dismissal would mean the termination of the worker's right to residence which, in turn, would constitute undue hardship.

Finally, under paragraph 92 of the Works Constitution Act, the employer is required to inform the works council of matters relating to this manpower planning, and discuss with it the necessary measures to be taken. One of the important objectives of manpower planning is to overcome discriminatory practices in the establishment's personnel policy (Blank, 1994, p. 288).

Should the works council fail to employ the means against discrimination available to it under the legislation, then the worker who has been discriminated against will have no legal recourse open to him to bring the works council to acts and forbearances. Nevertheless, where there has been gross breach of duty on the part of the works council or one of its members, a quarter of the workers entitled to vote, the employer or a trade union represented in the establishment can call for the dissolution of the works council or the exclusion of one of the members from the works council.

Finally, under paragraph 95, section 2, of the Works Constitution Act, the works council may, in an establishment with more than 1,000 employees, demand – or in an establishment with fewer employees come to an agreement on – the drawing up of selection guidelines. The object of such guidelines may be the technical, personal and social criteria to be applied in the selection process such as for example the establishment of skill requirements for a given job on the basis of a job description and, on this basis, the drafting of a job requirement profile. These guidelines are binding on the employer and consequently, in the case of a breach on the part of the employer, the works council can withhold its approval of the selected candidate.

2.5. Access to the courts

Procedure before the labour court

Under paragraph 2, section 1, No. 3(d), of the Labour Courts Act, in the case of disputes resulting from an unlawful act under paragraph 823 of the Federal Civil Code, i.e., for claims for damages, negligence and approximation, provided this is linked to the employment relationship, the labour courts have exclusive competence; in this context, under paragraph 2, section 5, of the Labour Courts Act, a judgment procedure shall be adopted for the decision. In the case of disputes between the employer and the works council on Works Constitution law matters, the labour court is, under paragraph 2(a), section 1, No. 1, of the Labour Courts Act, also the competent instance. In such a dispute, according to paragraph 2(a), section 2, of the Labour Courts Act, the determination procedure shall be adopted. Under paragraph 6 of the Labour Courts Act the labour courts shall be composed of professional judges and of honorary judges chosen from among the employees and employers.

Since, in German private law, it is the principle of individual-orientated legal protection that predominates, then the worker who has been discriminated against is required himself to pursue the claims available to him before the Courts. However, under paragraph 11, section 1, of the Labour Courts Act, the parties may be represented by private persons, association representatives (for example the legal representative of a trade union) or by attorneys-at-law. Before the disputes procedure begins, it is compulsory to carry out a conciliation negotiation in accordance with paragraph 54, section 1, of the Labour Courts Act. In the complaints procedure, the plaintiff is required to present the facts which justify his grievance, the so-called legally justifying facts. This means that a worker who has been discriminated against must demonstrate that the defendant had a discriminating motive for his behaviour. Nevertheless, the worker's task in pursuing his rights through action in the labour courts is facilitated by the fact that the Court costs under paragraph 12 of the Labour Courts Act are low in comparison with normal Court actions and that no cost advances are levied. Furthermore, the successful party, under paragraph 12(a), section 1, of the Labour Courts Act has no claim for reimbursement of the costs for an attorney-at-law. This ruling is favourable to the plaintiff worker in so far as that, in the case of defeat, he is not required to reimburse the defendant for these costs. What is nevertheless unfavourable for both parties is the fact that they cannot claim for their own costs and in particular the costs of their attorney-at law even in cases in which they win (Zöllner, Loritz, 1992, p. 565). However, should a party prove financially unable to have himself represented by an attorney at-law, then, under paragraph 11(a), section 1, of the Labour Courts Act, an attorney at law may be appointed to assist him where the plaintiff is himself represented by an attorney-at-law. Furthermore, as is also the case in civil actions, there is the possibility of assistance in meeting court costs, under paragraph 11(a), section 3, of the Labour Courts Act together with paragraphs 114 ff. of the Civil Action Ordinance. Under paragraph 121 of the Civil Action Ordinance, in this case too an attorney-at-law may be appointed to assist; but in such a case it is necessary that there be a prospect of success in the action. In the judgment procedure, the legal means available are an appeal on facts and law, an appeal on law, and a petition for review.

The determination procedure is used primarily for decisions on Works Constitution law matters and Codetermination law matters between the works council and the employer. Although the determination procedure, in the same way as the judgment procedure, is brought into action only on a motion, it distinguishes itself from the judgment procedure by the fact that the Court takes action within the framework of the submitted motions in an administrative manner i.e., it clarifies the factual content in an administrative manner so that the facts are not delineated by the parties presenting these facts. In addition, it is the Court and not the plaintiff that decides who, apart from the plaintiff, shall take part in the proceedings. In the determination procedure the proceedings are not adversarial; rather, those appearing before the Court are heard, in accordance with paragraph 83, section 4, of the Labour Courts Act, by the Court within a defined period determined for the

hearing. In accordance with paragraph 12, section 4, of the Labour Courts Act, court costs are not levied. Even though, in accordance with the rules of court law, there is no reimbursement of out-of-court costs, the works council nevertheless, under paragraph 40, section, of the Works Constitution Act, is entitled to full reimbursement of its costs by the employer even where the employer was the other party in the action and won the case (Löwisch, 1989, p. 159). In the determination procedure, the legal means of recourse against a decision are the petition for a review under paragraph 87 of the Labour Courts Act.

Penal action

In the event of a breach of penal provisions, the public prosecutor is authorised to open a preliminary investigation. Should the investigation provide sufficient grounds for bringing public action, i.e., if there exists adequate factual suspicion, then the public prosecutor will institute proceedings in accordance with paragraph 170, section 1, of the Criminal Proceedings Ordinance by issuing a summons in the competent court. In other cases, the public prosecutor institutes proceedings in accordance with paragraph 170, section 2, of the Criminal Proceedings Ordinance. When proceedings are instituted, the injured party has the possibility of instituting an enforcement procedure. If a summons is issued, the state prosecutor is required to advise the accused of the facts. Sentencing occurs only if the Court is convinced that the accused has actually committed the act he is accused of. If this is not the case, an acquittal is pronounced.

If there is suspicion of a penal act, for the prosecution of which charges need to be made (for example libel in accordance with paragraphs 185, 194 section 1, sentence 1, p. 1, of the Penal Code), then the act can be prosecuted only on presentation of such charges. Otherwise the proceedings will be halted in accordance with paragraph 170, section 2, of the Criminal Proceedings Ordinance. Under paragraph 77, section 1, of the Penal Code, the person entitled to institute charges is the injured party, except where other provisions exist.

Under paragraph 465, section 1, of the Criminal Proceedings Ordinance, it is the accused who is responsible for meeting the costs of the proceedings if he is condemned for the act in question. If the accused is acquitted, or if the proceedings against him are halted, then, under paragraph 467, section 1, of the Criminal Proceedings Ordinance, the costs of the proceedings and the expenditures required of the accused, are born by the state budget.

In accordance with the provisions of paragraph 406(f), section 1, of the Criminal Proceedings Ordinance, the injured party can be represented by an attorney-at-law. The costs of the attorney-at-law have to be borne by the injured party even where the accused is found guilty.

2.6. The Commissioner for Foreigners

2.6.1. The Federal Government Commissioner for the Interests of Foreigners

The Office of a “Commissioner for the Integration of Foreign Workers and their Family Members” was set up in the former Federal Government as early as 1978. In order to make due allowance for the fact that the foreigners living in the Federal Republic had for a long-time no longer been just migrant workers and that the concerns of the foreign population went beyond the mere aspect of integration, the name of the office was changed in 1991 to the “Federal Government Commissioner for the Interests of Foreigners”. Any incumbent of the Office of Commissioner holds the post on an honorary basis. In the pursuit of their functions, consecutive Commissioners have been seconded by an inter-ministerial staff made up of a section in Bonn and a section in Berlin;

these sections comprised a total of 16 staff members. From an institutional and logistics point of view, the Commissioner's staff are attached to the Federal Ministry of Labour and Social Affairs.

As the results of a Cabinet decision dating from 1991, the areas of competence and the functions of the Commissioner for the Interests of Foreigners may be categorized as follows:

- the Commissioner is responsible for foreign workers and for foreigners who are resident in the Federal Republic by way of a residence permit, a residence certificate, a bilateral state agreement or an agreement under European Community law, including family members entitled to join their relatives in the Federal Republic of Germany. This means that competence extends to virtually all foreigners who are legally resident in the Federal Republic, with the exception of asylum seekers pursuing the asylum process.
- in this arena, the Commissioner supports and advises the Federal Government in its efforts concerning foreign residents and, as from 1993, places each year before the Federal Parliament a report on the situation of foreign residents in the Federal Republic of Germany.
- the Commissioner has to be consulted in the preparation of legislation and regulations and all other matters relevant to the Commission's field of action.
- the Commissioner puts forward initiatives to the Federal Länder and boroughs and social groups and provides support for them in an effort to promote understanding between Germans and foreigners. For this purpose, the Commissioner has regular contact with welfare associations, other social groups such as those representative of employers and workers, as well as an increasing number of local foreign-German initiatives.
- another key area is a comprehensive programme of lectures given at events organized by virtually all social groups.
- the Commissioner is the partner for discussions on the subject of creating conditions for tension-free cohabitation between Germans and foreigners. On the basis of a Cabinet decision, this also includes dealing with both of individual submissions, i.e., complaints, requests, suggestions and requests for information from a multitude of Germans and non-Germans.
- finally, as a part of the Commission's public information programme, the Commissioner provides information to the press and the public about policy issues and measures concerning foreign residents.

In the pursuit of these functions, the Commissioner has available an annual budget of approximately 100,000 Deutschmarks.

2.6.2. The Commissioners for the Interests of Foreigners at Land and Community Level

The Office of Commissioner for Foreigners is not limited to the Federal level. Subsequently, corresponding offices have been set up at the Land level in nine of the 16 Federal Länder (Berlin, Bremen, Hamburg, Lower Saxony and Rhineland-Palatinate as well as Brandenburg, Thuringia, Saxony and Saxony-Anhalt). With a staff of 13, the Berlin Office is the largest unit for a Commissioner for Foreigners and highlights the deep commitment of the Berlin Senate to matters of policy relating to foreigners. The municipal land of Bremen has a central office for combating racial discrimination and xenophobia. Furthermore, a total of 15 boroughs scattered throughout the Federal territory, and not only in those Federal Länder in which a Commissioner for Foreigners has already been instituted at the Land level, have also set up an Office of Commissioner for Foreigners in their own districts.

The competence of these offices is similar to that of the Federal Commissioner; a number of these offices at the Land or borough level, such as for example the Berlin office, have set up working groups which deal specifically with anti-discrimination activities. These working groups organize, inter alia, training courses against discrimination and the use of force, and offer direct

advice in discrimination cases. The offices are financed by the relevant Länder or boroughs and work independently of the Federal Commissioner for Foreigners' Affairs; the Federal Commissioner promotes and coordinates a regular exchange of information between all Commissioners for Foreigners' Affairs.

3. Proposals for improvements in national law

Discrimination against migrant workers in employment in Germany is a widespread phenomenon. In both job applications and at the work place itself, migrant workers are treated worse than nationals in spite of comparable training, skills and work experience (see Zegers de Beijl, 1990, pp. 16-20). A study carried out recently for the International Labour Office by the Centre for Turkish Studies on the subject of discrimination in access to jobs in the Federal Republic of Germany (see Part A of this publication) has shown that foreign applicants were unlawfully discriminated against in 19 per cent of all cases when applying for a job as semi-skilled workers.

In a study carried out in 1980, Kremer and Spangenberg came to the conclusion that migrants have less likelihood than similarly qualified German workers of obtaining access to a job for a specialised worker. They also found that fluency in German did not lead to equal opportunities on the Labour market. This result is also confirmed by a study carried out by Gillmeister in 79 West Berlin firms. Gillmeister comes to the conclusion that migrant status has a negative influence on the opportunities of applying for a job in the majority of the firms studied. When applying for a job, migrants find themselves confronted by prejudices on the part of the personnel manager and other persons responsible for the allocation of jobs, with respect to their capacity for training, their flexibility and their motivation (Gillmeister et al, 1989, pp. 108-130; 307-311).

At the plant level, discrimination against migrants can be seen in particular from the fact that these workers are required to perform unskilled, poorly paid and, to a large extent, health-hazardous work. Twenty-five years after the onset of the massive recruitment and appointment of foreign workers, the average hourly wage of migrant workers is still around 10 per cent lower than that of their German work colleagues doing similar work (Mehrländer, 1986, pp. 150-154). The study carried out by Kern and Weinberg (in Dohse, 1982, pp. 54-56) in firms manufacturing automobile tyres shows that migrants have fewer opportunities than their German colleagues of moving from arduous work sectors of tyre production to more highly qualified or less arduous sectors. The study carried out by Friedo Dietz in 1987, entitled "The development and structure of foreign workers in the Federal Republic of Germany" comes to the conclusion that foreign workers continue to perform the jobs and hold positions for which they were originally recruited. A total of 85 per cent of foreign workers are employed as manual workers and 60 per cent of these carry out an unskilled or semi-skilled activity. This may be attributed to the fact that migrant workers are to a large extent excluded from in-plant training facilities and are consequently not competitive with their German colleagues in their applications for skilled jobs. Due to structural changes in the economy and the introduction of new technology, foreign workers are also affected to an exceptional degree by unemployment.

Nevertheless, discrimination against migrant workers at the work place comes not only from supervisors but also from work colleagues. For example in everyday activities, migrant workers are not greeted by their German colleagues; or they are disdained and thus thrust into social

isolation. Migrant workers are also the subject of jokes and graffiti on the part of their German colleagues (Hoffman, Even, 1985).

In the Federal Republic, it is the migrant workers from the former recruitment countries together with their children and grandchildren who are the subjects of discrimination. Since only a quite small percentage of these migrants or their descendants have acquired German nationality, it must be concluded that discrimination occurs on the basis of nationality. However, the discrimination against this group occurs far more in the form of xenophobia. Once again, this concept incorporates much more than rejection on the basis of a foreign nationality: xenophobia is linked not just to legal status but also to actual features such as appearance, language and custom. (Mager, 1992, p. 170). The focus of the legal position for protection against discrimination is consequently not just the status of being a foreigner but also xenophobia in the form described above.

The following section of the study therefore highlights the extent to which the current legal situation offers migrant workers and their descendants protection against inequality of treatment in employment and what further measures are required to achieve equality of treatment. For this purpose, a look will be taken at measures adopted in other countries in order to determine the most effective means for combating discrimination through legislation.

3.1. Constitutional law

As has already been indicated above, article 3, paragraph 3, of the Basic Law contains an explicit prohibition of discrimination on the basis of race and descent but not on the basis of nationality. There is lack of agreement in the jurisprudence and literature as to whether these explicitly stipulated prohibitions on discrimination actually incorporate nationality. Consequently, a foreigner discriminated against on the basis of his nationality can base himself solely on infringements of the general equality clause under article 3, paragraph 1, of the Basic Law but not on a breach of the more specific article 3, paragraph 3, of the Basic Law. In this context, we are faced with the question as to whether the nationality characteristics should not in addition be incorporated as an unlawful criterion for differentiation in article 3, paragraph 3, of the Basic Law in order to make unequal treatment of other nationalities by the State illegal. However, if nationality were to become a prohibited criterion for differentiation, it would be necessary to establish it as a separate legal concept; such a step comes up against recognition and good judgement in public law and international law. Neither should it be forgotten that, throughout the world, a differentiation that is linked to the legal bond of nationality is considered self-evident (Mager, 1992, p. 170). Consequently consideration cannot be given to an extension of article 3, paragraph 3, of the Basic Law. Since, under article 1, paragraph 3, of the Basic Law, the equality clause of article 3, paragraph 1, of the Basic Law and the prohibition of prejudicial treatment contained in article 3, paragraph 3, of the Basic Law are directly binding on legislation, executive power and jurisprudence, then article 3 of the Basic Law offers adequate protection as far as the State is concerned. However, owing to the lack of third-party effect of basic rights, it is not possible to derive any entitlements out of article 3 of the Basic Law. Furthermore, it is also necessary to put aside any direct effect of basic rights since there is no explicit regulation of the third-party effect of the basic rights; consequently protection of migrant workers from discrimination has to be pursued not through basic rights but rather through specific regulations.

3.2. Works Constitution Act

Under paragraph 75, section 1, of the Works Constitution Act, it is unlawful to treat workers unequally on the basis of their race, creed, nationality, origin, political or trade union activity or

convictions, or sex. The employer and the works council are presented here with the obligation of ensuring that this prohibition of discrimination is not breached.

3.2.1. Legal consequences

Paragraph 75, section 1, of the Works Constitution Act thus lays down a clear prohibition of discrimination; nevertheless, it says nothing about the legal consequences in the event of non-observance of this discrimination prohibition. It is widely recognised that this regulation forms the basis of official obligations under collective law and therefore in the event of an infraction, the injured party is able to institute a restrain and desist claim on the employer. It is also generally recognised that, on the one hand, an infringement of this regulation gives a worker who has been discriminated against a direct right to a grievance, and on the other, paragraph 75, section 1, of the Works Constitution Act establishes a prohibitive law within the meaning of paragraph 134 of the Civil Code, which as a result renders inoperative the provisions of an employment contract. These legal consequences are generally recognised, but in order to make the situation clear, they need to be firmly and expressly laid down.

Furthermore, the worker who has been discriminated against does not have any claim of acts and forbearances on the part of the works council in the event that this body breaches its prescribed official duties under paragraph 75, section 1, of the Works Constitution Act. However, the possibility of such a claim is an urgent requirement for the prohibition of discrimination contained in paragraph 75, section 1, of the Works Constitution Act since the works council has the duty to ensure that unlawful discrimination within the meaning of paragraph 75, section 1, of the Works Constitution Act is not committed. Consequently the possibility of a worker who has been the object of discrimination making a claim against the works council should be explicitly stipulated as a legal consequence in the prohibition of discrimination.

Finally, there is disagreement in the literature as to whether paragraph 75, section 1, of the Works Constitution Act is a protective act within the meaning of paragraph 823, section 2, of the Civil Code and whether the worker who has been discriminated against is entitled to make a claim for damage compensation against the employer or against individual members of the works council under paragraph 75, section 1, of the Works Constitution Act together with paragraph 823, section 2, of the Civil Code (see Wlotzke, 1992 p. 197; von Hoyningen-Huene, 1993, p. 48). Neither has the jurisprudence come to any decision on this matter, and consequently no uniform ruling has yet been established here. In view of this unclear legal situation, considerable legal knowledge is required in order to recognize the legal consequences of paragraph 75, section 1, of the Works Constitution Act. Consequently, the ruling of this regulation is far too imprecise to motivate the behaviour of those subject to the law. In the case of the person perpetrating discrimination, it does not create a sense of unjustness nor in the case of the person discriminated against does it create an awareness of the injured person's rights.

The need for a clear ruling on the legal consequences, introducing a ruling on compensation rights in the field of unlawful discrimination, is also highlighted by the example of discrimination on the grounds of sex. For this reason, the legislator felt himself required to establish an explicit prohibition of discrimination on the grounds of sex inclusive of a clear ruling on the legal consequences. This regulation is stipulated in paragraph 611(a) of the Civil Code. Under paragraph 611(a), section 1, of the Civil Code, the employer cannot, in justifying employment relations, in professional promotion, in the orders given or in the case of dismissal, discriminate against a worker on the grounds of sex. Under paragraph 611(a), section 2, of the Civil Code, if an employment relationship has not been established on account of a breach of the prohibition of

discrimination clause on the part of the employer, the employer is required to compensate the worker for the damage that the worker has suffered due to the fact that he was confident that the employment relationship would not remain undone on account of such a breach. Under paragraph 611(a), section 1, sentence 1, this applies accordingly to promotion if there is no entitlement to the promotion.

The amount of compensation for damage that can be claimed under paragraph 611(a) of the Civil Code is restricted to damage to trust, which is a symbolic figure. In the light of the European Economic Community Council Directive on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions, dated 9 February 1976, which calls for tangible sanctions for unlawful discrimination, the jurisprudence has moved its position towards recognizing more far-reaching claims for compensation for injuries suffered under paragraph 823, section 1, of the Civil Code together with paragraph 847 of the Civil Code in the shape of 2-3 months wages (see Mager, 1992, p. 173).

In the case of discrimination against migrant workers – for example on grounds of nationality – a similar solution offers itself. By laying down specific provisions on the prohibition of discrimination against migrant workers – as has occurred in the case of discrimination on the grounds of sex in paragraph 611(a) of the Civil Code – the legislator would give recognition to the importance of prohibition of this type of discrimination. The regulation should not be limited to existing employment relations but, as in the case of paragraph 611(a) of the Civil Code it should also deal with the pre-contractual sector in order to provide legal protection where, as the result of discrimination, a contract is refused. Moreover, as in the case of paragraph 611(a) of the Civil Code, it is necessary to have an explicit ruling concerning the legal consequences. The regulation should provide, in addition to claims for acts and forbearances, an explicit claim for compensation of the material and immaterial damage suffered so that it is not necessary to have recourse to claims for unlawful action under paragraph 823 of the Civil Code. This means that the amount of the damage compensation claim should not be limited to negative interest, i.e. damage to trust, and the minimum damage compensation overall; otherwise, in view of this symbolic value, the regulating content of the provision would go no further than providing a mere clarification function (see Mager, 1992, p. 173).

If a contract is refused due to discrimination, it is necessary to reject as legal consequence a claim to signature of the refused contract as is required in the United Kingdom (Zegers de Beijl, 1992, p. 14) and also, in part, in the Federal Republic. A claim of this type is in contradiction with the protection of private autonomy which includes freedom to decide with whom one wishes to establish contracts. When this basic rights position is taken into account, it can be seen that the enforcement of this prohibition on discrimination must not lead to full removal of freedom of contract. Consequently, the legislator has refrained from imposing in labour law an obligation to contract, which is the strongest encroachment on the fundamental principle of private autonomy – that itself underlies civil law – and which in the case of public monopolies is expressly regulated in the legislation, since, in legislating on the prohibition of discrimination on the grounds of sex under paragraph 611(a) of the Civil Code, he has stipulated as legal consequence a claim to compensation for damages but not a claim for conclusion of the previously refused contract (see Mager, 1992, pp. 172-173).

3.2.2. Indirect discrimination

Furthermore it is not discernible from paragraph 75, section 1, of the Works Constitution Act whether the prohibition on discrimination specified in this regulation applies only to direct discrimination or whether it also covers indirect discrimination. Direct discrimination occurs if an employee is discriminated against because he is considered to be a non-national or a person of foreign origin. Indirect discrimination occurs when, although an institution pursues a policy in which there is no formal differentiation, it nevertheless in practice discriminates against certain groups by employing selection criteria, testing requirements, etc. which are prejudicial to these groups (Zegers de Beijl, 1992, p. 3). Since the consequences of indirect discrimination are the same as those of direct discrimination, then it is necessary to have prohibition of not just direct discrimination but also explicitly a prohibition of indirect discrimination.

With reference to the prohibition on the grounds of sex under paragraph 611(a) of the Civil Code, the Federal Labour Court has already decided that, although indirect discrimination has not explicitly been made unlawful, the prohibition of discrimination covers not only direct but also indirect discrimination. It is necessary therefore to start from the premise that the prohibitions of discrimination on the grounds of descent and nationality under paragraph 75, section 1, of the Works Constitution Act also include indirect discrimination. In the literature too, it is put forward that all regulations for protection against discrimination cover both direct and indirect discrimination (see Forbes, Mead, 1992, p. 41).

Since, however, there has been neither express prohibition of indirect discrimination in the legislation nor the formation of uniform jurisprudence on this matter, the legal situation concerning indirect discrimination against migrant workers is unclear, and consequently this situation should be improved by incorporating an explicit prohibition of indirect discrimination. Furthermore, experience in other countries, such as for example the Netherlands, has shown that an explicit prohibition of indirect discrimination is necessary for protection against inequality of treatment and for this reason, the Netherlands anti-discrimination act of 1994 states that both direct discrimination and indirect discrimination are unlawful.

Research on paragraph 75, section 1, of the Works Constitution Act has shown that this regulation does not specify legal consequences in the event of its infringement. The legal situation, specifically in reference to claims for damage compensation, is unclear in the extreme. The situation concerning indirect discrimination for which there is no express prohibition in the legislation, is equally unclear. For this reason, paragraph 75, section 1, of the Works Constitution Act provides inadequate protection of migrant workers against discrimination.

3.3. The principle of equality of treatment in labour law

With respect to the principle of equality of treatment in labour law which prohibits arbitrarily treating one worker in a worse way than other workers, we encounter the same problems as under paragraph 75, section 1, of the Works Constitution Act. Although the principle of equality of treatment is generally recognised as a prohibitive law within the meaning of paragraph 134 of the Civil Code, the legal construction of claims for compensation – even though these are undisputed – is extremely unclear. Furthermore, the application of the principle of equality of treatment in cases of indirect discrimination has not been clarified. Consequently, the principle of equality of treatment in labour law does not offer the necessary protection of migrant workers in cases of discrimination at the workplace either.

3.4. Penal law

Examination of the situation relating to criminal acts has shown that only discrimination in the form of defamation is punishable under paragraph 185 of the Penal Code. The penal act of incitation to racial hatred under paragraph 130, section 1, of the Penal Code needs scarcely to be taken into consideration with respect to discrimination against migrant workers in employment since this regulation covers only the most serious forms of group discrimination.

Consequently, there is only a very low level of penal law protection against discrimination in employment. For example, advertisements in which foreigners are excluded from applying for jobs or discriminatory refusals to conclude a contract are not punishable; in such cases, one can only have recourse to civil law protection. Consequently, there has been considerable discussion about extending penal acts, such as for example has happened in the Netherlands. As early as 1971, provisions on the prohibition of discrimination were introduced into penal law in the Netherlands. For example, article 429 *cattier* of the Netherlands Penal Code provides, *inter alia*, penalties for “racial discrimination in the pursuit of a profession or in the offer of goods or services” (Zegers de Beijl, 1992, p. 16).

Nevertheless, when considering any extension of penal acts, it should not be forgotten that a judgment in a criminal action requires a significantly higher degree of proof than does that of a civil action. Consequently for the injured party it is significantly more difficult to win a criminal action than it is to win a civil action. Furthermore, in a criminal action, the injured party cannot make a claim for compensation for the material or immaterial damage he has suffered. In addition, studies in European countries with comprehensive penal regulations (see Colneric, 1994, p. 16) have shown that each year only a very small proportion of criminal actions have been pursued and, in most cases, they proved unsuccessful due to the high level of proof that was required. Consequently, civil law recourse is considered considerably more effective and given preference over penal action. The injured parties expect from a court action primarily a real settlement for the discrimination they have suffered but not punishment. Although the deterrent effect of penal law should not be overlooked, this function has run out of steam due to the lack of penal actions. This shows that an extension of penal acts – at least for the time being – in German penal law would not mean wider protection of migrant workers from discrimination. Furthermore, it should not be forgotten that penal law is not the only but rather the final recourse for protecting the individual’s rights in a State which is governed by law and order (Basic Law, 6, 389, 433; 39, 1, 47) and this also applies to application of the prohibition of discrimination. For these reasons, consideration should not be given to extending penal acts to discrimination in employment.

Nevertheless, the existing facilities should be fully exploited. In the case of offences prosecuted only upon application by the victim – such as for example paragraph 185 of the Penal Code – the victims should be given greater support by specialized institutions or organizations such as for example the Commissioners for the Interests of Foreigners or trade unions which are involved in discrimination matters, and further advised not to shy away from bringing penal charges.

3.5. Procedural law

Examination of procedural law demonstrates that distribution of the burden of proof constitutes a further problem area of the law as it currently stands in discrimination against migrant workers in employment.

On account of the burden of proof rule in the law for civil actions, a person who has been subject to discrimination bears the full burden of proving the discrimination to which he was subject. However, in all cases of discrimination, this proof is very difficult to demonstrate since the person perpetrating the discrimination will only rarely express his true motives and the evidence for this is usually to be found in his area of sway; consequently discrimination can be derived only from circumstantial evidence (see Mager, 1994, p. 173). In this context, paragraph 611(a), section 1, sentence 3, of the Civil Code offers a suitable solution in the case of unlawful discrimination on the grounds of sex. On the basis of this model, distribution of the burden of proof in cases of discrimination against foreigners and ethnic minorities should be structured in such a way that, in the event of a grievance, the facts that demonstrate presumption of discrimination on grounds of ethnic origin or nationality have to be proven by the worker only in a plausible manner and not to the full conviction of the court. If the worker succeeds in establishing the credibility of his case, then the employer has to bear the burden of proving that there were factual reasons unrelated to nationality or ethnic origin that justify the discriminatory treatment (Mager, 1992, p. 173). This type of ruling on the burden of proof in the form of “prima facie proof” is indispensable for the enforcement of the rights of migrant workers.

In the Federal Republic, only rarely actions have been instigated for discrimination against migrant workers in employment. Among the reasons for this was that the victim of inequality of treatment started out from the assumption that, due to the existing ruling on the burden of proof, it would not be possible to prove the discrimination that had been suffered; he consequently preferred not to call for assistance before the courts and therefore abandoned the claim he had against the perpetrator of the discrimination (Forbes, Mead, 1992, p. 42).

In addition, the example of discrimination on the grounds of sex has shown that it was not until the introduction of paragraph 611(a) of the Civil Code that actions began to be brought before the courts, and this was certainly attributable to the clear and “victim-friendly” distribution of the burden of proof.

3.6. Legal facilities open to works councils

The legal facilities opened up to the works council by the Works Constitution Act are adequate. Although what we have here are not special regulations for the protection of migrant workers, these general facilities are nevertheless adequate to provide protection.

However, effective protection of migrant workers can be achieved only if the works council also carries out its obligations or pursues the facilities for action provided. For example, the works council can make use of its right of recommendation under paragraph 92 of the Works Constitution Act in order to demand the introduction and implementation of manpower planning which makes due allowance for the special problems of foreign workers. In this context, guidelines should be laid down for personnel policy stating that a certain representative portion of jobs and training posts should be filled by foreigners. Using the ILO Convention No. 111 as a model it could for example further be laid down that, in the selection process, one should stipulate only those job-related qualification requirements that are actually called for by the job. In the case of manpower development planning, it could be agreed as a principle that specific attention be devoted to promoting the participation of foreign employees in in-plant training programmes. These objectives and principles laid down for manpower planning would have to be stipulated in in-plant job descriptions, in the design of personnel questionnaires and in the establishment of general principles of assessment (Bank, 1994, p. 289). Both personnel questionnaires and the

establishment of general principles of assessment are subject to co-determination requirements as laid down in paragraph 94 of the Works Constitution Act.

The worker has no enforceable legal claim against the works council as such, with the exception of claims for damage compensation against individual members of the works council. Consequently, the worker who has suffered discrimination has no right to demand that the works council act or not act in a certain way. We therefore have here a need for an improvement in the legal situation which gives the worker who has been discriminated against the right to demand a certain action or non-action on the part of the works council and which can, where necessary, be enforced with the help of a court injunction.

Mention should also be made of the fact that foreign workers are markedly under-represented in works councils in comparison with German workers. It is therefore necessary to encourage foreigners to stand for such positions, for example by advice, canvassing, etc.

3.7. Legal facilities open to the Commissioner for the Interests of Foreigners

The functions entrusted to the Federal Government Commissioner for the Interests of Foreigners in the field of advice to the Federal Government are necessary but also adequate. Furthermore, her public information work and lecture programme contribute to an enhancement of public awareness about the combat against discrimination. Although the Commissioner for Foreigners has also been entrusted with the task of the direct counselling of victims of discrimination, she is – according to her own statements – lacking the necessary resources to deal systematically with the cases of discrimination brought before her and to take specific steps to combat discrimination in individual cases. Consequently there is an urgent need to augment the budget of the Commissioner for Foreigners so that she can carry out her functions in this area of responsibility.

Furthermore, consideration should be given to whether the Commissioner for Foreigners should not be allocated additional areas of competence such as for example her own powers of complaint, powers of investigation, etc. Since the Commissioner for Foreigners is, however, dependent on the Government, tasks of this type should be transferred to an institution which is independent of Government control.

3.8. Summary

In summary it may be said that although the Basic Law offers comprehensive protection against discrimination from the State's point of view, protection under Civil Law is, however, not adequate. As far as the Works Constitution Act is concerned, and the explicitly specified prohibition of discrimination that its paragraph 75, section 1, contains, it has to be accepted that it holds no provisions on claims for compensation of damages suffered by injured parties who are victims of unlawful discrimination.

In such cases, recourse must be had to the general provisions concerning unlawful actions in the Civil Code. In addition, the legal situation concerning indirect discrimination is also unclear. A similar situation applies to the principle of equality of treatment in labour law. Furthermore, on account of the existing distribution of the burden of proof, there is scarcely any guarantee as to the success of a discrimination claim.

An improvement in the legal situation could be achieved by clear, simple statutory specification of the existing legal situation, that places obligations directly on private employers. Nevertheless, it should not be forgotten here that effective protection of migrant workers against discrimination in employment cannot be achieved solely by an improvement in the legal situation; what is more important is that the enforcement of these rights must be guaranteed. Although discrimination – as has been indicated above – occurs every day in both overt and covert forms at work and in the search for work, we know of scarcely any cases in which the victims have sought assistance from the courts. Consequently further measures are necessary, and these should also be solidly anchored in the law.

Consideration should therefore be given to whether improvement of the legal situation for protecting migrant workers should not, together with the additional measures required, be established in a special Anti-discrimination Act.

4. Comments with respect to an anti-discrimination act

In view of the very limited legal protection that migrant workers have against discrimination, as already shown above, we are confronted with the question as to whether one should not promulgate in the Federal Republic of Germany a special anti-discrimination act as has, for example, been in existence in the United Kingdom since 1965 and which was introduced in the Netherlands in 1994. For some time now in the Federal Republic, there has been discussion about the need for and the opportunity of a special anti-discrimination act. Various parties, the Commissioners for the Interests of Foreigners and Non-governmental Organizations such as, for example, the German Confederation of Trade Unions give their support to the promulgation of an anti-discrimination act.

This chapter looks at the need for an anti-discrimination act and makes proposals on the essential provisions of such an act.

4.1. Need for an anti-discrimination act

From the legal point of view, an anti-discrimination act would create a clear, uniform regulation of ethnic discrimination and, in this way, significantly facilitate the application of the provisions for the judiciary and the administration of justice. It would make a significant contribution to the legal clarity of the provisions governing equality of treatment which once again signifies more effective legal protection of victims of discrimination. Furthermore, the example of the Netherlands has shown that scattering anti-discrimination regulations throughout a variety of legal instruments results in uncertainty in application of the law and consequently provides only limited guarantee of targeted legal protection. As a result of this, a specific and comprehensive anti-discrimination act was promulgated in the Netherlands in July 1994. From the socio-political point of view, the legislator could, with an anti-discrimination law, give proof that with all the resources available to him, he is attempting to prevent discrimination not only on the part of the public authorities but also on the part of third parties subject to the power of the State.

However sceptical one may be about the educational capabilities of the law, the effect of a clear legal decision on the part of the legislator on the legal conscience of the citizen should not be underestimated; only a clear, self-contained law will help to sharpen the citizens' consciousness of injustice. Since numerous countries in the European Community have already promulgated an

anti-discrimination act, the promulgation of such a piece of legislation in the Federal Republic would also be desirable from the point of view of a uniform European standard.

The argument that an anti-discrimination act would promote the development of ethnicization i.e., the formation of ethnic minority groups, fails to recognise the fact that as a result of long-term discrimination, ethnicization of migrant workers has already taken place. An anti-discrimination act would instead promote implementation of the same rights for migrant workers and in this way contribute to the reversal of group formation which is of major significance for the integration of migrant workers. At the same time, this type of act would strengthen the confidence of migrant workers in the power of the State and, in this way, make a not insignificant contribution to integration from this point of view as well. Finally, it should not be forgotten that, by passing an anti-discrimination act, the Federal Republic would be complying with the proposals of the CERD Committee on more effective protection of migrant workers (Banton, 1994, p. 500).

4.2. Proposals on the key points of an anti-discrimination act

This proposal will present the key points that should be taken up in an anti-discrimination act. The basis for this proposal is the experience of other countries with similar legislation; at the same time, the obligations implied by the ratification of the CERD and ILO Conventions are taken into account.

4.2.1. Scope of protection

The scope of the protection offered by the anti-discrimination act should extend to both migrant workers and to other underprivileged groups since, in principle, we should combat all forms of discrimination with a uniform legislative concept. In addition, experience in other countries indicates that there is higher public acceptance and support if a link is established with protection for other underprivileged groups such as for example women. In addition, what has already been achieved in obtaining equality for “established” underprivileged groups could have a dynamising effect through the transfer of tried and trusted strategies, concepts and effective rights to politically weaker minorities. Linking anti-discrimination policy for ethnic minorities and migrants to that for stronger groups, in particular to that for equality for women, could promote the enforcement of anti-discrimination policy and reduce resistance.

In order to arrive at a uniform regulation of unlawful discrimination, all minority groups should be covered by the prohibition of discrimination stipulated within this act – as has already been done in the Netherlands anti-discrimination act. This means that the prohibition of discrimination should relate to ethnic origin, nationality, creed, convictions, political opinion, sex, sexual preference and family status. Furthermore, it should also extend to discrimination against the disabled.

Even though the anti-discrimination act should relate to the protection of a variety of underprivileged groups, the following paragraphs will, in view of the subject of this study, deal only with those points which are necessary in the anti-discrimination act for the protection of migrant workers.

4.2.2. Definition of the concept of discrimination

Discrimination should be defined as any prejudicial treatment which is based directly or indirectly on the above-mentioned characteristics. The result should be an explicit definition along these

lines. As far as the application of the act is concerned, it is of key importance that both direct and indirect discrimination be explicitly forbidden. In the same way, there should be an explicit distinction made between direct and indirect discrimination.

4.2.3. Scope of application

The act's scope of application should extend to all discrimination in the political, economic, social, cultural and any other area of public life. Using as a model the Race Relations Act in the United Kingdom, it should also be declared unlawful to exert pressure for the purposes of such discrimination and to support third parties in such discrimination. Furthermore, the act should contain specific exceptions for which unequal treatment may be considered justified in order to establish legal clarity in relation to lawful forms of discrimination. This is in line with Convention No. 111 of the International Labour Organization within which any distinction, exclusion or preference in respect of a particular job based on the inherent requirements thereof shall not be deemed to be discrimination. Cases that may be considered as exceptions here are when membership of a specific group constitutes a true professional qualification for a specific job. As far as the structure of the act is concerned, it would be desirable to draw up a general clause and then, by means of examples, list the acts of discrimination that occur particularly frequently, together with – in a concluding regulation – the necessary exceptions mentioned above since the effectiveness and enforceability of the law will gain by its specificity.

4.2.4. Positive action

The anti-discrimination act should restrict itself to establishing formal equality before the law and guaranteeing the protection of individual rights. It should, however, contain an opening clause within the meaning of article 1, paragraph 4, of the International Convention on the Elimination of all Forms of Racial Discrimination, which permits specific forms of “positive action” so as to allow members of a particular minority group who are at a disadvantage in employment to compete on equal terms with others. In employment, thought should also be given to a regulation, such as is to be found in the United Kingdom, which allows employers to take steps to encourage members of a particular racial group to be trained for a particular form of work or to give preference to employees from that group in allocating training places, provided that the proportion of the racial group doing such work is under-representative (Zegers de Beijl, 1992, p. 6). Furthermore, trade unions and employers' or professional associations should be allowed to take positive action to ensure that members of all ethnic groups are fully represented at all levels of the organization.

In addition to this, the local authorities should – as in the United Kingdom – be given the responsibility of ensuring that, in carrying out their mission, they take due account of the need to eliminate unlawful racial discrimination and promote equality of opportunity and good relations between persons of different racial groups. The local authorities should be required to ensure that firms that receive contracts from them for the supply of goods or services are employers that operate an equal opportunity policy.

Thought should finally also be given to establishing a legal basis for governmental measures for promoting equality of opportunity. A model for such a regulation in employment would be the Act promulgated in the Netherlands in 1994 for promoting equality of opportunity amongst underprivileged groups in employment. This requires employers with more than 35 employees to ensure that ethnic minorities are not under-represented in their undertakings. To this end, they must draw up a plan which explains clearly how they intend to achieve this objective. Furthermore, they are required to draw up an annual report on their efforts. A breach of this obligation does not entail

any legal consequences, with the exception of the requirement to draw up a report. In order to make this measure even more effective, it would be possible to extend the reporting requirement – as is also laid down in the Netherlands Act for the promotion of equality of opportunity for underprivileged groups in employment – to make it necessary for these reports to be published. The result of this would be that the employers' practices would become public knowledge and, in this way, pressure would be exerted on employers to conform with statutory regulations. The anti-discrimination act should at least give the legislator explicitly the possibility of stipulating measures for implementing "positive action programmes".

It is necessary to refrain from other measures along the lines of "positive discrimination" and in particular the establishment of compulsory quotas under which it is not qualifications which are the determining factor for an appointment but rather the membership of a disadvantaged group, since the State should only create a framework in which ethnic differences can cohabit; it should not however actively contribute to upholding such differences. There is of course validity in the argument that "positive discrimination" does not create ethnicization since ethnicization has already taken place as the result of long-term discrimination. However, it should not be forgotten that the Federal Republic is required to combat everything which promotes ethnicization; "positive discrimination" as a form of group protection and group promotion does not, however, contribute to the reduction of ethnicization; on the contrary it strengthens it. Furthermore, the example of the United States shows that "positive discrimination" intensifies ethnicization and counteracts the integration of minorities protected by "positive discrimination".

Finally, it should not be forgotten that "positive discrimination" is not in accord with the prohibition of differentiation found in article 3, paragraph 3, of the Basic Law and would consequently constitute a breach of the Constitution.

4.2.5. Distribution of the burden of proof

An anti-discrimination act should explicitly stipulate the distribution of the burden of proof along the lines already indicated above, namely that the party discriminated against has only to make credible the unlawful prejudice, whereas where this credibility has been achieved it is the employer who is required to bear the burden of proving that the prejudice is not attributable to ethnic factors or nationality but that it is justified on factual grounds.

4.2.6. Compensation for damage

Furthermore, the legal consequences of unlawful discrimination should be laid down clearly and unequivocally. What come into consideration here are claims for neglect, suppression and compensation for damage which should cover both material and immaterial damage. To ensure that damage compensation for unlawful discrimination is not just of symbolic value, the discriminating party should, as the legal consequence of his action, and as is laid down in the Directive of the Council of the European Commission of 9 February 1976 on the implementation of the principle of equal treatment for men and women, in the event of unlawful discrimination, be required to make a tangible sacrifice which can be enforced by the establishment of a minimum sum for compensation for immaterial damage.

One should not impose a limit on compensation in the form of a stipulated maximum amount, as is provided for in the Netherlands anti-discrimination act and which was also provided for until recently in the United Kingdom, since the damage occasioned by an injury such as discrimination

cannot in principle be limited. Furthermore, this would make it possible for the discriminating party to calculate the legal consequences of unlawful discrimination.

4.2.7. Equal Treatment Commission

Using as a model the Commission for Racial Equality in the United Kingdom and the Commission for Equality of Treatment in the Netherlands, a Commission should be set up which is empowered to advise, investigate and arbitrate in matters of racial discrimination, and its rights and duties should be laid down in the anti-discrimination act. The Commission should have a central administration and a number of branch offices. This body should be financed by the State but it should have the characteristics of a non-governmental organization to ensure its independence.

The competence and powers of such a Commission should include the examination of individual discrimination complaints. In this context, as in the United Kingdom and in the Netherlands, it should lie within the discretion of the Commission to support complainants in the pursuit of their cases when these cases raise fundamental questions or when it may be presumed that the complainants will not pursue their cases without assistance. The forms to be taken by this support should range from advice or the provision of legal assistance from an attorney-at-law through to representing the complaint before the Courts. The importance of such a support task can be seen from a finding of the Commission for Racial Equality in the United Kingdom; according to this, it is virtually impossible for an individual to set in motion and pursue action before the courts without advice and support (R. Zegers de Beijl, 1992, p. 21).

In cases in which it is not an individual that is affected by discrimination but rather where discrimination is directed against a whole group of persons, the Commission should have its own power to lodge a complaint. What we have in mind here is, in particular, cases of discriminatory advertising or incitation or the exertion of pressure to discriminate, together with persistent discrimination. Support and complaint powers such as this are provided for in the 1990 European Council Declaration against racism and xenophobia which proposes to Member States in paragraph 2(e) of the declaration that a suitable measure for combating racism and xenophobia is to provide national institutions dealing with discrimination the right to offer support and their own right of complaint.

An important area of competence for the Commission should be its powers of investigation. These powers should relate to formal investigations of organizations, firms or branches of the economy which are under suspicion of unlawful discrimination. As in the United Kingdom, the right to investigate should be linked to specific conditions so as to minimize interference in non-related spheres of activity. Consequently, prior to each formal investigation, the Commission should be required to precisely specify its remit. Where the investigation relates to named persons, or named firms, then these must be informed of the intended investigation. Furthermore, the person or firm under suspicion must be given the opportunity to express himself before the investigation starts. In the case of a general investigation which does not involve the activities of an individual person, then the investigation can be the subject of a general notification for example by a newspaper announcement.

Where discrimination has been proved, consideration should be given, as the legal consequence, to the issue of a non-discrimination order. This non-discrimination order should instruct the firm or person that has been investigated to refrain from the discriminating practices and to provide, by a specified date, proof that the instructions of the Commission have been implemented. The recipient of this type of non-discrimination order must be given the right to appeal to the

Commission against the instructions contained in the order with the justifications that, as result of incorrect findings, the order is ineffective or that the instructions are impracticable.

If the period specified for an objection has run out without an objection being made or if the objection submitted by the recipient of the non-discrimination order has been withdrawn or if it has been refused by the Commission, then the order will finally become effective. If, in spite of the order being effective, the discrimination continues, then the Commission must be given the right to call on the labour courts or the civil courts to give a judgment on the cessation of discrimination and, in the case of non-compliance – similar to the requirements of paragraph 890 of the ZPO – require the perpetrator of the discrimination to pay a fine or be placed in detention. Powers of investigation such as these, including the right to issue a non-discrimination order with the legal consequences as previously described, are essential since the Commission is closer involved in discrimination cases than are the courts and this also offers the possibility of an out-of-court settlement which would mean a reduction of the burden on the courts.

In addition to these functions, the Commission should also have the responsibility of issuing codes of good practice for employment matters. The object of these would be to offer employers and other circles a practical guide for an understanding of the anti-discrimination act. In addition, the codes should propose measures for the elimination of racial discrimination and the promotion of equality of opportunity in employment. Although these codes of good practice would not have any binding force, they should, nevertheless, as is the case in the United Kingdom and in the Netherlands, be considered permissible evidence in cases before the Courts.

4.2.8. Further functions of the Commission

In addition, the public information work together with research and educational activities contained in the anti-discrimination act should be transferred to the Commission. As far as the educational activities are concerned, thought should be given in particular to instruction within undertakings and also to training programmes for lawyers about the act and discrimination in general.

4.2.9. Responsibilities with respect to dissemination

The effectiveness of an anti-discrimination act of this sort would be further reinforced if both boroughs and undertakings were made responsible for disseminating the text of the act and the major commentaries on the act.

5. Conclusions

The first part of the study has shown that the Federal Republic of Germany has, in addition to the European Community Treaty, ratified international conventions for the protection of migrant workers against discrimination. As a result of this, the Federal Republic has, inter alia, assumed the responsibility of taking all necessary legal measures for combating discrimination. The Federal German Basic Law and various other items of legislation contain clauses which may be called upon to protect migrant workers against discrimination in employment.

The second part of the study shows, however, that these standards, especially in private law, are incomplete and consequently do not guarantee any real protection. Moreover, under Federal German law, access to the courts in cases of discrimination is complicated by the regulations on

the burden of proof, since, in view of these regulations, it is scarcely possible for the victim of discrimination to prove the discrimination he has suffered. Consequently there is an urgent need for an improvement in the legal situation for the protection of migrant workers. This improvement in the legal situation could be achieved by a simple legislative specification of the legal situation.

The last part of the study demonstrates however that the promulgation of a self-contained legislative instrument would bring about a significantly improved protection of migrant workers against discrimination; it also puts forward the need for an anti-discrimination act of this type and enumerates the key points which should be contained in such legislation. Admittedly, an anti-discrimination act alone would not put a halt to discrimination; what is needed more here is a process of heightening the awareness of the population as a whole. Nevertheless, the argument that discrimination is a social and not a legal problem should not condemn the legislator to a passive role. Rather, the task for the legislator is to opt for a clear legal regulation for the fight against discrimination.

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