

# **ECRI REPORT ON SWITZERLAND**

**(fifth monitoring cycle)**

Adopted on 19 June 2014

Published on 16 September 2014

COUNCIL OF EUROPE



CONSEIL DE L'EUROPE

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## FOREWORD

The European Commission against Racism and Intolerance (ECRI), established by the Council of Europe, is an independent human rights monitoring body specialised in questions relating to racism and intolerance. It is composed of independent and impartial members appointed on the basis of their moral authority and recognised expertise in dealing with racism, xenophobia, anti-Semitism and intolerance.

In the framework of its statutory activities, ECRI conducts country-by-country monitoring work, which analyses the situation in each of the member States regarding racism and intolerance and draws up suggestions and proposals for dealing with the problems identified.

ECRI's country-by-country monitoring deals with all member States of the Council of Europe on an equal footing. The work takes place in 5-year cycles, covering 9-10 countries per year. The reports of the first round were completed at the end of 1998, those of the second round at the end of 2002 and those of the third round at the end of 2007, and those of the fourth round will be completed at the beginning of 2014. Work on the fifth round reports started in November 2012.

The working methods for the preparation of the reports involve documentary analyses, a visit to the country concerned, and then a confidential dialogue with the national authorities.

ECRI's reports are not the result of inquiries or testimonial evidence. They are analyses based on a great deal of information gathered from a wide variety of sources. Documentary studies are based on a large number of national and international written sources. The in situ visit provides the opportunity to meet with the parties directly concerned (both governmental and non-governmental) with a view to gathering detailed information. The process of confidential dialogue with the national authorities allows the latter to provide, if they consider it necessary, comments on the draft report, with a view to correcting any possible factual errors which the report might contain. At the end of the dialogue, the national authorities may request, if they so wish, that their viewpoints be appended to the final ECRI report.

The fifth round country-by-country reports focus on four topics common to all member States: (1) Legislative issues, (2) Hate speech, (3) Violence, (4) Integration policies and a number of topics specific to each one of them. The fourth-cycle interim recommendations not implemented or partially implemented during the fourth monitoring cycle will be followed up in this connection.

In the framework of the fifth cycle, priority implementation is requested again for two specific recommendations chosen from those made in the report. A process of interim follow-up for these two recommendations will be conducted by ECRI no later than two years following the publication of this report.

**The following report was drawn up by ECRI under its own responsibility. It covers the situation at 20 March 2014 developments since that date are neither covered in the following analysis nor taken into account in the conclusions and proposals therein.**





## SUMMARY

**Since the adoption of ECRI's fourth report on Switzerland on 2 April 2009, progress has been made in a number of areas.**

With the conclusion of Cantonal Integration Programmes (CIPs), the Confederation and the cantons have strengthened their action to achieve good integration of persons from migrant backgrounds. The cantons have acknowledged the importance of early schooling and the majority of them are in the process of lowering the compulsory school age to 4 years. A system of indicators to measure progress made with integration is currently being developed.

There is extensive support for Article 261bis of the Criminal Code (CC) on combating racism and racial discrimination: more than a dozen initiatives to have it abolished have failed. With regard to public and private law, Parliament has asked the government to prepare a comparative study on the right to protection from discrimination. New Ombudsmen and the Swiss Centre for Human Rights shall contribute to the fight against racism and intolerance. The awareness-raising work carried out by the Zurich Ombudswoman has made "racial profiling" a familiar term – referring to the discriminatory conduct of an authority, in particular the police, based on criteria as the colour of a person's skin. The training of police cadets on human rights has been improved. In the CIPs, the cantons have undertaken to offer any victim of racial discrimination qualified counselling and support.

The Federal Supreme Court has ruled that freedom of expression must not be given such importance that it "completely voids the efforts to fight racial discrimination". Several media concerns have adopted self-regulation measures to combat hate speech on their websites. Under public pressure, some politicians have had to resign following racist comments they had made. The level of racist, homophobic and transphobic violence remains relatively low. Several cantons and municipalities have created support bodies for Lesbian, Gay, Bisexual and Transgender (LGBT) persons. They have also adopted measures to deal with questions of sexual orientation and gender identity, particularly at school.

**ECRI welcomes these positive developments in Switzerland. However, despite the progress achieved, some issues continue to give rise to concern.**

Following continuing negative trends in political discourse, Black people, the Yenish and other Roma groups perceive a considerable deterioration of their image and living conditions. Refugees, cross-border workers and LGBT persons are also the target for xenophobic, homophobic and transphobic discourse. These same groups are faced with considerable discrimination, for example on the labour market. The Black community lives in fear of being subject, as a result of racial profiling, to police controls including public arrest, being made to undress and subject to body searches for drugs.

Switzerland still does neither have comprehensive and effective legislation to combat racism, homophobia and transphobia, nor easily accessible judicial procedures. The police does not systematically register offences having a racist, homophobic or transphobic motivation. The Federal Commission against Racism (CFR) has still not been given the key power of being able to hear and consider complaints of racism. At the same time, it suffers from a lack of independence. It is only Geneva, Vaud and Zurich that have appointed authorities tasked with promoting and protecting the rights of LGBT persons.

Too few children from migrant backgrounds attend pre-school education. Migrants having a low level of education and having to cope with multiple social problems lack assistance in achieving the objectives laid down in the integration agreements. It is also difficult for them to acquire the level of proficiency in one of the national languages required by the legislation on foreign nationals. Refusals to grant residence permits

are, in general, not subject to any review by the courts. Certain humanitarian migrant groups have to pay a discriminatory tax on their income. The situation concerning encampment sites for Travellers has not improved.

Young LGBT persons are often the victims of verbal aggression at school and few are able to count on the support of their family or friends. Many experts working with young people have little knowledge of the situation of young LGBT persons and the risk factors to which they are exposed when they “come out”.

**In this report ECRI requests that the Swiss authorities take further action in a number of areas; it issues a series of recommendations, including the following.**

The authorities should, in civil and administrative law, adopt comprehensive legislation to combat discrimination based on the criteria of race, sexual orientation and gender identity. They should include these last two criteria in Article 261bis CC, and should fill other gaps in the protection afforded by criminal law. The authorities should also adopt legislation to ensure that any police constraint is conditional on there being a reasonable suspicion. The system of police recording and following up of racist, homophobic or transphobic incidents should be improved and a police department should be tasked with actively combating hate speech on the Internet.

The Swiss authorities should consolidate the independence of the CFR, which should be assigned the competencies of providing legal aid and assistance to victims, hearing and considering complaints and seeking settlements.\* The authorities should bring international recommendations to the attention of politicians to avoid xenophobia in political discourse. The prosecution services should resolutely prosecute any statement by politicians that comes under Article 261bis CC. The authorities should rethink the way in which statistics on asylum and crime by foreigners are presented and develop an action plan to tackle the reflexes that can lead to media coverage stigmatising vulnerable groups, such as the Roma and people of colour.

The authorities should ensure that migrants with a low level of education are given speedier and more effective assistance with integration, and broaden the Federal Supreme Court's powers of judicial review under the legislation relating to foreign nationals. They should make better use of the new indicators to measure the extent to which integration objectives have been achieved, especially with regard to the participation rate in pre-school education. The special tax for humanitarian migrants should be abolished and the encampment area needs of Travellers should be satisfied as a matter of urgency.

The authorities should task an authority to promote understanding of LGBT persons and combat discrimination against them throughout Switzerland.\* LGBT adolescents should be given the necessary information, assistance and protection to enable them to live in accordance with their sexual orientation or gender identity.

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\* This recommendation will be subject to a process of interim follow-up by ECRI no later than two years after the publication of this report.

## FINDINGS AND RECOMMENDATIONS

### I. Common topics

#### 1. Legislation to combat racism<sup>1</sup> and racial discrimination

##### - Protocol No. 12 to the European Convention on Human Rights (ECHR)

1. Switzerland has not ratified Protocol No. 12. The authorities still consider that its impact remains hard to assess, in particular with regard to its scope, the margin of appreciation left to states, possible horizontal effects and possible positive obligations to legislate.<sup>2</sup>
2. However, ECRI considers ratification of this instrument, which provides for a general prohibition of discrimination, to be vital in combating racism and racial discrimination. The European Court of Human Rights has again pointed out that the notion of discrimination in Article 1 of the Protocol and Article 14 of the ECHR is interpreted consistently.<sup>3</sup> ECRI moreover reiterates its recommendation that the Swiss authorities should enact comprehensive legislation against racial discrimination (§ 12 of this report). Such legislation, drawing on ECRI's General Policy Recommendation (GPR) No. 7 on national legislation to combat racism and racial discrimination, would facilitate ratification of the protocol by Switzerland.
3. ECRI reiterates its recommendation that Switzerland ratify Protocol No. 12 to the European Convention on Human Rights.

##### - Criminal law

4. Article 261bis of the Criminal Code (CC) was put to a popular vote in 1994 and adopted with 54.6% of the votes cast. ECRI notes that there have been more than a dozen failed initiatives to abolish it.<sup>4</sup> It welcomes the fact that this article therefore still commands the necessary support. While bearing in mind this political context, it encourages the authorities to take advantage of any opportunities to enhance even further the protection against racism afforded by criminal law.
5. ECRI has been informed that the three grounds – race, ethnic origin and religion - on which "racial discrimination" constitutes an offence under Article 261bis CC are too often narrowly interpreted. Cases involving discrimination on account of colour or nationality, in particular, are dropped.<sup>5</sup> ECRI consequently refers to § 18 of its GPR No. 7 requiring that the grounds of colour, language and nationality should also be included in criminal law provisions. Inciting violence and making threats on racist grounds are not expressly qualified as offences (§ 18 a and c of GPR No. 7).<sup>6</sup> Defamation and public insults (§ 18 b of GPR No. 7) against groups such as foreigners or asylum seekers are not penalised.<sup>7</sup>

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<sup>1</sup> In accordance with ECRI's General Policy Recommendation (GPR) No. 7, "racism" is understood to mean the belief that a ground such as race, colour, language, religion, nationality or national or ethnic origin justifies contempt for a person or a group of persons. "Racial discrimination" is understood to mean any differential treatment based on a ground such as "race", colour, language, religion, nationality or national or ethnic origin, which has no objective and reasonable justification.

<sup>2</sup> Swiss Federal Council 2013d: 1930.

<sup>3</sup> *Maktouf and Damjanović v. Bosnia and Herzegovina*, Nos. 2312/08 and 34179/08, 18 July 2013, § 81; see also the explanatory report to Protocol No. 12, in particular §§ 24-28.

<sup>4</sup> Swiss Centre of Expertise in Human Rights (SCHR) 2013a: §§ 52 et seq.

<sup>5</sup> Federal Commission against Racism (CFR) 2010a: 31 and 65; SCHR 2013a: §§ 63 and 75; public prosecution service of the canton of Bern, 17.10.2011 – BM 11 35647/P36 concerning the picture of a person of colour; Federal Supreme Court (TF) 6B\_715/2012, 06.02.2014 concerning nationality/foreigners.

<sup>6</sup> Such acts are nonetheless covered by Articles 259.2 and 180 CC.

<sup>7</sup> See the citations in footnote 5. Concerning homosexual persons see TF 6B\_361/2010, 1.11.2010.

Public denial of war crimes is not covered by Article 261bis 4 CC. Production or storage, with a racist aim, of written, pictorial or other materials (§ 18 f of GPR No. 7) and creation or leadership of a group which promotes racism, support for such a group and participation in its activities for the purposes set out in § 18 g of GPR No. 7 are not criminal offences.<sup>8</sup> Nor does the Criminal Code provide that any racial discrimination in the exercise of a public office or an occupation shall constitute an offence (§ 18 h of GPR No. 7); it solely prohibits public discrimination. Under Article 102 CC, contrary to the requirements of § 22 of GPR No. 7, a company or other undertaking is to be held responsible for an offence only if it cannot be attributed to a natural person on account of organisational shortcomings within the undertaking. Article 47 CC makes it possible to take account of a racist motivation when determining the penalty for an offence, but does not expressly provide that it constitutes an aggravating circumstance (§ 21 of GPR No. 7).

6. ECRI recommends that the Swiss authorities seize all opportunities to bring the Criminal Code into line with its General Policy Recommendation No. 7 and in particular (i) include the grounds of colour, language and nationality in Article 261bis of the Criminal Code, (ii) penalise insults against or public defamation of a group of persons on the grounds cited, (iii) penalise the production and storage, with a racist aim, of written, pictorial or other materials, (iv) prohibit the creation, leadership and support of a group which promotes racism, and participation in its activities, and (v) make express provision that a racist motivation shall constitute an aggravating circumstance for all offences.

- **Civil and administrative law**

7. ECRI regrets to have to find that, since the publication of its fourth report, scant progress has been made towards the adoption of comprehensive anti-discrimination legislation. A number of initiatives for the adoption of such legislation have failed, and the Legal Affairs Committee of the National Council (the lower house of the Federal Parliament)<sup>9</sup> considered, in 2011, that the existing provisions allow victims of racial discrimination to defend themselves.

8. It is true that Article 8.2 of the Federal Constitution prohibits discrimination in particular on grounds of origin, race, gender, language, way of life or religious, ideological or political convictions, or because of a physical, mental or psychological disability. Under Article 35.2, all authorities and all public employees are required to respect this fundamental right and to contribute to its implementation. It follows from Article 35.1 and 3 that the constitutional prohibition on discrimination applies throughout the legal system, but only indirectly extends to relationships between natural persons. For this reason the courts and legal doctrine seek to enforce this prohibition via an interpretation of certain general legal provisions, such as those concerning illegal infringement of personality (Article 28 of the Civil Code), good faith (Article 2) and the obligation under labour law to protect and respect an employee's personality (Article 328 of the Code of Obligations).<sup>10</sup>

9. ECRI has however been informed of many deficiencies in the protection thus afforded against discrimination between individuals. Mention must be made, in particular, of the vague and non-dissuasive nature of these general provisions,

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<sup>8</sup> SCHR 2013a: § 62. Following the tabling of a motion in 2005, the Federal Council (government) brought a bill before Parliament with the aim of penalising the public use of symbols glorifying extremist movements that encourage acts of violence and racial discrimination. Following the results of the consultation procedure, Parliament decided to abandon the motion in 2010, Swiss Confederation 2012a: § 140.

<sup>9</sup> National Council 2011: 2 and 2009: 2. Cf. §§ 29-41 of the 4th report on Switzerland.

<sup>10</sup> CFR 2010a: 18-22.

the burden of proof, the duration and cost of proceedings, the legal system's complexity, victims' fears and lack of information and the inadequacies of the counselling bodies.<sup>11</sup> The measures taken by the authorities to overcome these shortcomings<sup>12</sup> have not led to a satisfactory degree of protection of victims, including through lawful compensation, or at least to an increase in the number of legal actions brought.

10. ECRI considers that the Swiss legal system's effectiveness would be enhanced if Swiss private and administrative law clearly defined and expressly prohibited direct and indirect racial discrimination. This prohibition should apply to all public authorities and all natural and legal persons, whether active in the public or the private sector. It should encompass in particular the fields of employment, housing, goods and services intended for the public and access to public places. The law should also guarantee easier access to the courts and provide for lightening of the burden of proof in certain cases. The penalties should include the payment of compensation in respect of material and moral damages (§§ 4-15 of GPR No. 7). Concerning the recommendation that undertakings which have breached the prohibition on discrimination should be sanctioned when public procurement contracts are awarded (§ 9 of GPR No.7), only two cantons seem to provide for such measures.<sup>13</sup> Nor does Swiss law contain an obligation to withdraw public funding from organisations that foster racism.<sup>14</sup>
11. ECRI welcomes the fact that the Swiss parliament has passed specific legislation prohibiting discrimination based on gender or disability and has considered that this legislation does not unduly restrict contractual freedom.<sup>15</sup> It encourages the adoption of a similar approach in the case of racial discrimination.<sup>16</sup> At the same time, it notes with satisfaction that the National Council has asked the government to prepare a comparative study on the right to protection from discrimination.<sup>17</sup>
12. ECRI again recommends that the Swiss authorities reinforce the civil and administrative law provisions on the protection of victims of racial discrimination by adopting comprehensive legislation to combat racism and racial discrimination in all key fields of life. In this connection, it refers to §§ 4-17 of its General Policy Recommendation No. 7.

#### - **Independent authorities**

13. The Federal Commission against Racism (CFR), which was founded in 1995 by a government decision, is competent for dealing with discrimination based on racial, ethnic and cultural criteria. Its role is to promote understanding between persons of different race, colour, origin, religion or ethnic or national background, combat all forms of discrimination and guarantee effective prevention. Despite a revision of its statute in 2013, the Commission still suffers from a lack of independence: its terms of reference are not set out in a constitutional or other

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<sup>11</sup> CFR 2010a: 49 et seq.; SCHR 2013a: § 77.

<sup>12</sup> See, in particular, the legal guide published in 2010 by the Federal Service for Combating Racism (SLR), the training measures proposed by the SLR and the work done by the counselling bodies.

<sup>13</sup> CFR 2010: 63.

<sup>14</sup> § 16 of GPR No. 7; for more details see Group of States against Corruption (GRECO) 2013.

<sup>15</sup> The Legal Affairs Committee of Parliament took the view that a specific law prohibiting racial discrimination would undermine the principle of contractual freedom to too great an extent, National Council 2011: 2.

<sup>16</sup> Along similar lines United Nations 2012b: §§ 123.27 et seq; CERD 2008: § 9 et seq; Council of Europe Commissioner for Human Rights (CommDH) 2013, Appendix: § 4; SCHR 2013a: § 113; CFR 2010: 57, 60 et seq. – Concerning international standards in these matters see ECRI's GPR No.7, the European Union's directives and framework decision (not applicable in Switzerland) and Article 2.1.d of the International Convention on the Elimination of All Forms of Racial Discrimination.

<sup>17</sup> Federal Council, Postulate No. 12.3543.

legislative instrument (Principle 1 of General Policy Recommendation No. 2 on specialised bodies to combat racism) and the independence of its members is not sufficiently guaranteed.<sup>18</sup> The Commission does not have sufficient protection against state interference: at the beginning of each legislature, it is required to transmit its work programme to the Federal Department of the Interior (DFI), for information, and its news releases, position statements, recommendations and requests are to be communicated to the DFI before they are made public. The Commission's secretariat is managed by the DFI and has its offices within the department's premises. It is for this reason that the International Coordinating Committee of National Human Rights Institutions downgraded the Commission's accreditation status to level C.<sup>19</sup>

14. ECRI again recommends that the Swiss authorities consolidate the independence of the Federal Commission against Racism, bringing it into line with principles 1 and 5 of General Policy Recommendation No. 2.
15. Among the key functions that should be performed by independent bodies to combat racism,<sup>20</sup> the Commission lacks that of providing (legal) aid and assistance to victims and that of hearing and considering complaints and seeking settlements to them either through amicable conciliation or through binding and enforceable decisions. Nor does it have appropriate powers to obtain evidence and it cannot have recourse to the courts or intervene in judicial proceedings. This makes the situation of victims of racism twice as difficult, since, apart from the lack of appropriate legislation and of easy access to justice, they are also deprived of legal assistance and are unable to lodge a complaint with a specialised body.
16. Apart from the CFR, new bodies with a role in fighting racism and intolerance have been established: (i) ECRI welcomes the creation of new Ombudsman services in a number of cantons and cities. The Ombudsmen can receive requests or complaints against any institution performing a public task, attempt to mediate a solution, make recommendations and give opinions so as to help arrive at a settlement.<sup>21</sup> (ii) Under the Cantonal Integration Programmes (CIP) the cantons are committed to ensuring that anyone discriminated against because of their origin or race will be able to obtain qualified counselling and support.<sup>22</sup> It is for the cantons to establish the competent bodies, some of which could take the form of independent authorities. (iii) In autumn 2010 the federal government mandated four universities to set up the Swiss Centre of Expertise in Human Rights (SCHR). This centre's main objective is to enhance knowledge regarding the protection and development of human rights at the level of the authorities, civil society and businesses. The SCHR will be evaluated after four years so as to decide on its future and on whether to establish a national human rights institution to assist victims of racism and discrimination.<sup>23</sup>
17. ECRI welcomes these initiatives, which show a willingness on the part of the authorities to improve the protection afforded to victims of racism. At the same time, it notes that the possibility of complaining about racism or discrimination to an independent institution exists only in the cantons and cities that have appointed an Ombudsman and that it is confined to the public law field alone.

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<sup>18</sup> Articles 8a-8i of the Order on Organisation of the Government and the Administration do not require its members to be independent and do not lay down appropriate safeguards against arbitrary non-renewal of their appointments.

<sup>19</sup> ICC 2013. Only one other European country's institutions have been classified at this level.

<sup>20</sup> The CFR carries on the functions listed in Principle 3 a, c, h, k, l, m and, in part, b of GPR No. 2.

<sup>21</sup> <http://ombudsman-ch.ch> brings together the Ombudsmen of five cantons and five cities.

<sup>22</sup> Swiss Confederation 2013b: 1st part, p. 4. The content of the CIPs is described in §§ 44 et seq.

<sup>23</sup> Swiss Confederation et al. 2011: §§ 3.1 and 7.

Though, ECRI considers that these protection mechanisms should also cover the field of private law and be available throughout Switzerland.<sup>24</sup> Therefore, the CFR's competence should be broadened.

18. ECRI again recommends that the Swiss authorities confer on the Federal Commission against Racism functions and responsibilities for (i) providing aid and assistance to victims, including legal assistance, so they can assert their rights with the authorities and the courts, (ii) receiving complaints and seeking settlements either through amicable conciliation or through binding and enforceable decisions, (iii) gathering evidence and information and (iv) having recourse to the courts and intervening in judicial proceedings (Principle 3 of General Policy Recommendation No. 2).<sup>25</sup>

## 2. Hate speech<sup>26</sup>

19. An idea of the extent to which hate speech is in use in Switzerland can be obtained by referring to police and civil society statistics. In 2012 the police recorded 181 offences under Article 261bis CC (compared with 169 in 2011) and 7 cases under other articles (2 in 2011). For these other articles of the CC a racist motive is not yet systematically recorded. In 2011, the Federal Commission against Racism recorded 14 court cases involving Article 261bis (32 cases in 2010),<sup>27</sup> but it considers that it was not informed of all such cases. The counselling network for victims of racism assumes that the racist incidents which are never included in the statistics greatly out-number those that come to its knowledge. People of colour continue to report many cases.<sup>28</sup> No statistics exist on homophobic or transphobic hate speech.<sup>29</sup>

### - Racism in political discourse

20. In its 4th report ECRI expressed deep concern at developments in the tone of political discourse in Switzerland and recommended that the Swiss authorities urgently reinforce their efforts to combat this racism. Following the adoption, with a score of 57.5%, of the popular initiative on inclusion of a ban on construction of minarets in the Federal Constitution,<sup>30</sup> ECRI reiterated its grave concerns on this subject. During its fifth visit to Switzerland, ECRI could but note the extremely harmful consequences of this trend: Muslims,<sup>31</sup> Black people, the Yenish and the Roma<sup>32</sup> perceive a considerable deterioration of their situation and of the political

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<sup>24</sup> See SCHR 2013b: §§ 174 et seq.

<sup>25</sup> See also §§ 25, 50 et seq. of GPR No. 7.

<sup>26</sup> This part of the report covers racist and homophobic/transphobic speech. For a definition of "hate speech", see Recommendation No. R (97) 20 of the Committee of Ministers, adopted on 30 October 1997.

<sup>27</sup> The figures for 2012 have not yet been published.

<sup>28</sup> Humanrights.ch and CFR 2013: 9. The counselling network for victims of racism includes eleven specialist services offering consultations for victims of racial discrimination. It was set up by the NGO humanrights.ch and the CFR. In 2012, it recorded 196 cases (2011: 156 cases recorded by 10 centres), including 66 cases of racist remarks; 18 cases involving racist bodily or facial gestures or sounds; 17 cases of racist propaganda; 13 cases of defamation and 11 cases of harassment. For a full description of the available data see SLR 2013: 22 et seq.

<sup>29</sup> ODIHR 2012; Recher 2011: § 1.

<sup>30</sup> See §§ 88 et seq. of the 4th report and ECRI's Statement of 1.12.2009.

<sup>31</sup> A popular initiative to ban wearing of full-face veils in public places was adopted with a score of 65.4% in the canton of Ticino, whereas very few women in this canton wear burkas, "Starkes Votum gegen verhüllte Gesichter", Neue Zürcher Zeitung, 23.9.2013.

<sup>32</sup> The term "Roma" used at the Council of Europe refers to Roma, Sinti, (Manouche), Kale (Gitan) and related groups in Europe, including Travellers and the Eastern groups (Dom and Lom), and covers the wide diversity of the groups concerned, including persons who identify themselves as "Gypsies". Cf. also ECRI's GPR No. 13 on combating anti-Gypsyism and discrimination against Roma. Concerning the terminology used in Switzerland cf. CFR 2012a: 21 et seq.

climate. Refugees,<sup>33</sup> cross-border workers and lesbian, gay, bisexual and transgender (LGBT) persons are also the targets of hate speech. In particular, the Democratic Union of the Centre (UDC) party, which remains the largest at federal level (scoring 26.6% of the vote in 2011), has continued to use extremely intolerant images and language<sup>34</sup> in connection with its recent popular initiatives "For the expulsion of foreign criminals" (approved by 52.9% of voters in 2010), "Against mass immigration" (adopted on 9 February 2014 by 50,3 % of the voters) and "For the effective expulsion of foreign criminals" (lodged in 2013).

21. ECRI notes that the cantonal prosecution services regularly receive complaints concerning these racist political messages.<sup>35</sup> In 2012 at least seven investigation procedures were opened against politicians. In this context ECRI welcomes the fact that, like the European Court of Human Rights, the Federal Supreme Court has ruled that, in a democracy, it is essential to be able to defend points of view that are displeasing for a majority or that many people find shocking; conversely, freedom of expression must not be given such importance that it completely voids the efforts to fight racial discrimination.<sup>36</sup> In the light of these principles, ECRI considers that the investigation procedures do not always have an appropriate outcome: a number of cases of clear incitement to hatred have been dropped.<sup>37</sup> One case was initially affected by an avoidable dispute over territorial jurisdiction between two prosecution services, before being dropped by the competent prosecution service. The Bern Supreme Court then had to order the prosecutor to initiate proceedings, but the defendant's immunity was not waived.<sup>38</sup>
22. ECRI considers that the authorities, in particular the prosecution services, should adopt a zero tolerance attitude in respect of all racist statements by politicians, since their exemplary role and widespread media coverage multiply their impact. The more freedom politicians are given to make racist statements with impunity, the fewer scruples members of the general public will have about making racist comments.<sup>39</sup>
23. ECRI recommends that the public prosecution services should take firm action in the event of any statement by a politician that comes under Article 261bis of the Criminal Code, making use of all the interpretation possibilities opened up by the Federal Supreme Court. It also recommends that the authorities ensure that the immunity of politicians using racist discourse is lifted.
24. In 2009, 40 people complained following the publication by the Young UDC movement in the Valais of a press release entitled "No to normalisation of

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<sup>33</sup> In 2012, in connection with its popular initiative on asylum, the UDC brought out a poster showing, without the photographer's permission, an image of a lorry overloaded with Black people accompanied by the text "They are coming! There are more and more of them. Most of them have no chance of obtaining asylum. Yet, virtually all of them will remain here, and they are costing us millions."

<sup>34</sup> It used posters showing a sinister-looking bearded man with the slogan "Ivan S., rapist and soon a Swiss national?", pictures of Osama Bin Laden on a Swiss identity card or minarets transformed into missiles. With regard to the successful use of provocative messages by the UDC, see the study cited in "How a far-right party came to dominate Swiss politics", *The Local*, 7.10.2011.

<sup>35</sup> The CFR recorded 41 procedures and 15 convictions between 1995 and 2011.

<sup>36</sup> ATF 6B 664/2008, 27 April 2009, C 3.1.2.

<sup>37</sup> See for example footnote 38 and the decision of the Bern cantonal prosecution service, BM 11 35647/P36 of 17.10.2011 concerning a poster showing a person of colour lying in a hammock with the slogan "No naturalisation of criminals and welfare recipients!". The prosecution service considered that the poster did not affect a specific group of persons, although the skin colour used conveyed an openly racist message. See the recommendation made in § 6 of this report.

<sup>38</sup> Federal Criminal Court BG.2012.26, 25.9.2012; Bern Supreme Court, BK 12 376 HAA, 6.5.2013. The National Council also refused to waive the immunity of one of its UDC members, who made the following statement during a televised debate: "It is in point of fact the young North-Africans from Tunisia who arrive as asylum-seekers but nurture criminal intentions. They don't care whether they receive emergency aid or welfare benefits."

<sup>39</sup> See CFR 2012c: 2.



homosexuality!" condemning it as "deviant behaviour". The Federal Supreme Court decided that the investigating judge had rightly refused to open an investigation, as defamation offences had to be targeted against a specifically identified or identifiable person.<sup>40</sup> With a view to avoiding such impunity, ECRI refers to the recommendations made in §§ 6 and 79 of this report that insults against a group of persons should be punishable and that sexual orientation should be included under Article 261bis CC.<sup>41</sup>

25. In 2012 the Council of Europe Commissioner for Human Rights stated that certain of the popular initiatives referred to above raised serious issues of compatibility with the European Convention on Human Rights.<sup>42</sup> In March 2013 the Federal Council proposed, firstly, that popular initiatives' compatibility with international law should be examined even before the collection of signatures and, secondly, that the federal Parliament should invalidate not only those that violated peremptory norms of international law, but also those that were incompatible with the essence of fundamental constitutional rights. A little under half of the participants in the public consultation rejected both proposals. ECRI regrets that the Federal Council intends to abandon these initiatives.<sup>43</sup>
26. In this context ECRI would draw the authorities' attention to a recent decision by the Federal Supreme Court whereby a partial revision of the Constitution must not violate mandatory provisions of international law (Article 194 of the Federal Constitution). According to this judgment, international provisions for the protection of human rights, such as those of the European Convention on Human Rights, take precedence over national legislation, with the result that national law must not be applied.<sup>44</sup> In view of the extremely harmful impact of the campaigns preceding the above-mentioned referendums and given that the Federal Supreme Court has made it clear that it will verify the conformity of the proposals adopted with public international law, ECRI considers that the Swiss authorities should re-examine the possibilities of introducing a prior screening system.
27. ECRI recommends that the Swiss authorities draw the attention of political decision-makers to the principles and recommendations laid down in the Charter of European Political Parties for a Non-Racist Society and in ECRI's Declaration on the Use of Racist, Antisemitic and Xenophobic Elements in Political Discourse. It also recommends that they re-examine the possibility of introducing a system of prior screening of the draft texts of popular initiatives so as to verify their conformity with international law and thereby avoid racist and discriminatory campaigns.
28. Xenophobia in respect of various refugee groups, in particular people of colour, has also been fed by a number of statistical effects: according to official figures, of the 80 454 persons falling under asylum legislation in 2012, 28 110 had recognised refugee status.<sup>45</sup> Often, persons admitted on a temporary basis (22 625 in 2012) are portrayed as failed asylum seekers, although many of them have subsidiary protection provided by the European Convention on Human

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<sup>40</sup> Federal Supreme Court 6B\_361/2010, 1.11.2010.

<sup>41</sup> See parliamentary initiative No. 13.407 of 07.03.2013.

<sup>42</sup> CommDH 2012: §§ 6 et seq. Regarding expulsion of foreigners, a number of violations of the European Convention on Human Rights by Switzerland have been found: Udeh v. Switzerland No. 12020/09, 16.4.2013; Hasanbasic v. Switzerland, No. 52166/09, 11.6.2013; Polidario v. Switzerland, No. 33169/10, 30.7.2013.

<sup>43</sup> Federal Council 2013c.

<sup>44</sup> Federal Supreme Court, 2C\_828/2011, 12.10.2012, ATF 139 I, 16, 28 et seq. concerning changes to the Federal Constitution adopted by the popular vote "For the expulsion of foreign criminals".

<sup>45</sup> Swiss Confederation, Federal Office for Migration (OFM) 2012: 9.

Rights.<sup>46</sup> The 9 688 persons who arrived from a "safe" third country which must deal with their application are also included in the failed asylum seekers statistic. Lastly, the practice of giving priority to the processing of asylum applications with little prospect of success has helped to bring about a fall in the official recognition rate from 21.0% in 2011 to 11.7% in 2012. These figures could lead to populist theories concerning the abuse of asylum procedures in Switzerland. The same applies to the crime rate for foreigners in Switzerland, since the law-abiding nature of the vast majority of foreigners, of all origins, is not reflected in public debate.<sup>47</sup>

29. ECRI recommends that the authorities rethink the way in which statistical data on asylum and crime by foreigners are selected and presented so as to avoid a situation where such data help to form a false impression in public opinion.

- **The media and the Internet**

30. The manner in which information is presented by the media has a considerable influence on public debate. In this context, ECRI welcomes the fact that, following cases of racist discourse by certain politicians, Swiss media outlets played a role in stepping up public pressure leading to their resignation.<sup>48</sup>

31. A recent study on the quality of news items concerning Roma people published in the mainstream Swiss media showed that there has been a constantly growing focus on such matters since 2007. While media coverage of the situation of Roma in other countries dealt with the discrimination they suffer, articles and reports on Roma people in Switzerland were predominantly concerned with problems posed by this community's itinerant lifestyle or with delinquent behaviour. According to the study, this focus has a decisive influence on public perception of Roma people. Whilst Roma people were able to express their point of view in only 13% of the news items and articles concerned, representatives of executive power and the prosecution authorities were very frequently quoted. Roma people were also unable to formulate and voice their own concerns, since they were generally only asked for their reactions to pre-existing problems. Half of the news items relied on generalisations. Over 12% contained negative stereotypes and must therefore be regarded as discriminatory.<sup>49</sup>

32. Members of the Black community also informed ECRI that they suffered from deterioration of their public image as a result of media coverage and that they were not able to express themselves often enough in the media.<sup>50</sup> ECRI indeed noted that media coverage of the police checks carried out in respect of Black people on suspicion of drug trafficking and of abuse of the asylum system have contributed to this deterioration. ECRI therefore considers that the authorities should launch a process to heighten journalists' awareness of the negative effects brought to light by the study mentioned in paragraph 31 and develop measures to rebalance media coverage of vulnerable groups.

33. ECRI recommends that the Swiss authorities develop an action plan in close co-operation with media representatives, and without encroaching on media independence, so as to tackle the established routines and reflexes that can lead media coverage in Switzerland to have a stigmatising effect on vulnerable groups, in particular Roma and people of colour.

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<sup>46</sup> See for example <http://www.asile.ch/vivre-ensemble/2012/08/21/statistiques-plus-de-70-des-demandes-dasile-sont-justifiees/>.

<sup>47</sup> OFM 2013: 23 et seq; "Von der Schwierigkeit, die Ausländerkriminalität zu messen", Tagesanzeiger (11.3.13).

<sup>48</sup> "Kristallnacht-Tweet: Anzeige und Ausschlussdrohung gegen SVP-Mitglied", Tagesspiegel (25.06.2012).

<sup>49</sup> Ettinger 2013 : 7 et seq.

<sup>50</sup> See the publications by the CRAN cited in the bibliography.

34. Complaints were lodged following the publication on the front cover of the weekly magazine "Die Weltwoche" of a photograph of a Roma child pointing a gun at the reader under the headline "The Roma are coming: crime tourism in Switzerland – criminal family gangs". Although the public prosecution services in Zurich and Vienna closed the case without taking further action, the Swiss Press Council decided, on 13 September 2012, that the magazine had breached paragraph 3 (distortion of information) and paragraph 8 (discrimination) of the Declaration of Journalists' Rights and Duties.<sup>51</sup> At the same time, the Council has dismissed most of the other complaints lodged with it in recent years<sup>52</sup> since it considers that, to qualify as discrimination, news coverage must be based on generalisations and attain a degree of severity.
35. A significant share of hate speech is disseminated via the Internet. ECRI is pleased to note that a number of online newspapers have adopted self-regulatory measures, such as more systematic moderation of comments, abolition of anonymity for posters and the automatic closure of the accounts of persons who resort to racist discourse.<sup>53</sup> On the other hand, civil society representatives informed ECRI that the follow-up given by the authorities to complaints concerning racist comments on the Internet was still inadequate. The National Co-ordination Unit to Fight Internet Crime (SCOCI) has 16 staff members and focuses its proactive investigations on paedophilia. It merely records cases of hate speech and reports them to the competent authorities. Since prosecuting online hate speech involves specific skills and know-how, ECRI considers that the SCOCI or other police units should specialise in conducting such investigations and be given the necessary technical and human resources.<sup>54</sup>
36. ECRI recommends that the Swiss authorities give one or more police units, preferably the National Co-ordination Unit to Fight Internet Crime, responsibility for actively combating hate speech on the Internet, along with appropriate technical and human resources.
37. In addition, ECRI encourages the Swiss authorities to pursue their efforts to prevent racism and xenophobia,<sup>55</sup> particularly in the fields of education and sport. It also welcomes the work of the specialist Extremism Unit in the army, aimed for example at raising future officers' awareness of extremism issues.

### 3. Racist and homophobic/transphobic violence

38. In Switzerland there are no reliable statistics on the extent of racist and homophobic/transphobic violence. In this connection, ECRI refers to the case-law of the European Court of Human Rights, requiring state authorities investigating violent incidents to take all reasonable measures so as to verify whether they were racially motivated and establish whether hatred or prejudice based on ethnic origin played a role in such events.<sup>56</sup> ECRI considers that systematic recording of such motives is a key means of satisfying this requirement.

<sup>51</sup> Opinion No. 59/2012 of 13.09.2012.

<sup>52</sup> Of the 64 complaints lodged from 2008 to 2012 for failure to respect human dignity and the ban on discrimination, nine were allowed. One of them concerned a "proposal for a new national anthem" published by the regional newspaper Gipfel Zytig, which "published an insulting rant against different nationalities, dishing up prejudiced generalisations against foreigners". In Opinion No. 22/2011 the Council dismissed a complaint against an article on summer fashions entitled "Men watch out, homo trap!", dividing clothing into two categories – "cool" and "schwul" (gay).

<sup>53</sup> Swiss Press Council 2013; Advisory Committee of the Framework Convention for the Protection of National Minorities (FCNM) 2013: § 63.

<sup>54</sup> See also Personal Representatives of the OSCE Chair-in-Office on Tolerance Issues 2012: 6.

<sup>55</sup> For further details see SLR 2013.

<sup>56</sup> Natchova and Others v. Bulgaria [GC], Nos. 43577/98 and 43579/98, 6.7.2005, §§ 160 à 168; Dink v. Turkey, Nos. 2668/07, 6102/08, 30079/08, 7072/09 and 7124/09, 14.09.2010, § 81.

39. ECRI recommends that the Swiss authorities improve their system for recording and monitoring in particular incidents of violence in order to obtain more reliable statistics on the racist, homophobic or transphobic motivation of offences under the Criminal Code (§ 12 of General Policy Recommendation No. 11).

40. The available data suggest that the level of racist, homophobic and transphobic violence is relatively low. The counselling network for victims of racism nonetheless noted an increase in incidents of physical violence from five in 2011 to 14 in 2012.<sup>57</sup> To reverse this trend, ECRI considers that the Swiss authorities must in coming years take firm steps against hate speech, as the spread of such discourse and tolerance of it lead to radicalisation and increased violence. At the same time, the authorities should exercise vigilance with regard to all forms of extremism.<sup>58</sup>

41. Police violence, such as the case of bodily harm judged by the European Court of Human Rights in 2013, fortunately remains exceptional.<sup>59</sup> All police departments should nonetheless continue to pursue a policy of zero tolerance for such acts.

#### **4. Integration policies**

##### **- Integration policies for people from migrant backgrounds**

42. The attributions of the Confederation linked to integration include legislation on the entry, departure, residence and permanent residence of foreign nationals, the granting of asylum, vocational training and employment. The cantons are competent for pre-school and school education, health, social welfare and internal security.<sup>60</sup> For the first time, the 2008 Federal Law on Foreign Nationals laid down the broad outlines of an integration policy.<sup>61</sup> In order to achieve the objectives of integrating foreigners and protecting them against discrimination, the authorities must create conditions conducive to equality of opportunity and to foreigners' participation in public life (Article 53.1 and 2). The law covers all foreigners lawfully resident long-term (Article 4.2), including refugees and those admitted on a temporary basis. It does not cover asylum-seekers, naturalised persons and cross-border workers.

43. In its 4<sup>th</sup> report, ECRI had recommended that the authorities assess the integration measures taken, paying particular attention to integration agreements and verify that the applicable sanctions did not have a counter-productive effect on integration. In 2010, a study was made of the integration agreements of five cantons which advocated greater standardisation of rules and procedures governing their conclusion, improved assistance to people facing multiple social problems, and the provision of an initial information interview for each new arrival.<sup>62</sup> Another study concluded that it would be more effective to use incentive measures rather than impose sanctions. The people who integrated most successfully were, it was claimed, those with whom no integration agreement had

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<sup>57</sup> Humanrights.ch and CFR 2013: 7. Police statistics include about five racially motivated violent offences per year. In 2012 the Foundation against Racism recorded four cases of physical violence and the CICAD (Coordination intercommunautaire contre l'antisémitisme et la diffamation) and FSCI (Swiss Federation of Israeli Communities) one case of violent antisemitism. Pink Cops estimates that, in 2012, there were some 20 physical attacks on LGBT persons in eastern Switzerland, Pinc Cross puts the number at one or two violent attacks on LGBT persons per month.

<sup>58</sup> In 2012 the police recorded no violent offence with ideological motives, Fedpol 2013: 42. However, in June 2013 police forces in Swiss, Germany and the Netherlands took action against a group of Neo-Nazis suspected of preparing terrorist attacks.

<sup>59</sup> Dembele v. Switzerland, No. 74010/11, 24.9.2013; SCHR 2013b: §§ 156 et seq.

<sup>60</sup> Achermann 2008: 10 et seq.

<sup>61</sup> Cf. paragraphs 150 to 163 of the 4<sup>th</sup> report on Switzerland.

<sup>62</sup> Tov 2010: 2 et seq.; concerning the evaluation of integration policies, see also Federal Council 2010b.

been concluded. Considerable human resources should be put in place to assist migrants.<sup>63</sup>

44. In 2011, the Confederation, the cantons and the municipalities agreed on a “coherent system of encouraging integration”.<sup>64</sup> Such encouragement should be carried out at local level and primarily via ordinary structures, such as school, training, work, in the public health field and in the local neighbourhood. Specific encouragement has been designed to supplement this and is pooled in the cantonal integration plans (CIPs) for the period 2014-2017. CIPs are based on three pillars: (i) initial provision of information, advice and protection against discrimination, (ii) language learning, encouragement at pre-school level and improving the employability of immigrants, and (iii) communication and social integration. The Confederation and the cantons invest respectively CHF 36 million (EUR 30 million) and CHF 41 million per year, and the Confederation adds CHF 38 million each year for the integration of humanitarian migrants. There are indicators for annual evaluations. Certain cantons have opted, as indicators, for measures to be taken rather than results to be achieved.
45. In March 2013, the government put forward a draft amendment to the Federal Law on Foreigners and Integration. It is based on the principle of “encouragement and obligation”, i.e. encouraging integration and placing an obligation on foreigners to integrate.<sup>65</sup> Only “integrated” foreigners will be entitled to a permanent residence permit (Article 34.2).<sup>66</sup> Article 58a.1 lays down the criteria for successful integration as follows (i) respect for public order and security (ii) compliance with the values of the constitution (iii) language proficiency and (iv) a willingness to participate in economic life or follow training. The granting of residence permits would be conditional on the conclusion of an integration agreement where it is likely that integration would prove problematic (Articles 26a.2, 33.5, 43.1ter, 44.3, 58b, 83.9). Foreigners who have good language skills would be able to obtain the permanent residence permit already after five years (Article 34.4). The draft revision of the Federal Law on Nationality provides that a permanent residence permit and successful integration will also be imperative for obtaining Swiss nationality, which the authorities regard as the final stage in the integration process.
46. ECRI has received reports that illiterate immigrants and the ones with a poor level of education will have considerable difficulty in satisfying the requirements of Article 58a.1 regarding language proficiency and integration into the labour market. This affects certain recognised refugees, asylum seekers, persons admitted on a temporary basis and family reunification.<sup>67</sup> ECRI is therefore of the opinion that the authorities should do all they can to ensure that these migrants may also attain a sufficient level of integration within the meaning of Articles 58a.1 and 34.2 of the Federal Law on Foreigners and Integration and sit any exams. They should be given speedy and effective assistance, in particularly if objectives are set as part of an integration agreement. To avoid counterproductive effects, these agreements should serve to encourage migrants

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<sup>63</sup> Schönenberger et al. 2012: 5 et seq. See paragraph 156 of the 4<sup>th</sup> report on Switzerland. See also 2013b.

<sup>64</sup> Federal Department of Justice and Police (FDJP) and the Federal Office for Migration (FOM) 2011: 2 et seq.; Swiss Federal Council 2013a: 2 et seq.

<sup>65</sup> Swiss Federal Council 2013a: 2 et seq.

<sup>66</sup> The permanent residence permit is for an unlimited duration.

<sup>67</sup> Asylum seekers are able to enter the labour market once three months have elapsed (Liebig 2012: 46). Also affected are the 100 000 undocumented immigrants, most of whom are in employment, Federal Commission for Migration Issues (CFM) 2010: 55 et seq. A regularisation procedure is provided for in Article 30 of the Federal Law on Foreign Nationals. However, there are significant differences from canton to canton, [https://www.bfm.admin.ch/bfm/fr/home/dokumentation/zahlen\\_und\\_fakten/auslaenderstatistik/haertefaele.html](https://www.bfm.admin.ch/bfm/fr/home/dokumentation/zahlen_und_fakten/auslaenderstatistik/haertefaele.html), accessed on 5 February 2014.

and provide them with the necessary assistance rather than threaten them with sanctions. In the annual evaluation of CIPs, the authorities should closely monitor changes in particular in the number of rejections, withdrawals and non-renewals of residence permits.

47. ECRI recommends that the Swiss authorities, in the field of the legislation relating to foreigners, monitor trends regarding the number of negative decisions based on a lack of language proficiency or integration. It also recommends that they (i) provide speedy and appropriate assistance to bring about integration, especially when concluding an integration agreement (ii) help in particular migrants with a poor level of education to attain a sufficient level of integration within the meaning of the Federal Law on Foreign Nationals, (iii) ensure the necessary human resources to provide this assistance, (iv) accompany any obligation appearing in the integration agreements first and foremost with incentives and rewards and confine sanctions to cases where such motivating measures have failed and integration is unlikely without fulfilment of the integration agreement.

48. The draft law put forward by the government provides, for the first time, for a right to a residence permit if the conditions set out in the law are met. This would enable the Federal Supreme Court to review the legality of administrative decisions in this area and would also help harmonise administrative practices in all cantons. However, the Council of States has rejected this part of the draft law, voting to retain the cantons' margin of appreciation.<sup>68</sup> Currently, these decisions are only subject to judicial review by the cantonal courts. Since the Federal Supreme Court had found that there were substantiated cases of discrimination in the neighbouring field of naturalisations,<sup>69</sup> ECRI believes it is imperative to broaden the Federal Supreme Court's powers of judicial review under the law relating to foreign nationals.

49. ECRI strongly recommends that the Swiss authorities ensure that refusals to grant a residence permit can be subject to judicial review by the Federal Supreme Court.

- **Effects of integration policies for people from migration backgrounds**

50. ECRI welcomes the considerable efforts made by the authorities to integrate migrants. Worthy of particular mention are the extensive language learning programmes and the new national programme for preventing and combating poverty which is addressed, amongst others, at migrants. ECRI is also satisfied with the efforts made in the health field and with the drawing up of a system of 68 indicators established by the Federal Statistics Office that make it possible to measure trends in the integration field.<sup>70</sup> It encourages the authorities to carry this project through, in particular by devising indicators to measure the extent of racial discrimination.

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<sup>68</sup> Official Gazette of the Council of States, 2013, E 1134 et seq. The Council of States is the chamber representing the cantons. The National Council, the other chamber of parliament, will begin its examination of the draft law in the second quarter of 2014.

<sup>69</sup> Federal Supreme Court judgments ATF 129 I 217 and 232 of 29 July 2003. Of the 23 naturalisation applications at issue, only those submitted by Italians had been accepted, and none by the other applicants, most of whom were from the former Yugoslavia. In its 4<sup>th</sup> report, ECRI had welcomed the fact that a new federal law provided that all negative decisions on naturalisation must state the reasons and that the cantons are required to set up judicial authorities responsible for hearing and deciding appeals. For further details, see CFR 2007a.

<sup>70</sup> <http://www.bfs.admin.ch/bfs/portal/fr/index/themen/01/07/blank/key/04/05.html>, accessed on 5 February 2014. The indicators cover, amongst others, education, housing, the labour market, health, language proficiency and the number of marriages with a Swiss national. ECRI has received no information that these indicators are already being used by the CIPs (cf. paragraph 44). – The OFS definition of the population from migrant backgrounds covers all persons, regardless of their nationality, whose parents were born abroad. This therefore concerns those who have moved to the country (migrants) and those being directly concerned by the migration experience of their parents (descendants of migrants).



51. On the other hand, according to the 2011 MIPEX III integration policies index, Switzerland has lost ground and is now placed 23<sup>rd</sup> out of 31 countries. The weak points noted include family reunification, regulations governing long-term residence, naturalisation, the considerable variation in policies between cantons, and the worst protection against discrimination of all the countries studied.<sup>71</sup>
52. In the education field, the indicators (see paragraph 50) show that 15.8% of the descendants of migrants born in Switzerland have a higher education qualification (as compared with 27.8% of Swiss nationals born in Switzerland). Their drop-out rate is 10.7% and that of migrants is 19.3% (as compared with 3,8% for Swiss nationals). Accordingly, ECRI encourages the authorities to pursue their activities to assist young people from a migrant background throughout their schooling, vocational training and university education.<sup>72</sup>
53. In addition, ECRI underlines, as does the Organisation for Economic Co-operation and Development (OECD), the importance of pre-school education from the age of three as a means of improving the school results of children from migrant backgrounds.<sup>73</sup> ECRI therefore welcomes the recognition by the authorities of the importance of pre-school educational activities: the majority of cantons are in the process of lowering compulsory school age to four.<sup>74</sup> The CIPs have the strategic objective of ensuring that migrant families have access to pre-school educational activities suited to their family situation. However, according to the latest figures available, fewer than 10% of all three year-olds, only 40% of four-year-olds and 95% of five-year-olds attend school.<sup>75</sup> ECRI received no information regarding more detailed figures for children from migrant backgrounds. In this context, ECRI believes that the CIPs should not simply ensure access to pre-school educational activities but should include an obligation of result, in terms of increasing the take-up rate in pre-school education of children from migrant backgrounds, setting a target to be achieved.
54. ECRI recommends that the federal and cantonal authorities agree on the objective of increasing the participation rate in pre-school education of children from migrant backgrounds and on a target figure to be achieved.
55. As far as integration into the labour market is concerned, an OECD study found that in relation to other countries, the situation in Switzerland is rather favourable.<sup>76</sup> This is explained by the overall healthy situation of the labour market and the fact that most migrants speak one of the national languages and come from high-income OECD countries. ECRI also welcomes the extensive training programmes set up by Switzerland to promote the integration of migrants into the labour market.
56. However, official indicators (see paragraph 50) show that the unemployment rate among migrants is 6.6%, that of their descendants 4.9% (as compared with 2.3% of Swiss nationals born in Switzerland). 17.3% of migrants and 11.9% of their descendants having a higher-education qualification are employed in positions for which they are overqualified (as compared with 9.6% of the population without migration backgrounds). The situation is more complicated for migrant women

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<sup>71</sup> Huddleston et al. 2011: 10 et seq.; <http://www.mipex.eu/switzerland>, accessed on 9 January 2014.

<sup>72</sup> Regarding needs in this field, see, for example, Kanton Zürich 2013: 33.

<sup>73</sup> Liebig 2012: 6 ; Fibbi et al. 2012: 22 et seq.

<sup>74</sup> Under the 2009 intercantonal agreement on the harmonisation of compulsory schooling (HarmoS concordat), children must attend preschool for two years. The cantons that have signed the concordat have until the beginning of the 2015-2016 school year to implement those aspects of the agreement that have not yet been put into effect, the Swiss Conference of Cantonal Directors of Public Education (CDIP) 2010.

<sup>75</sup> Figures for the 2011-2012 school year, <http://www.bfs.admin.ch/bfs/portal/fr/index/themen/15/01/key/blank/02.html>, accessed on 22 January 2014.

<sup>76</sup> Liebig 2012: 5.

with young children and for humanitarian migrants.<sup>77</sup> Several sources indicate that young migrants from countries outside the EU suffer particularly substantial discrimination, even where they have successfully completed their school education in Switzerland.<sup>78</sup> ECRI therefore refers to its recommendation on enacting comprehensive legislation against racism and racial discrimination in paragraph 12. In addition, ECRI calls on all stakeholders to draw on its GPR No. 14 on Combating racism and racial discrimination in employment, particularly in order to eliminate discrimination in recruitment procedures and to emphasise the advantages for an employer inherent in a diverse and multicultural workforce.<sup>79</sup> At the same time, it believes that the CIPs and the work of the Tripartite Conference on Agglomerations (TCA), could be enhanced if the objectives and measures were more systematically supplemented by indicators and target values.

57. ECRI recommends that the authorities use their new system of indicators for integration more systematically.

58. According to Article 86 of the Law on Asylum, asylum-seekers and persons in need of protection without a residence permit who are gainfully employed are required to pay, for a maximum ten-year period, a special tax fixed at 10% of their income to cover the overall costs generated by these persons and their dependents. The Federal Administrative Tribunal found in 2012 that this provision violated the prohibition of discrimination set out in Article 29 of the Convention relating to the Status of Refugees of 28 July 1951<sup>80</sup> requiring Contracting States not to impose upon refugees any taxes other or higher than those which are levied on their nationals in similar situations. Nonetheless, this tribunal decided that Article 86 of this Law should be applied since the legislator would have taken this conflict between the two sources of law into account when adopting this provision.

59. ECRI draws the attention of the authorities to the fact that this decision would appear to contradict the case-law of the Federal Supreme Court cited in paragraph 26. The latter ruled that where there was a conflict, public international law and, more particularly, conventions in the field of human rights took precedence over domestic law, even in cases where the drafters had explicitly taken such a conflict into account. Since ECRI cannot see any justification for the imposition of a special tax, it is of the opinion that the authorities should repeal that provision.

60. ECRI strongly recommends that the Swiss authorities repeal Article 86 of the Law on Asylum which imposes a special tax on certain humanitarian migrants.

#### - **Integration policies for national minorities**

61. Article 17 of the Federal Law on the Promotion of Culture of 11 December 2009 stipulates that the Confederation may take measures to enable Travellers to live a life in keeping with their culture.<sup>81</sup> However, ECRI regretfully has to observe that little progress has been made in this matter. This concerns, in particular, the creation of encampment areas,<sup>82</sup> the schooling of children of Travellers and their occupations. In part, the situation is getting worse.

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<sup>77</sup> Liebig 2012: 5.

<sup>78</sup> See in particular Fibbi 2010: paragraphs 24 et seq.; Liebig 2012: paragraphs 126 et seq.; FIMM 2005: 12.

<sup>79</sup> See in particular paragraphs 4, 5 and 7 of the GPR. For an example of good practice, see Antidiskriminierungsstelle des Bundes 2012.

<sup>80</sup> No. C-1026/2009, 31.10.2012, paragraphs 10 et seq.

<sup>81</sup> The Federal Supreme Court had already recognised, in a judgment of 28 March 2003, that the right of Travellers to preserve their identity was guaranteed by the constitution.

<sup>82</sup> See Ad hoc Committee of Experts on Roma Issues (CAHROM) 2013.



62. A distinction is made in Switzerland between encampment areas, used as a long-term place in which to stay, especially during the winter months, and transit sites designed for short-term stays of up to one month. Over the last ten years, the number of encampment areas has increased from 11 to 15. This covers only 50% of needs. In the same period, the number of transit sites has fallen from 51 to 43, satisfying only 60% of the demand.<sup>83</sup> Furthermore, ECRI received information from civil society representatives that certain authorities had called into question the encampment of Swiss Travellers on private land, which had been a practice for many years.<sup>84</sup> Since the steps taken to increase the number of encampment areas has failed to produce satisfactory results, ECRI is of the opinion that the Confederation, the cantons and the municipalities should implement alternative and rapidly achievable solutions as a matter of urgency. This could include encouraging the renting of private land, authorising sojourning in caravans on land for property development as well as on farmland, and legalising the occupation of sites which has been tolerated for a long period (paragraph 6 of GPR No. 13). With regard to the schooling of children of Travellers, ECRI welcomes the preparation of two projects: the canton of Bern plans to explore the new technologies such as Skype as a means of maintaining contact, during the travelling period, with the school the children attend in the winter months. Several Yenish organisations have requested funding for a project covering certain aspects of their life, including education. Given the continuing and serious problems in this sector,<sup>85</sup> ECRI is of the opinion that the authorities should, in close co-operation with the families in question, take responsibility for finding solutions.
63. ECRI received information from civil society representatives regarding the inadequate funds allocated to the two organisations whose role is to find solutions to the problems faced by the Yenish and to assert their rights. Given the vulnerability of this community, ECRI again refers to the recommendation made in paragraph 18.
64. ECRI recommends that the authorities, as a matter of urgency, satisfy the encampment area needs of Travellers including the itinerant Yenish, and implement as quickly as possible a project or measures to ensure effective education for their children, with due regard for their families' way of life.

## **II. Themes specific to Switzerland**

### **1. 4<sup>th</sup> cycle interim follow-up recommendations**

65. ECRI's first interim follow-up recommendation to the Swiss authorities in its 4<sup>th</sup> report was to pursue their efforts to train police officers, prosecutors, judges and future legal professionals in the scope and application of Article 261bis of the Criminal Code. In its conclusions,<sup>86</sup> ECRI noted that the initiatives taken did not cover all police forces and that no training had been organised for judges, prosecutors and future legal professionals. In its opinion, this recommendation had not been fully implemented.
66. Since then, the authorities have informed ECRI that training on Article 261bis of the Criminal Code is now an integral part of the training of all police cadets on professional ethics and human rights. The textbook for this subject was revised in

<sup>83</sup> Swiss Confederation 2012b: paragraphs 43 et seq.; CAHROM 2013: 6.

<sup>84</sup> For example, a farmer was forbidden from continuing to rent out land to Travellers. One town asked a large Traveller family which had been living on farmland for 15 years to leave, despite having agreed to their living there following completion of the connections to services. In an encampment area in the canton of Zurich, the authorities had marked out the spaces for each caravan in such a way that the Travellers were unable to park them in accordance with their customs and needs.

<sup>85</sup> ECRI was informed, for example, that the canton of Valais had refused a request from a Traveller family to grant leave from school and that it had imposed a fine of CHF 800 (€650) for absence from school.

<sup>86</sup> Adopted on 21 March 2012, CRI(2012)30.

2012 and the final exam includes a two-hour paper on these issues.<sup>87</sup> For their part, judges and prosecutors must in general have a law degree and Article 261bis of the Criminal Code is a compulsory subject on the law studies syllabus. However, ECRI finds it a matter of regret that the Swiss authorities have still not organised a seminar for all these professionals, enabling them to exchange expertise on improving application of Article 261bis. In its opinion, this recommendation has still not been fully implemented.

67. The third<sup>88</sup> interim follow-up recommendation was to provide all police staff with training and awareness-raising courses regarding the need to combat racism and racial discrimination in policing, including racial profiling. In 2012, ECRI took the view, in particular in the light of a report by the Zurich Ombudswoman on the practice of racial profiling, that this recommendation had not been fully implemented.<sup>89</sup> Since then, it welcomes the fact that the awareness-raising work carried out in particular by the Zurich Ombudswoman received considerable media coverage with the result that the expression “racial profiling” became better known. In Zurich, this work led to training measures, the creation of a regular round-table with civil society and the introduction at the strategic plan and at the code of conduct, of passages focusing on the behaviour to observe in dealing with different population groups. The police forces in other cantons<sup>90</sup> have also worked on these issues.
68. At the same time, ECRI received concurring information that the Black community lives in constant fear of being subject at any time, as a result of racial profiling, to police controls because of the colour of their skin. These controls may entail a considerable degree of use of force by the police, including arrest and being publicly handcuffed, taken away to the police station, made to undress completely and being body-searched for drugs. This is the case not only in several cities, but also in the areas surrounding centres housing applicants for asylum.
69. Discriminatory profiling is closely linked to the day-to-day work of the police when stopping persons, regulated by Article 215 of the Code of Criminal Procedure (CCP) and by most of the cantonal police laws. Article 215.2 CCP gives the police the right to take the person in question to a police station, hold him or her, require him or her to disclose his or her identity, display the property in his or her possession and to open his or her bags or vehicle. A person may be stopped without any specific suspicion.<sup>91</sup> The Swiss Centre of Expertise in Human Rights (SCHR) states that there simply needs to be an objectively comprehensible reason, such as odd behaviour, proximity to a potential crime scene or of a suspect. This gives the police a vast margin of appreciation.<sup>92</sup>
70. In paragraph 3 of its GPR No. 11, ECRI advocates introducing a reasonable suspicion standard, whereby powers relating to control, surveillance or investigation activities can be exercised only on the basis of a suspicion that is

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<sup>87</sup> The authorities informed ECRI that they had responded to the poor assessments of these courses by the police cadets (Pichonnaz 2012: 48 et seq.; Republic and Canton of Geneva 2012a: 48 et seq.; Cortesius et al. 2012: 55 et seq.) by including practical case studies and reinforcing the link with the cadets' experiences during their placements in police departments.

<sup>88</sup> The second interim follow-up recommendation has been implemented by the Swiss authorities.

<sup>89</sup> This recommendation gave rise to Parliamentary Question No. 09.3857 at the Federal Council.

<sup>90</sup> In particular Vaud, Geneva, Lucerne, SCHR 2013b: paragraph 46; Swiss Confederation 2012a: paragraphs 295 et seq.

<sup>91</sup> Swiss Federal Council 2006: 1206; Federal Supreme Court 6B\_53/2013, 8.7.2013, recital 2.2. In contrast, persons may not be searched without their consent unless there is reason to assume that evidence of a crime may be found, Article 249 CCP, Federal Supreme Court ATF 139 VI 128, 131 et seq.

<sup>92</sup> SCHR 2013a: paragraphs 121 et seq.; SCHR 2013b: paragraph 46. Odd behaviour could, however, help justify a suspicion.

founded on objective criteria.<sup>93</sup> It is of the opinion that being merely in the vicinity of a potential crime scene – such as a location where drugs are sold – should not in itself be enough to justify public arrest, being taken to a police station and being held there for up to three hours. Accordingly, the Swiss authorities should, either by revising the legislative provisions and implementing texts or by developing established case-law, ensure that any instance of persons being stopped is conditional on there being a reasonable suspicion.

71. ECRI is of the opinion that all police forces should ensure, through awareness-raising activities, training and, if necessary, disciplinary measures, that Black people in Switzerland, the vast majority of whom have never committed any offence, are not subject to police controls or constraint measures without reasonable suspicion.<sup>94</sup> Given the role of the law enforcement agencies in setting an example and the importance of enhancing the trust in the police of the groups falling under ECRI's mandate, ECRI believes that all police services should limit measures which deprive individuals of their liberty to the strict minimum. In order to strengthen the protection of victims, it refers to its GPR No. 11 which advocates providing for the possibility for complaints of racially-motivated misconduct by the police to be referred to an independent authority.<sup>95</sup> It also recommends that it be made mandatory for police to display their serial number and for there to be a written report on any police constraint measure.

72. ECRI recommends that the authorities pass legislation guaranteeing that any police constraint measure, and in particular the power to stop be conditional on the existence of a reasonable suspicion. It also recommends that they ensure meanwhile that Black persons in particular are not subject to control or police constraint measures except where there is a reasonable suspicion (paragraph 3 of General Policy Recommendation No. 11).

73. In the light of the findings appearing in paragraphs 68 to 70, ECRI is of the opinion that this recommendation has not yet been fully applied.

## **2. Policies to combat discrimination and intolerance vis-à-vis Lesbian, Gay, Bisexual and Transgender persons (LGBT)<sup>96</sup>**

74. It is estimated that several percent of the population are homosexual or bisexual. Up to 2012, 5 894 partnerships had been registered under the registered partnership scheme which applies only to homosexual couples.<sup>97</sup> One out of three lesbian couples raises a child from a previous marriage. While the government claims that there are between 100 and 200 genuinely transsexual persons<sup>98</sup>, other sources give considerably higher figures.<sup>99</sup>

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<sup>93</sup> Concerning the need to justify violations of Articles 5 and 8 ECHR and Article 2 of Protocol No. 4, see *Austin and others v. the United Kingdom*, Nos. 39692/09, 40713/09 and 41008/09, 15 March 2012, paragraphs 52 et seq.; *Mekiye Demirci v. Turkey*, No. 17722/02, 23 April 2013, paragraphs 40 et seq.; *McFeeley v. the United Kingdom* No. 8317/78, 15 May 1980, paragraphs 78 et seq.

<sup>94</sup> ECRI welcomes the information from the authorities that the federal examination for police cadets systematically comprises a question on proportionality.

<sup>95</sup> See paragraphs 10, 58 et seq. of GPR No. 11, whereby this function could be carried out by the CFR/EKR and the Ombudsmen, paragraph 18 of the report. For a critical self-analysis of a body responsible for investigating such allegations, see Republic and Canton of Geneva, Commissariat for Ethics for Police and Prison Staff 2012b.

<sup>96</sup> For the terminology used, see the definitions given in Council of Europe 2011: 139 et seq.

<sup>97</sup> It should be noted that registration is not necessarily a popular option as it increases the tax burden.

<sup>98</sup> Swiss Confederation, Federal Office for Civil Status 2012: 5 a.

<sup>99</sup> Walker 2012: 29 et seq.

## - **Legislation**

75. The prohibition of discrimination, enshrined in Article 8.2 of the Federal Constitution covers sexual orientation and gender identity without explicitly mentioning them.<sup>100</sup> In 2007 the Federal Law on Registered Partnership entered into force, having obtained 58% of the votes in a referendum. The status of registered partners is different from that of married persons in terms of the less formal procedure for concluding the partnership (Article 7 of the Law), less restrictive conditions for cancellation and dissolution by the courts (Articles 29 to 30), the duty of assistance and respect (Article 12), the ordinary property regime (similar to the separation of property, Article 18 of the Law) and the rights of the surviving partner. While Article 28 of the Law rules out adoption and assisted procreation for registered partners, in 2013 parliament accepted a motion to provide for the adoption of the child of a partner. Two other initiatives, tabled in 2013, seek to align the conditions for the naturalisation of registered partners with those of married couples.<sup>101</sup>
76. A change of name and gender by transsexual persons falls under the competence of the cantons (Article 30.1 of the Civil Code). Certain cantons require sterilisation, divorce and hormone or surgical treatment. In 2012, the Federal Office for Civil Status (OFCE), in a legal opinion, came out against surgical operations aimed at sterilisation or the construction of the genital organs of the desired gender. Drawing on the recommendations of the Council of Europe,<sup>102</sup> it also stipulated that it was possible to convert the marriage or registered partnership where the partners or spouses wish to remain together. This legal opinion is binding on the cantonal authorities. While some courts have now abandoned the requirement for proof of sterility,<sup>103</sup> other authorities and courts have retained these requirements, in the absence of an explicit legal basis.<sup>104</sup>
77. Case-law has not yet definitively established whether LGBT persons may rely on the Federal Law on Gender Equality, the purpose of which is to prohibit discrimination in employment relationships (Article 2). The Federal Office for Gender Equality (Article 16 of the Law) has not been given any official terms of reference to act for LGBT persons. In the event of hate speech, LGBT persons do not enjoy the protection afforded by Article 261bis CC, but they may rely on Articles 28 et seq. of the Civil Code and Articles 173 et seq. CC, in particular for insult.
78. ECRI recommends that the authorities adopt comprehensive legislation against discrimination on the grounds of sexual orientation and gender identity and to include these grounds in Article 261bis of the Criminal Code.

## - **Combating discrimination and promoting understanding**

79. There are few studies on the living conditions of LGBT persons in Switzerland and the extent of discrimination they suffer. Experts agree that young LGBT persons are exposed to considerable verbal violence in schools.<sup>105</sup> Many do not

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<sup>100</sup> They are covered by the criteria regarding life-style and sex, SCHR 2013c paragraph 203. On 22 February 2013, the Grand Council of the Canton of Geneva passed a resolution to explicitly add sexual orientation to Article 8.2 of the Federal Constitution. For paragraphs 75 to 77 see Copur, Montini, Ziegler 2014 and Recher: paragraphs 216 et seq.

<sup>101</sup> Motion No. 11.4046 tabled by the Legal Affairs Committee; motions 13.421 and 13.422.

<sup>102</sup> Swiss Confederation, OFCE 2012: 3 et seq.; see Council of Europe 2011, CM/Rec(2010)5: paragraph 20 and explanatory memorandum, paragraphs 20 to 21; Parliamentary Assembly, Resolution 1728 (2010) paragraph 16.11.2.

<sup>103</sup> International Lesbian, Gay, Bisexual, Trans and Intersex Association (ILGA)-Europe 2013: 215.

<sup>104</sup> With regard to paragraphs 79 et seq. see. SCHR 2013c: paragraphs 209-213.

<sup>105</sup> Harcèlement entre pairs, Résonances – Mensuel de l'école valaisanne, October 2012: 4 et seq.; Nadler 2013: 7; Homosexuelle gehen durch eine harte Schule, Neue Zürcher Zeitung (2013, October 15).

have the support of their families or their friends: either they do not dare speak about their sexual orientation, or indeed their gender identity, or they come up against a lack of understanding from those close to them. The enormous tension to which young homosexuals are exposed when they “come out” was shown in a 2013 study: more than 20% of homosexuals have attempted suicide during their lives and half of these attempts were made before the age of 20.<sup>106</sup>

80. ECRI welcomes the action taken by the authorities in several cantons to address the dangerous silence which surrounds questions of sexual orientation and gender identity. Examples are the cantons of Geneva and Vaud which have decided to co-operate to combat discrimination and homophobia in schools. They have created the “mosaic” website as an information platform for young people<sup>107</sup> and networks of volunteers and associates in schools to bring homophobia and transphobia out of the silence. In partnership with design schools and video-makers, poster and short film competitions have been run. A book provides advice to adolescents, their parents and teachers at the coming-out stage.<sup>108</sup> Adolescents themselves have addressed these issues and discussed homophobia and the 2013 Federal Youth Session.
81. On the other hand, the SCHR believes that many experts working with young people have little knowledge of the situation of young LGBT persons and the risk factors associated with the discrepancy of its deviation from traditional conventions.<sup>109</sup> Moreover, these questions are not an integral part of the mandatory subjects included in the training of future teachers. Furthermore, a referendum in preparation seeks to ban sex education at school. In this context, ECRI is of the opinion that the federal and cantonal authorities should ensure that adolescents, at the crucial stage of their coming-out, find the information and assistance they need to get through this difficult stage in their life. At the same time, the work of promoting understanding of LGBT persons in schools should be made more systematic, for example by including it as a mandatory subject in the study plans in all cantons.
82. ECRI recommends that the federal and cantonal authorities provide all LGBT adolescents with the necessary information, assistance and protection to enable them to live in accordance with their sexual orientation and gender identity. It also recommends that they implement measures in all cantons to promote in schools mutual understanding and respect for all persons, irrespective of sexual orientation or gender identity. They could draw on the good examples already to be found in several cantons.
83. More generally, Swiss society has not yet taken on board the extent of the specific problems faced by LGBT persons, and especially transsexual and intersexual persons. The fact is, however, that they are the victims of discrimination, rejection and hostility in many fields. One study highlights the discrimination against transsexual persons in vocational training, the labour market, when seeking housing or in their contacts with the authorities, in the health field and in their family and social environment. This is also the case for Lesbian, Gay and Bisexual persons. According to another study, the unemployment rate amongst transsexuals was 20 %, i.e. six times higher than the general rate. During the transition phase, each person questioned had had their work contract terminated and almost half had seen their occupational situation deteriorate significantly. LGBT persons are regularly required to reveal their sexual orientation or change of gender and they feel a considerable lack of

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<sup>106</sup> Wang et al. 2012; Junge Schwule sind häufiger suizidgefährdet, Tagesanzeiger (2013, February 22).

<sup>107</sup> <http://www.mosaic-info.ch/>.

<sup>108</sup> Thorens-Gaud 2010.

<sup>109</sup> SCHR, Das Recht des Kindes auf seine sexuelle Orientierung und seine Geschlechtsidentität, <http://www.skmr.ch/de>, accessed on 28 January 2014.

support from the state. Only the city and canton of Geneva and the city of Zurich have appointed authorities tasked with promoting the rights of LGBT persons.<sup>110</sup>

84. ECRI observed an encouraging number of good examples in this field. At the same time, it noted many concerns and gaps regarding the legal situation, the promotion of understanding vis-à-vis LGBT persons and their protection against discrimination. There is no protagonist responsible for co-ordinating the efforts required to address these challenges. ECRI therefore encourages the authorities to appoint, preferably at federal level, an independent authority to promote acceptance of LGBT persons and to combat discrimination against them. The authorities and this specifically appointed person should ensure that there are studies into the living conditions of LGBT persons and relevant data collected. They should also tackle the legal questions identified, catalogue, strengthen, supplement and optimise the good practices that have been developed in various cantons in order to improve the living conditions of LGBT persons and the protection they are afforded. This could be carried out by means of an action plan drawn up in close collaboration with representatives of LGBT persons.
85. ECRI recommends that the Swiss authorities task one or more independent authorities to promote understanding of LGBT persons and combat the discrimination against them. These authorities should cover the whole of Switzerland and be given a specific budget for this purpose.

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<sup>110</sup> With regard to this paragraph, see SCHR 2013c: paragraphs 213 et seq.; Walker 2012: 50 et seq. and Transgender Network Switzerland 2012. Concerning intersexual persons, see the position adopted in 2012 by the National Advisory Commission on Biomedical Ethics.

## **INTERIM FOLLOW-UP RECOMMENDATIONS**

The two specific recommendations for which ECRI requests priority implementation from the Swiss authorities are the following:

- ECRI again recommends that the Swiss authorities confer on the Federal Commission against Racism tasks and responsibilities for (i) providing aid and assistance to victims, including legal assistance, so they can assert their rights with the authorities and the courts, (ii) receiving complaints and seeking settlements either through amicable conciliation or through binding and enforceable decisions, (iii) gathering evidence and information and (iv) having recourse to the courts and intervening in judicial proceedings (Principle 3 of General Policy Recommendation No. 2).
- ECRI recommends that the Swiss authorities task one or more independent authorities to promote understanding of LGBT persons and combat the discrimination from which they suffer. These authorities should cover the whole of Switzerland and be given a specific budget for this purpose.

A process of interim follow-up for these two recommendations will be conducted by ECRI no later than two years after the publication of this report.





## LIST OF RECOMMENDATIONS

The position of the recommendations in the text of the report is shown in parentheses.

1. (§ 3) ECRI reiterates its recommendation that Switzerland ratify Protocol No. 12 to the European Convention on Human Rights.
2. (§ 6) ECRI recommends that the Swiss authorities seize all opportunities to bring the Criminal Code into line with its General Policy Recommendation No. 7 and in particular (i) include the grounds of colour, language and nationality in Article 261bis of the Criminal Code, (ii) penalise insults against or public defamation of a group of persons on the grounds cited, (iii) penalise the production and storage, with a racist aim, of written, pictorial or other materials, (iv) prohibit the creation, leadership and support of a group which promotes racism, and participation in its activities, and (v) make express provision that a racist motivation shall constitute an aggravating circumstance for all offences.
3. (§ 12) ECRI again recommends that the Swiss authorities reinforce the civil and administrative law provisions on the protection of victims of racial discrimination by adopting comprehensive legislation to combat racism and racial discrimination in all key fields of life. In this connection, it refers to §§ 4-17 of its General Policy Recommendation No. 7.
4. (§ 14) ECRI again recommends that the Swiss authorities consolidate the independence of the Federal Commission against Racism, bringing it into line with principles 1 and 5 of General Policy Recommendation No. 2.
5. (§ 18) ECRI again recommends that the Swiss authorities confer on the Federal Commission against Racism functions and responsibilities for (i) providing aid and assistance to victims, including legal assistance, so they can assert their rights with the authorities and the courts, (ii) receiving complaints and seeking settlements either through amicable conciliation or through binding and enforceable decisions, (iii) gathering evidence and information and (iv) having recourse to the courts and intervening in judicial proceedings (Principle 3 of General Policy Recommendation No. 2).
6. (§ 23) ECRI recommends that the public prosecution services should take firm action in the event of any statement by a politician that comes under Article 261bis of the Criminal Code, making use of all the interpretation possibilities opened up by the Federal Supreme Court. It also recommends that the authorities ensure that the immunity of politicians using racist discourse is lifted.
7. (§ 27) ECRI recommends that the Swiss authorities draw the attention of political decision-makers to the principles and recommendations laid down in the Charter of European Political Parties for a Non-Racist Society and in ECRI's Declaration on the Use of Racist, Antisemitic and Xenophobic Elements in Political Discourse. It also recommends that they re-examine the possibility of introducing a system of prior screening of the draft texts of popular initiatives so as to verify their conformity with international law and thereby avoid racist and discriminatory campaigns.
8. (§ 29) ECRI recommends that the authorities rethink the way in which statistical data on asylum and crime by foreigners are selected and presented so as to avoid a situation where such data help to form a false impression in public opinion.
9. (§ 33) ECRI recommends that the Swiss authorities develop an action plan in close co-operation with media representatives, and without encroaching on media independence, so as to tackle the established routines and reflexes that

can lead media coverage in Switzerland to have a stigmatising effect on vulnerable groups, in particular Roma and people of colour.

10. (§ 36) ECRI recommends that the Swiss authorities give one or more police units, preferably the National Co-ordination Unit to Fight Internet Crime, responsibility for actively combating hate speech on the Internet, along with appropriate technical and human resources.
11. (§ 39) ECRI recommends that the Swiss authorities improve their system for recording and monitoring in particular incidents of violence in order to obtain more reliable statistics on the racist, homophobic or transphobic motivation of offences under the Criminal Code (§ 12 of General Policy Recommendation No. 11).
12. (§ 47) ECRI recommends that the Swiss authorities, in the field of the legislation relating to foreigners, monitor trends regarding the number of negative decisions based on a lack of language proficiency or integration. It also recommends that they (i) provide speedy and appropriate assistance to bring about integration, especially when concluding an integration agreement (ii) help in particular migrants with a poor level of education to attain a sufficient level of integration within the meaning of the Federal Law on Foreign Nationals, (iii) ensure the necessary human resources to provide this assistance, (iv) accompany any obligation appearing in the integration agreements first and foremost with incentives and rewards and confine sanctions to cases where such motivating measures have failed and integration is unlikely without fulfilment of the integration agreement.
13. (§ 49) ECRI strongly recommends that the Swiss authorities ensure that refusals to grant a residence permit can be subject to judicial review by the Federal Supreme Court.
14. (§ 54) ECRI recommends that the federal and cantonal authorities agree on the objective of increasing the participation rate in pre-school education of children from migrant backgrounds and on a target figure to be achieved.
15. (§ 57) ECRI recommends that the authorities use their new system of indicators for integration more systematically.
16. (§ 60) ECRI strongly recommends that the Swiss authorities repeal Article 86 of the Law on Asylum which imposes a special tax on certain humanitarian migrants.
17. (§ 64) ECRI recommends that the authorities, as a matter of urgency, satisfy the encampment area needs of Travellers including the itinerant Yenish, and implement as quickly as possible a project or measures to ensure effective education for their children, with due regard for their families' way of life.
18. (§ 72) ECRI recommends that the authorities pass legislation guaranteeing that any police constraint measure, and in particular the power to stop be conditional on the existence of a reasonable suspicion. It also recommends that they ensure meanwhile that Black persons in particular are not subject to control or police constraint measures except where there is a reasonable suspicion (paragraph 3 of General Policy Recommendation No. 11).
19. (§ 78) ECRI recommends that the authorities adopt comprehensive legislation against discrimination on the grounds of sexual orientation and gender identity and to include these grounds in Article 261bis of the Criminal Code.
20. (§ 82) ECRI recommends that the federal and cantonal authorities provide all LGBT adolescents with the necessary information, assistance and protection to enable them to live in accordance with their sexual orientation and gender

identity. It also recommends that they implement measures in all cantons to promote in schools mutual understanding and respect for all persons, irrespective of sexual orientation or gender identity. They could draw on the good examples already to be found in several cantons.

21. (§ 85) ECRI recommends that the Swiss authorities task one or more independent authorities to promote understanding of LGBT persons and combat the discrimination against them. These authorities should cover the whole of Switzerland and be given a specific budget for this purpose.



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