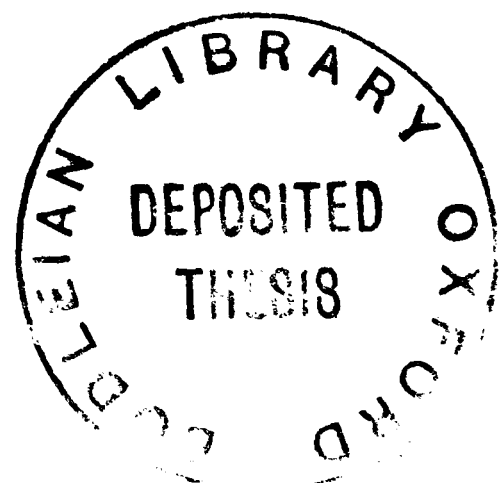
A MODEL FOR COMBATING RACE DISCRIMINATION WITHIN EU LAW

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I. INTRODUCTION

1. THEMES

Values are operative in all of human rights law. That is an organizing principle of the entirety of this work. I have endevoured to remain true to a self-consciously value-orientated approach to elaborating a model against race discrimination in EU law, and I have made no attempt to disguise the substantive values which underpin it, or the commitment to protect fundamental human rights above market goals.

While values are controversial, and while reasonable people will disagree on their application, it is submitted that attempting an articulation and exploration of those at work in anti-discrimination law is essential. Values are not, however, plucked from the abstract, and this is how context introduces itself, and remains central to this work. Context is viewed as determinative of values, and therefore of laws and their application.

Chapter II offers a contextual definition of race and racism, looking to how a contextualised approach forces us to go beyond formalistic categorise and assumptions of objectivity in anti-discrimination law. The hope is that by freeing our legal conceptions of these categories, we may more fully appraise the extent of discrimination in context, and allow for more progressive strategies to combating it.

Chapter III follows from the theoretic position established in Chapter II, looking to various aspects of the 'European context,' its history of immigration and the constitution of its diverse population. This chapter describes the political climate that prevails today and the rise of the extreme right in the past decade, as well as the social and economic consequences of racism in context. It examines also the emergence of 'Eurocentrism' as a new form of ethnocentrism specific to Europe, and partially reinforced by EU law.

Chapter IV also relies on the contextual approach of Chapter II but applies it to a legal context. It examines the legal context of race discrimination in EU law, with special emphasis on the legal construction of race through the distinction between EU Nationals and Third Country Nationals. This discussion traces the roots of that foundational distinction to Member State laws and looks to the ways in which EU law has replicated and amplified it, and more importantly, to the ways in which it supports a racialised or even racist construct. The focus of this discussion is therefore *de jure* discrimination which effects race discrimination and how EU law participates in constructing racial Other.

Chapter V concerns the corollary *de facto* discrimination affecting all minorities residing

in the EU, but highlights this discrimination as the 'central case' because it afflicts minority EU citizens in the exercise of their EU law rights: in this way it is about insiders who are treated as Other. This chapter examines discriminatory contexts as they are reinforced by aspects of EU law, and as they generate an EU obligation to act from within EU law itself.

Chapter VI is a theoretic excursus, which considers the multitude of choices which the anti-discrimination law may embody, dividing these into two basic poles: the liberal perspective and the alternative perspective. A number of central substantive tenets of anti-discrimination law are analysed from the perspective of these two poles. The second part of the chapter applies this theoretic modality to EU law, again considering substantive tenets in EU law in the light of the two poles of anti-discrimination law, with special emphasis on Article 13 and the new Race Directive. A final part of this chapter considers form and the adequacy of the current EU law anti-discrimination model in the light of other existing models.

Chapter VII builds on Chapter VI but looks 'behind' the poles that present themselves in EU law, to the normative justifications and aims of anti-discrimination laws. Once again, this issue presents a multitude of choices. This chapter focuses on one such choice involving two distinct orientations in EU law: the Single Market and fundamental human rights. These are considered in turn as justifications for action against race discrimination, and it is argued that a balance between them is needed in EU law. Beyond that mutually defining coexistence, it is also argued that where they are irreconcilable, the normative prioritisation should favour fundamental human rights.

An overarching theme of this work is the acknowledgment of the centrality of context and the duality of anti-discrimination law in terms of theoretic models, substantive choices and normative justification and aims. Acknowledging these offers a stronger model for combating discrimination in novel and *sui generis* contexts, such as the legal context of the EU, allowing us transcend existing legal models in search of more effective synergies. EU law cannot combat race discrimination without acknowledging the *sui generis* nature of its social and legal contexts and the politics and norms at work at all its levels, or without recognising the specific challenges presented by an economic law burgeoning fundamental rights provisions, or by the sheer diversity of standards and traditions and legal rules that exist within its boundaries.

II FORM

This thesis is submitted for examination for the Degree of Doctor of Philosophy pursuant to the University of Oxford *Examination Decrees and Regulations* 2000; Ch.IV Sec.VIII § 7 *et seq.*

Every effort has been made to comply with the conventions set forth in the Oxford Standards for the Citation of Legal Authorities 2000 promulgated by the Faculty of Law of the University of Oxford. The terminology 'EU' for European Union is employed throughout for the sake of clarity and to fit the current academic usage, but also in recognition of the increased communitarisation of all pillars of the Treaty. Therefore, in some instances I refer to what the EU has done or will do and the action in question is in fact within the purvey of the institutions of the European Communities.

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I am deeply indebted to a great many people, and I will endeavour to acknowledge as many of them as possible here. Responsibility for errors and weaknesses in this work remains my own.

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amdg

"And when we allow freedom to ring, when we let it ring from every village and hamlet, from every state and city, we will be able to speed up that day when all of God's children - black men and white men, Jews and Gentiles, Catholics and Protestants - will be able to join hands and sing in the words of the old Negro spiritual, "Free at last, free at last, thank God Almighty, we are free at last."

Rev. Dr. Martin Luther King (1963)[1]

[1] Negro History Bulletin 21 (May1968) 16-17 in JM Washington (ed) *I Have a Dream* (1992) 105-106. Speech delivered before the Lincoln Memorial, Washington D.C. on August 28, 1963 as key note address of the March on Washingotn.

II. RACE AND RACISM: DEFINITIONS AND CONSTRUCTS

I. INTRODUCTION

Race discrimination is a notoriously complex phenomenon: the preliminary definitional tasks pertaining to it are therefore fraught, and part of the challenge of this introductory chapter is to establish the boundaries and orientation of an inquiry which spans a potentially endless inter-disciplinary endeavour; it is therefore critical to situate this thesis in law and political theory, rather than sociology or anthropology. Given this, and the fact that race discrimination, and the related concepts of race and racism are all deeply contested notions, admitting of multiple interpretations, this chapter aims only to introduce an approach to them for the *legal* analysis of race discrimination to follow. Rather than attempting an objective definition or comprehensive discussion, it will introduce a contextual approach, treating these concepts as constructs which are contingent and evolving.

This contextual approach is adopted partly because it is held to be the most compelling, and partly because of its appropriateness to race discrimination as it intersects with EU law. EU law is still evolving, as are its incipient social policy and human rights discourse and their normative underpinnings. These features, coupled with the fact that any legal measure against race discrimination within EU law would cover race as it emerges on a number of levels and in multiple national contexts further supports the need for a context-based approach. Moreover, as later chapters will attempt to illustrate, the principal reasons for which race is implicated in EU law stem from the disparate impact or racist *effects* of its operation and racial constructs in areas of its substantive law.

2. THE PROBLEMATIC DEFINITION OF RACE

Race is just one of the many referents employed socially, politically and legally to create difference and to justify it. It has become one of the most powerful and pernicious indices of difference because of the irrational presumptions its deployment is founded on. Yet, despite the pervasiveness of its use in popular and political discourse, 'race' itself defies any precise or objective definition and, as a concept, is well averred to be 'historically and scientifically problematic.'[1]

[1] RJ Townshend-Smith *Discrimination Law:Text, Cases and Materials* (1998) 4.

(1) Approaches to 'race'

One common understanding of race is that of "biological race",[2] rooted in the idea that there exist natural and inherent physical divisions among people which are hereditary, reflected in morphology and biology,[3] and regroup people as 'Black', 'White' etc.[4] This concurs in part with the traditional understanding of race, as a 'great division of mankind having in common certain distinguishing physical peculiarities, constituting a comprehensive class appearing to be derived from a distinct primitive source,'[5] or 'a group sharing physical (as distinguished from cultural) attributes.'[6] Other related conceptualisations, include race as lineage, type or species (ie 'human race'), or even the Darwinian notion of 'sub-species.'[7]

More recent definitions in this vein view race as a socially defined group seen to belong together because of physical markers such as skin, pigmentation, hair texture, facial features, stature etc.[8] Others rely on a 'panoply of classificatory variables such as skin colour, country of origin, religion, nationality and language.'[9] A recurring notion in these understandings of race, and perhaps the most coherent idea they have to offer contemporary analysis, is the very loose notion of 'a group or category of person connected by common origin.'[10]

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[2] This term is taken from IF Lopez 'The Social Construction of Race: Some Observations on Illusion, Fabrication and Choice' (1994) 29 *Harvard CR-CL L Rev* 1, 6.

[3] A recent judicial example of this approach is vividly illustrated in *Metro Broadcasting v FCC* (1990) 497 US 547 [related to review of the Federal Communications Commission order under a program awarding enhancement for minority ownership in comparative procedures for new licenses, challenging minority 'distress sales' programs permitting a limited category of exiting radio and television stations to be transferred only to minority controlled firms, US Court of Appeals for DC affirm commissions order awarding new license to minority owner and hold that the FCC's distress sale policy is in violation of the equal protection clause of the fourteenth amendment. Justice Brennan (for the maj.) held that 1) program of minority ownership and distress sales was not a violation of equal protection; 2) minority ownership is substantially related to a legitimate government interest: broadcasting diversity; 3) minority ownership policy did not impose impermissible burdens on non-minorities. 5/4. Justice Antonin Scalia, dissenting, conceived of the race-based diversity policy as being a "matter of blood, not background and environment", 637.

[4] IF Lopez above n2, 6.

[5] *Black's Law Dictionary* (6th edn 1990) 1258.

[6] Other definitions which support this can be found in E Cashmore *Dictionary of Race and Ethnic Relations* (4th edn 1988); JE Farley *Majority-Minority Relations* (1995); J Rex *Race Relations in Sociological Theory* (1970); T Sowell *Race and Culture: A World View* (1994); W Wilson *Power, Racism and Privilege* (1973).

[7] For an overview of the various schools of thought on race I Law *Racism, Ethnicity and Social Policy* (1996) 4 which he attributes to F Fanon *The Wretched of the Earth* (1967) 3-4.

[8] E Cashmore, above n6 297.

[9] J Solomos *Race and Racism in Britain* (1993) 8-9

[10] E Cashmore above n6 294.

However, 'biological racial regroupments' are easily deconstructed[11] and their genetic foundations exposed as fallacious since 'there are no genetic characteristics possessed by all Blacks but not by non-Blacks; [...] there is no gene or cluster of genes common to all Whites but not to non-Whites,'[12] and there are greater genetic variations *within* populations typically labeled Black or White than there are *between* these. The idea of race existing as a 'biological reality' is therefore not only disingenuous, but incorrect, enjoying no objective or scientific justification. 'It has long been recognised that, notwithstanding the long history about this category, races do not exist in any scientifically meaningful sense [...].'[13] The *International Covenant on the Elimination of all Forms of Racial Discrimination* (1969)[14] supports this assertion in its Preamble, stating that: '[...]any doctrine of superiority based on racial differentiation is *scientifically false*, morally condemnable, socially unjust and dangerous, and that there is no justification for racial discrimination, in theory or in practice, anywhere[...].'[15]

This proposition is further endorsed in the *Council Directive implementing the principle of equal treatment irrespective of racial or ethnic origin* (2000).[16] It states in relevant part that, 'The European Union rejects theories which attempt to determine the existence of separate human races. The use of the term 'racial origin' in this Directive does not imply an acceptance of such theories.'[17]

Another problem with the deployment of race in a traditional sense is its tendency to

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[11] The case of *Hudgins v Wright* 11 Va. (Hen.&M) 134 (Sup. Ct. App. 1806) a classic, pre-Reconstruction US case, provides an excellent example of how equivocal the notion of racial regroupment founded on morphology or 'biology' can be broken down, and how the case of persons of 'mixed' heritage can so easily challenge traditional categories. In that case, the Plaintiffs were enslaved women suing the state of Virginia on the ground that they descended from a free maternal ancestor (a free Indian woman): a person born to a slave woman was a slave and a person born to a free woman was deemed free. In this instance, the only evidence before the Court to support their claims to freedom, or their owners defence of their slave status, was their physique. Under the infamous test devised by Judge Tucker in this case, the fate of the women rested completely on their complexion, the texture of their hair and the width of their noses which were to establish their race and therefore their status. On the basis that their mother's hair was long and black, and "was of the right Indian copper colour" as well as the fact that she was "generally called Indian by the neighbours"(at 134). The Plaintiffs were pronounced free.

[12] Lopez above n3 11. Citing L Kamin, R Lewontin & S Rose *Not In Our Genes: Biology, Ideology and Human Nature* (1984); A Almquist & J Cronin 'Fact, Fancy and Myth on Human Evolution' (1988) 29 *Current Anthropology* 520; B Bower, 'Race Falls from Grace' (1991) 140 *Sci News* 380.

[13] J Solomos *Race and Racism in Britain* (1993) 8-9

[14] Adopted by UN General Assembly resolution 2106 (XX) 21, December 1965. UK Treaty Series, Misc.77 1969. Cmnd. 4108.

[15] The use of the category 'race' in international law is understood to be a shorthand for differentiation based on skin colour and ethnicity. M Wilkie 'Victims of Neutrality: Discrimination in Denmark (1990) 59 *Nordic Journal of International Law* 4, 6.

[16] Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin. [2000] OJ L 180/22 . (Hereafter 'Race Directive').

[17] Race Directive, Preamble Recital 5.

over-simplify what it refers to, and essentialise[18] what is in fact diffuse, complex and heterogeneous; this in turn may undermine efforts to combat race discrimination. Moreover, despite the startling persistence of racism, racial constructs and identity constantly evolve, and that change and fluidity is something which 'racial essentialism'[19] fails to accommodate.

Anti-racist endeavours rely, therefore, only in part on the persistence of disadvantage, and must invest in the idea that 'the colour-line' is something which does and can change, and may one day cease to be a pervasive 'problem' for our societies,[20] since 'there is nothing 'essential about blackness' or 'black culture.'[21] It is the assumptions of 'self-evidence', immanence and immutability which accompany the deployment of race that empty it of meaning, since race is created and re-created through 'communities of meaning' within which race and even colour are socially constructed categories rather than concepts endowed with inherent meaning.[22] 'Race alone cannot be self-evident on the basis of skin colour, for skin colour alone has no inherent meaning.'[23]

Related to the foregoing is the objection that employing the term 'race' endows the concept with a natural or inevitable quality, giving credence to the reinscription of racist generalisations and stereotypes. This is partly because a continued use of 'race', especially in race relations legislation and policy, programmes of study and party political agendas, reinforces dominant 'common-sense' assumptions that different races exist and have a biological and 'official' reality, which, in turn, fosters the belief that there exists a natural ordering of racial difference.[24] 'To acknowledge race is to leave open the possibility - indeed the certainty - that this acknowledgment will at times be turned to racism's service.'[25]

This dilemma is one which underlies the consideration of any dimension of race discrimination, in that the categories necessarily employed in anti-racist strategies are the same ones we inherit from ignominious racist history. Thus, there is always a risk that

[18] To categorise people on the basis that they possess essential 'conditions' or 'properties' which exist independent of context or experience, and which determine their classification.

[19] Applying essentialism, as defined above, to racial classifications or categories.

[20] This idea is taken from the prophetic words of WEB Du Bois: 'The problem of the twentieth century is the problem of the color-line'. WEB Du Bois *The Souls of Black Folk* (1903) 24.

[21] D Wilkins 'Two Paths to the Mountain Top? The Role of Legal Education in Shaping the Values of Black Corporate Lawyers' (1993) 45 *Stanford Law Review* 1981, 1999.

[22] M Wieviorka *The Arena of Racism* (1995) *passim*..

[23] J Chong-Soon Lee 'Navigating the Topology of Race' in G Peller, K Crenshaw, N Gotanda & K Thomas (eds)*Critical Race Theory* (1995) 446.

[24] I Law above n7, 5. Law also notes the fact that left wing discourse tends to ignore the problematic nature of this issue, and cites Sivanandan as an example of the left attributing 'race' with an independent reality.

[25] IF Lopez above n2, 19.

employing the terms which have defined the evil sought to be remedied will open the way for further perpetuation of that evil. The circularity of using race as a category is thus endemic to what has been termed 'racialisation',[26] describing a dynamic process of using 'race' in a variety of contexts, both racist and anti-racist. The potential duality in 'race discourse' is however more evident in liberal, 'universalist' discourses, than in more particularised or contingent ones, since the latter rely on context to inform values, and reject the putative 'neutrality' of concepts, terms or categories while still acknowledging that racial categories must be confronted before the stigma and disadvantage that have evolved around them can be effectively extirpated.

Skepticism about the coherence of 'race' as a category has lead modern theorists to confine its its meaning to specified contexts or instances. One such approach views race as a 'signifier[27]' or synonym, holding that race itself is a wholly indeterminate concept or a shifting index, capable of multiple interpretations, which has meaning only when applied to rules or codes. Race is thereby rendered a diffuse phenomenon entirely subject to its discursive or subjective meaning. Others have endorsed the idea of race as an ideology with regulatory power within society, or an ideological effect, a masks which hides real economic relations;[28] the only legitimate forms of class consciousness are those reduced to economic relations which are hidden within the regulatory process of 'racialisation'. For such theorists, the construction of political identities which utilise racial consciousness plays no part in the development of progressive politics and race based politics politics are viewed as no more than the distillation of class conflict, and the politics of race confined to no more than the struggle against racism.[29]

More extreme still is the recent body of thought which rejects outright any essentialist conceptions of race with the charge that 'race' has no meaning at all. The impulse propelling this approach lies partly in the history of subjugation behind biological or essential conceptions of race, and their uncritical use in anti-racist endeavours.[30] It questions whether

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[26] I Law above n7, 4, which he attributes to F Fanon, *The Wretched of the Earth* (1967). However, Omi & Winant use the term to describe the 'extension of racial meaning to a previously racially unclassified relationship, social practice or group. Racialisation is an ideological process, and historically specific one. '

[27] E Cashmore above n6 298.

[28] Indeed some of these theorists, such as Robert Miles, oppose the existence of the sociology of race and view that racism not race should be the object of analysis since the former is considered integral to the process of capital accumulation.

[29] R Miles *Racism and Migrant Labour* (1984); *Racism* (1989).

[30] An example of a contemporary analysis of race which questions such approaches is KA Appiah *In My Father's House: Africa in the Philosophy of Culture* (1992).

one can meaningfully analyse race within frameworks that already assume biological difference, even within anti-racist practice, or whether terms can ever be wholly divorced from their histories. In the same vein are those critiques which repudiate the coherence or meaning of 'race', treating as a false or illusory construct: 'The truth is that there are no races: there is nothing in the world that can do all we ask race to do for us [...]. Such evil is done by the concept, and by easy - yet impossible - assumptions as to its application.'[31] Henry Louis Gates, relegates race to a 'trope of ultimate, irreducible difference between cultures, linguistic groups or adherents of specific belief systems... it is so very arbitrary in its application.'[32] For these, the very admission of the word into our language enables and encourages us to will the sense of natural difference into our formulations in a manner which exacerbates the complexity of ethnic and cultural difference, and gives credence to the notion that (racial) 'otherness' is something ineluctable and even natural precisely because discourse, language and terminology are an integral part of the process of 'racialising'.

(2) Preferred Approach to 'race'

Without espousing a conception of race having essential or immutable meaning, one must still confront the existence of what has evolved around the idea of race in social, political and legal terms. 'Race' is still central to pragmatic anti-racist efforts: 'The value of such 'strategic essentialism', where categories of 'race' may be invoked in political struggle cannot be theoretically assumed to have a racist political effect.'[33] Skepticism about the deployment of race or racial categories should therefore be tempered by the reality of disadvantage founded along racial lines, and by the risk of weakening the quest for substantive racial equality through abandoning or denying 'race'. Reducing racial identities to ethnic ones or to socioeconomic condition fails to account for the centrality of race to the histories of oppressed groups, and serves to entrench existing racist divisions. Arguments which entirely discount the role biological and essentialist conceptions of race have played may eventually fall prey to their own logic: that is, considering 'race' dangerous, regardless of its specific historical and social context, fails to recognise that race is not defined by its inherent structure or meaning, but by the social processes that construct it. The result is still an abstract and unitary conception of race, albeit not one founded on biology or morphology.

[31] C West 'Black Leadership and the Pitfalls of Racial Reasoning' in T Morrison (ed) *Race-ing Justice, Engendering Power* (1992) 45.

[32] HL Gates 'Talkin' that Talk' in HL Gates Jnr. and KA Appiah (eds) *"Race", Writing and Difference* (1986) *

[33] Law, above n7, 5.

Furthermore, the fact that the social or political meaning of constructs such as race are always subject to change should not obscure the way in which the stigma and disadvantage associated with race has become entrenched and almost impervious to change.[34] Moreover, from a legal perspective, there is nothing to support the idea that ignoring the reality of racial divisions, or employing a modality of 'race-neutral' or 'colour-blind' concepts actually decreases racial divisions or disadvantage, and indeed, much to endorse the counter-claim.

While the complexities, and even dangers, of employing 'race' are acknowledged, what is opted for here is a pragmatic and effects-orientated approach which attempts to extrapolate how biological conceptions of race have interacted with social and political context, and gained meaning thereby. Race is understood here as a variable and constructed index for differentiation which has resulted in the substantive disadvantage of groups defined or distinguished by it.[35] The reality of that disadvantage must therefore be confronted in terms of its genesis in this index which, while it may be constructed, has also operated in a paradoxal manner, reinforcing and denying the problem of race discrimination and racism simultaneously.

One response to this quandary of defining 'race' in the context of combating race discrimination is to begin by acknowledging that the representation and deployment of 'race' in legal, social and political discourse has no 'necessary political belonging'[36] and no immutable meaning, and from this, concede that it is both social context and substantive values which remain determinative in the definition of its import and meaning. This requires the confronting of substantive political values, and a scrutiny of context, rather than a simple or blanket reliance on terminology. The link between value and context is thus central to understanding categories which, while constructed and artificial, have gained substantial meaning in social, political and legal reality.[37] The interrelationship between relations of politics, power and racism is therefore of pivotal importance, as is 'the role of political and

[34] D Bell *Faces at the Bottom of the Well: The Permanence of Racism* (1992) 3-10.

[35] S Hall 'New Ethnicities' in J Donald and A Rattansi (eds) *Race, Culture and Difference* (1992) 254: 'Black is essentially a politically and culturally constructed category, which cannot be grounded in a set of fixed trans-cultural or transcendental racial categories and which therefore has no guarantees in Nature. What this brings into play is the recognition of the immense diversity and differentiation of the historical and cultural experiences of black people.;

[36] Law, above n7, 6 quoting A Rattansi '"Western" racisms, ethnicities and identities in a "postmodern" frame', in A Rattansi & S Westwood (eds) *Racism, Modernity and Identity* (1994) 56-7.

[37] For a critique of the insufficient emphasis of sociological studies of race relations on (political) contexts S Zubaida *Race and Racism* (1970). In this he called the need to study 'the way the race relations issues enter into the structures, strategies and ideologies of political parties and trade unions and government bodies' 141.

legal relations in defining the existence of racial categories and defining the social meanings of notions such as racial inequality, racism and ethnicity.'[38]

Race must therefore be understood as a term capable of being used within emancipatory projects and endeavours, while also being open to racist appropriation and misuse, as evidenced historically. Race has been, and can still be, redeployed as an affirmative category around which people can regroup to assert the power of their group and its identity.[39] Indeed, it may be that denying the significance of the category of race is itself compromising of personal identity since race has become an essential part of the way in which we understand ourselves and others.[40] Race should not therefore be conceived of as an essence, or as something immutable or objective, but rather as 'an unstable and 'decentered' complex of social meanings constantly being transformed by political struggle.'[41] This emphasises the contingent and evolving nature of race while acknowledging its pervasive and systematic effect on our histories and our societies.[42] 'Human fate still rides upon ancestry and appearance. The characteristics of our hair, complexion, and facial features still influence whether we are figuratively free or enslaved.'[43]

3. RACE AS A SOCIAL AND POLITICAL CONSTRUCT

Race is thus the process and the product of social and historical construction,[44] such that racial categorisations refer to "human interaction rather than natural differentiation."[45] Race has relevance only insofar as it has been endowed with meaning, or evolved into what has been termed a 'racial formation.'[46] The concept of racial formation places race at the center or social relationships, viewing it as 'a fundamental organising principle' of these at

[38] J Solomos *Race and Racism in Britain* (1993) 30.

[39] This point is forcefully made by J Chong-Soon Lee, above n23, 441.

[40] For a duty based theory in the context of race and racial kinship, D Wilkins 'Identities and Roles: Race, Recognition and Professional Responsibility' (1998) 57 *Maryland Law Review* 101.

[41] M. Omi & H Winant *Racial Formation in the United States: From the 1960's to the 1980's II* (1986) 68. (hereafter '*Racial Formation*'; JO Calmore 'Critical Race Theory, Archic Shepp and Fire Music: Securing an Authentic Intellectual Life in a Multicultural World' (1992) 65 *S Cal L Rev* 2129, 2160 defining the premise of Critical Race Theory along similar lines.

[42] 'That is when I realised that a nigger is not so much a person as a form of behaviour; a sort of obverse reflection of the white people he lives among.' W Faulkner, *The Sound and the Fury* (1929) 86.

[43] IF Lopez above n2, 3.

[44] M Omi & H Winant endorse this approach stating that 'race is indeed a pre-eminently sociohistorical concept. Racial categories and the meaning of race are given concrete expression by the specific social relations and historical context in which they are embedded. Racial meanings have varied tremendously over time and between different societies' Omi & Winant above n42, 60.

[45] IF Lopez above n2, 27.

[46] This is the term used by M Omi & H Winant above n42, 61.

either a micro level, defining individuality and the formation of identity, or a macro level, 'as a matter of collectivity and the formation of social structure : economic, political and cultural/ideological.'[47] The idea of racial formation or race as a social construct also views race as interacting with, and defined by, other social or political classifications such as gender, class, wealth, nationality and citizenship, and is pivotal to the definition of groups or individuals within a society.[48] Racial difference is thus a social construct based on an idea that 'difference is itself very much a relational concept. It is neither inherent in a person nor in a state of affairs. Rather it can be identified by comparing one reality in relation to another.'[49] Race is subject to a plethora of forces and contested meanings which may be social, cultural, political or historical.[50] As Ian Lopez contends, 'Race is an ongoing, contradictory, self-reinforcing process subject to the macro forces of social and political struggle and the micro effects of daily decisions.'[51] This may be partly why the understanding of race and racial difference varies so much between societies and countries, and why there are as many constructions of race as there are social and political contexts.

Race is thus more a social and political construct than something inherently meaningful.[52] This understanding of racial groups therefore conceives of persons being *socially defined as belonging together* because of physical markers such as skin pigmentation, hair texture, facial features, stature etc., with the physical or morphological index understood to be preliminary only, and in many ways, only coincidental. What is more significant about the regroupment is the similarity in terms of social experience and subjugation: it is in this final sense that the notion of 'social race' is most validated since it is not reliant on a notion of genetic or biological similarity, but rather on experience and context. In this way, the significance and meaning of racial categories and labels lies principally in the specific social, political or legal context in which they emerge: from this one may conclude that there should be as many definitions of race as there are contexts. The context and experience of race

[47] M Omi & H Winant above n42, 66-67.

[48] This complex interaction, as well as the manner in which the state and political institutions of capitalist societies reproduce racism, are questions seen by some to have so far defied resolution, J Solomos *Race and Racism in Britain* (1993) 241.

[49] G Quinn 'Rethinking the Place of Difference in Civil Society - the Role of Anti-Discrimination Law in the Next Century' in R Byrne & W Duncan (eds) *Developments in Discrimination Law in Ireland and Europe* (1997) 65,70.

[50] Townshend-Smith above n1 , 5.

[51] It has even been contended that this feature renders race 'more contingent on the experiences of a particular society than are gender issues' above n1, 5.

[52] Similarly, in the US context Cornel West maintains that blackness is primarily a political and ethical construct' C West *Keeping Faith, Philosophy and Race in America* (1993); *Race Matters* (1994).

discrimination defines identity collectively and creates a social and cultural commonality: 'We have community, of a sort, (courtesy of racism) in our common victimhood.'[53] Communities and identities have therefore become racially identifiable: 'if race is closely linked to communities, and communities similarly tied to identities, then race and identity are themselves connected.'[54] This conception of the 'social construction of race'[55] therefore challenges the abstraction of minorities experience and identity, and deflecting attention from the problems ingrained in white majoritarian society and those of institutional racism through focusing on 'race relations' rather than racism itself.[56]

Race is thus taken very approximately to be that which regroups a vast pool of people 'loosely bound by historical contingency, socially significant elements of their morphology and/or ancestry.'[57] It is more a social phenomenon or process of inter-relationship than an objective fact connecting a complex of general physical characteristics, collective cultural identity and individual personality: 'Social meanings connect our faces to our souls.'[58]

Choice is another important dimension to be considered, because if race is understood to be 'constructed' or created, the input of 'racial actors' and the self-conscious understanding and self-definition of members of racial groups is central, so that, despite our 'social inheritance' and our contexts, we choose our race in the way we 'invest our morphology with racial meanings.'[59] However, choice itself may be influenced by context, such that the two form a critical symbiosis in the construction of race itself. 'Meaningful action and social struggle necessarily occur in a social context that obfuscates options and limits freedom. Nevertheless, racially meaningful choices are constantly made, and constantly remake the social context.'[60]

This element of choice brings the definition of race defended here close, in certain essential respects to the accepted understandings of ethnicity.

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[53] R Delgado 'Critical Legal Studies and the Realities of Race- Does the Fundamental Contradiction Have a Corollary?' (1988) 23 *Harvard Civil Rights-Civil Liberties Law Review* 407, 410.
[54] IF Lopez above n3, 57.
[55] P Jackson 'The idea of 'race' and the geography of racism' in P Jackson (ed) *Race & Racism, Essays in Social Geography* (1987) 3, 6-9.
[56] J Bourne & A Sivanandan (1980) 'Cheerleaders and ombudsmen: the sociology of race relations in Britain', 21 *Race and Class* 331-352.
[57] J Bourne & A Sivanandan above n56, 6
[58] J Bourne & A Sivanandan above n56, 6
[59] IF Lopez above n2, 7.
[60] IF Lopez above n2, 52.

4. ETHNICITY

An overlapping, though more expansive concept which is relevant in terms of the input of choice and socio-cultural definition of racial categories is that of ethnicity. Ethnicity is generally understood as a symbolic mode of regroupment, uniting or differentiating people according to cultural similarities and social solidarity.[61] These might include a distinct and shared history of which the group is conscious, a distinct cultural tradition, a common geographical origin or descent from a small number of ancestors, a common language, a common literature, a common religion, and most importantly, the characteristic of being a minority or being an oppressed or dominated group within a larger community.[62]

A number of features draw the foregoing definition of race and ethnicity close, indeed some theorists state that the 'ethnicity paradigm represents the modern sociology of race';[63] one is the role of choice and self-conscious appropriation of a racial identity, 'an ethnic groups is not a mere aggregate of people of a sector of a population, but a self-conscious collection of people united, or closely related by shared experiences.'[64] Another is the frequently reactive nature of ethnicity, and the way it can emerge as a response to common plights of political marginalisation or economic and social disadvantage. 'Ethnic groups are more often than not fractions of the working class, an underclass that is especially vulnerable to the kinds of exploitation that capitalism is based on.'[65]

The same groups can simultaneously be viewed as a distinct 'race' and organise themselves as an 'ethnic group', and while there need not be any connection or overlap between them, 'race' and 'ethnicity' are frequently conflated in reality: a group labeled 'race', is often pushed to the perimeters of a society, and will self-consciously define itself accordingly. This issue of cultural self-definition in contradistinction to the majoritarian polity becomes a deeply embedded feature of a cultural group, resulting in ethnic boundaries being as difficult to break as they are to define.

However, despite the concurring features in race and ethnicity, important distinctions

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[61] Discussing the concept of ethnicity as it relates to nationalism in Europe, Hobsbawm states 'Ethnicity, whatever its basis, is a readily definable way of expressing a real sense of group identity which links the member of 'we' because it emphasises the difference from 'them'. What they actually have in common beyond not being 'them' is not so clear, especially today.' EJ Hobsbawm 'Ethnicity and nationalism in Europe today' (1992) 8(1) *Anthropology Today* 3.

[62] Taken from *Mandla v Lee* [1983] IRLR 209 (HL) 211-212; Judgment of Lord Fraser interpreting S 3 Race Relations Act 1976.

[63] M Omi & H Winant above n41, 14.

[64] E Cashmore above n6, 119.

[65] E Cashmore above n6, 124.

between them exist. One obvious distinction is that, at its origins, the construct of race is inextricably tied to colour and morphology, where the indices of an ethnic construct are more elusive in nature, being rooted in a host of shared cultural and historical characteristics.

Another important difference is that race is a construct *generally* defined and imposed by the perceptions the dominant group or majority has of a minority group, where ethnicity is *primarily* determined by how the minority views itself. As Skellington and Morris state, 'the category 'white' [...] is regarded as a fixed and unchanging category, whereas black is generally broken down into different 'ethnic' groups.'[66]

Moreover, ethnicity usually connotes *positive* identification and inclusion, where race commonly reflects dissociation and exclusion. Ethnicity therefore relates to the central uniting feature of a group that subjectively regards itself as different in one or many ways. The distinction might also be posited as 'race' simply representing the general, outer attributes of one group, where ethnicity pertains to the ways in which a group *defines itself* in response to feeling marginal to the mainstream of society.

It is also said, that to conflate race and ethnicity, or define racially defined minorities in terms of ethnicity alone is to neglect the meaning of race itself, and the 'qualitatively different historical experience - one which includes slavery, colonization, racially based exclusion and in the case of Native Americans, virtual extirpation. In addition it has been argued, the paradigm tends to "blame the victims" for their plight and thus to deflect attention away from racial meanings and dynamics.[67]

Thus, race and ethnicity, while close in meaning, might better be conceived of as 'flip-side' concepts of one another. Race being primarily an imposed construct, with ethnicity defined more in terms of participation or engagement, in the way race is not *ab initio*.[68] Ethnicity may be instructive for race through informing the definition of minority and prioritising the group's *experience*, in a way that colour or numeric minority cannot;[69] indeed it may ironically be that it is ethnicity, and not race itself, which identifies a group subject to race discrimination. Where the experience of exclusion defines identity, race and ethnicity

[66] R Skellington & P Morris *'Race' in Britain Today* (1996) 25.

[67] M Omi & H Winant above n41, 21.

[68] Race may evolve into something which fits this definition and be embraced under the banners of the 'politics of difference', 'affirmative racial solidarity' or 'racial kinship'. See the work of Cornel West, Henry L. Gates and David Wilkins and Iris Young.

[69] Most subordinate groups are minorities, but not all minorities are subordinated groups (because of their wealth or power, see e.g. RSA.) For an insightful discussion of these 'axis' of analysis R Schermerhorn 'Ethnicity and Minority Groups' in *Comparative Ethnic Relations* (1970) 12-14 as reproduced in J Hutchinson & AD Smith (eds) *Ethnicity* (1996)17-18.

can be mutually informing, but the pivotal, coercive role played by the majoritarian system or polity in defining race render it initially more relevant to a project on discrimination. That is not to discount the harms of ethnic discrimination, since it is acknowledged that the impulses which create ethnic distinctions may be discriminatory, and ethnic minorities may have part of their identities imposed, or suffer equally pernicious discrimination. Where this is the case, ethnicity may be covered by much of what will be argued in respect of race discrimination.

The differences between the two concepts may be posited as a matter of degree in terms of engagement in identity, or of ordering in terms of how each emerges or operates as a distinguishing factor: race is *a priori* imposed as a mode of exclusion and subordination, and perhaps later embraced; ethnicity is engaged in, and may later serve to discriminate and exclude. It is where these constructs exclude and degrade that they become the subjects of anti-discrimination law, and under this definition, both are potentially open to scrutiny.[70] The ideology of racism, and phenomena of race discrimination, which perpetuate such degradation and exclusion must now be dealt with in turn.

5. RACISM AND RACE DISCRIMINATION

(1) Racism

Racism can be broadly defined as those ideologies, institutional arrangements and social processes which discriminate between persons on the basis of their (perceived) racial difference; it is usually founded on a notion or claim to racial superiority and / or 'an irrational *fear*[71] of difference,'[72] and supports racial discrimination and disadvantage.

'Racism is defined as 'a belief that race is the decisive factor for qualities in talents of a human being and that racial difference establish the hereditary supremacy of a particular race'[73] In this way, it arises where *ideas* of the distinct stock or biological difference of a group are given negative deterministic meaning or limiting social significance and are

[70] Indeed the proxy of subordination may widen the realm of scrutiny to the point where race discrimination is viewed as one emblematic instance of widespread subordination with 'the elimination of racism as part of a larger goal of eliminating all forms of subordination', M Matsuda 'Voices of America: Accent, Antidiscrimination Law, and a Jurisprudence of the Last Reconstruction' (1991) 100 *Yale LJ* 1329, 1331.

[71] 'Both racism and xenophobia are part of the general phenomenon of heterophobia the fear of difference or 'the other'. D Schick 'Contract Law, Discrimination and European Integration' in T Wilhelmsson & S Hurri (eds) *Welfare State Expectations, Privatisation and Private Law* (1998) 405, 409; EU Commission, *Legal Instruments to Combat Racism and Xenophobia* (1992)15.

[72] D Schiek above n71, 409.

[73] D Schiek above n71, 409.

symbolically mobilised.[74] Accordingly, racism can be conceived of as 'a case of culture "hijacking genes" which were selected for different ends (e.g. skin pigmentation),[75] and making them serve an entirely different social agenda.'[76] The reason this social or political 'agenda' is the target of anti-racist strategies lies in its bigoted content and the irrational set of assumptions which accompanies it, from prejudice, nationalism or intolerance, to xenophobia and genocide.

Racism can be defined by a number of elements: (i) the signification of biological characteristic to identify a collectivity; (ii) the attribution of such a group with negative biological or cultural characteristics; (iii) the designation of boundaries to specify inclusion and exclusion; (iv) variation in form such that it may be relatively coherent theory or a loose assembly of images and explanations; (v) its practical adequacy, in the way it successfully 'makes sense' of the world for those who articulate it.[77]

Definitions of racism may also be expanded to embrace *acts* of a racially harmful or disadvantaging nature: some definitions cover only those acts which are *intentionally* harmful to members of racial minorities and are propelled by racial animus or prejudices, where others include *de facto* disadvantage suffered by racial minorities, and harms entrenched in supposedly neutral social practices and structures. The latter approach concurs more with an idea that racism and race discrimination are fluid and contextually defined phenomena, which evolve in a variety of social and historical contexts, often becoming ingrained in these to the point of becoming invisible and indistinguishable from the main social or political fabric.

This contextualised definition of racism sees that 'although at its root racism may involve clear and simple images, it is by no means uniform or without contradictions. Indeed, what is most interesting about racism as a set of ideas and political practices is that it is able to provide images of 'Other' which are simple and unchanging and at the same time adapt to the changing social and political environment. Thus, contemporary racist ideas are able to retain a link with the mystical values of classical racism and to adopt and use cultural and political symbols which are part of contemporary society.'[78]

The idea of racism as a singular, trans-historical mode of explanation has been subject

[74] D Mason 'Some problems with the concept of racism' *Discussion Papers in Sociology (U. Leicester)* (1992) no S92/5, 23.

[75] Skin pigmentation serves to regulate exposure to sun radiation in different latitudes.

[76] P Van Den Berghe 'Does race matter?' I:3 *Nations and Nationalism* 359-68 (1995) reprinted in J Hutchinson & A Smith (eds) *Ethnicity* (1996) 57, 62.

[77] I Law above n7; 48, who attributes point (vi) to R Miles *Racism* (1989) 79-80.

[78] J Solomos & L Back *Racism and Society* (1996) 216.

to trenchant criticism;[79] racism is neither a unitary nor a static phenomenon, but something which evolves in various spheres, produced and reproduced through media, education, the workplace, political processes and the through the law.[80] 'Racism does not stay still; it changes shape, size, contours, purpose, function - with changes in the economy, the social structure, the system and, above all, the challenges, the resistances to that system.'[81]

Racism, like race, should be understood in contextually specific terms, since, like race, it exists only as a result of constructed racial or ethnic difference. Although the characteristics used as proxies for racist and discriminatory distinctions are usually 'immutable'[82] (ie pigmentation, hair texture, facial features), their social construction is not.[83] Thus, racism is, at least in part, reliant on a reified view of race in the way it ascribes false concreteness to categories that are in fact invented.[84]

(2) Race Discrimination

Race discrimination is understood here as more than an analogue of racism or the existence of constructed racial difference. In certain respects it is the *result* of racist ideas and behaviour, and a substantive register of the stigma, exclusion and disadvantage which accompanies the existence or creation of difference along 'racial lines'. These racial lines have been reproduced on a number of levels, and persist implicitly in the structures and norms of social, political and legal systems.

Race discrimination is thus the active, formal or structural manifestation of individual or group subordination and exclusion, whose referent is the contingent, *sui generis* construct

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[79] I Law above n7, 47.

[80] For an insightful discussion of the subject of racism R Miles *Racism* (1989) 41-50.

[81] A Sivanandan 'Challenging racism: strategies for the '80s' (1983) 25 *Race and Class* 1, 2.

[82] Some describe this as discrimination by ascription : since the personal characteristics used to discriminate are ascribed to the victims as permanent and as starting points for social exclusion. D Schiek above n71, 406-410.

[83] The question of the relevance of characteristics which regroup people along racial or ethnic lines will be revisited as it is key to the larger issue of the purposes and aims of anti-discrimination law in respect of race, most especially in regard to its remedial aspects.
This discussion is intended only to introduce the notion of racial categories and constructions, and dispel the rationality or legitimacy of discrimination (as opposed to remedial measures) founded on race or ethnicity. In some respects this pays tribute to the worth of the general thrust of the anti-discrimination principle as necessary, if not sufficient. The perspectives and values elaborated on infra define the position defended here which dictates that while the categorisations which have given rise to race discrimination and substantive inequality are irrational and indefensible, the social reality of disadvantage and exclusion demand a response which registers this. Thus, the ideal may be stated as a symmetrical vision of equality, as a long term goal or ideal in accordance with the ADP, while the immediate remedial approach requires that present disadvantage and historical injustice be registered: often along race, colour or ethnicity lines.

[84] M Kelman *A Guide to Critical Legal Studies* (1987) 269-274.

of race.[85] It may also be 'the active or behavioral expression of racism aimed at denying members of certain groups equal access to scarce and valued resources.'[86] It is therefore something more than thinking unfavorably of certain groups: discrimination requires operationalising such beliefs, with or without the *intention* to disadvantage. Thus, while racism and race discrimination may be mutually reinforcing, they are not concomitant. Such an idea would severely compromise a contextual or comprehensive vision of race discrimination, limiting it to acts accompanied by racial prejudice or animus, and race discrimination is contended to be a more pervasive phenomenon than overt racism. Denying certain racially defined groups access to resources, services or position reinforces racist stereotypes, and may well be based on racist beliefs and perceptions; but discrimination need not be based on *current* or 'active' racism, since it may also result from past racist practices now inculcated in apparently 'neutral' rules or forms of the *status quo*.

Therefore, what must be scrutinised is how legal norms and structures reinforce such disadvantage, particularly in their operation and effects. It is the intersection between the law, and the reality of powerlessness, exclusion and the 'constant, if not increasing socioeconomic disparity between the races'[87] which requires examination. What must also be assessed is the extent to which the law can be seen to have 'fixed racial identities,'[88] and thereby fixed the location of power. Thus, recurring theme in the remaining chapters is that of the symbiosis between race and power, and its complex relationship to law; part of the difficulty of examining the role of the law in this regard is the (liberal) tendency to deny it, and aspire to 'neutrality' in the elaboration and interpretation of legal provisions.

6. THE JUDICIAL CONSTRUCTION OF 'RACE': US EXAMPLES OF DIVERGENT APPROACHES

If race is constructed, what are the ways in which it has been legally or judicially constructed? That courts constantly deploy constructions of race, whether explicitly or not, is a premise of this discussion; the very consideration of race in a legal context requires some working definition or construction of it, and its nature will depend on how a court views race

[85] Racism itself has been defined as 'discriminatory behaviour based on inherited physical appearance, [...] expected to arise whenever variance in inherited physical appearance is greater between groups rather than within groups', P Van Den Berghe above n54, 60.

[86] E Cashmore above n6, 305. Cashmore applies the term 'racialism' to this definition.

[87] KW Crenshaw 'Race, Reform and Retrenchment: Transformation and Legitimation in Antidiscrimination Law'(1988) 101 *Harvard L Rev* 1331, 1332.

[88] M Minow *Not Only for Myself* (1997) 61.

itself, and the influence of law on race. Part of the importance of the judicial construction of race is its ability to formalise, amplify and legitimate the classifications it employs.[89] Despite fundamental substantive and methodological differences, the import of judicial or legal constructions of race applies as much to domestic legal systems as to a system such as that of the EU.

A critical dimension of this question is whether, in their appraisal of race, courts have constructed it in terms of content rather than the *context*[90] Apposite examples of both essentialist and contextual approaches to the judicial constructions of race can be found United States Supreme Court jurisprudence. The examples chosen concern the two seminal cases on racial segregation, and illustrate not only the malleability of doctrine or law, but also the political power of the judicial construction of race, and the correlation between values and context. As may be expected, the more an approach seeks to justify the social or political status quo, the more formalistic and essentialist its construct of race is. Conversely, the more searching the standard of scrutiny regarding substantive justice and values, the more contextual the approach to race is.

The most extreme example of a formalist and non-contextual construction of race emerges in one of the most ignominious cases in US constitutional history, the case of *Plessy v Ferguson.*[91] *Plessy* concerned a challenge to segregated public transportation in rail cars in Louisiana, which the Supreme Court upheld under the infamous 'separate but equal' doctrine. The case illustrates various dimensions of an essentialist and formalistic conception of race, and one which denied the centrality of context in determining whether such segregation violated the Equal Protection Clause of the fourteenth amendment.

First, the Court interpreted equality under the fourteenth amendment to mean only equality *before the law*, distinguishing political from social equality such that the latter was seen as neither a necessary nor desirable adjunct of racial equality. As in other cases, the formal distinction between political and social equality was relied on to justify a formalistic conception of equality, and therefore of race[92]. Thus, in its application, the equality principle was rendered extremely limited and essentially abstract, just as it had been in *Stauder*: 'But

[89] For a recent defence of this general idea, albeit in more extreme terms, D Kennedy *A Critique of Adjudication (Fin du Siecle)* (1997).

[90] The two approaches discussed in regard to the judicial construction of race will be returned to in greater detail as two directions in anti-discrimination law with respect to race discrimination; chapter VI below.

[91] 163 US 537 (1896); Error to the Supreme Court of the State of Louisiana.

[92] *Civil Rights Case* (1863) 109 US 3; *Strauder v West Virginia* (1879) 100 US 303, distinguished here because it related to 'political equality' implicated in the right to serve on juries. Emphasis added.

when this great principle comes to be applied to the *actual and various conditions of persons in society* it will not warrant the assertion that [people] [...] are legally to have the same functions and be subject to the same treatment.'[93]

The Court refused to accept that 'social background conditions might render the superficially equal unequal in reality,'[94] through conceiving of race in an abstracted way, divorced from its social context. It therefore rejected the idea that enforced separation of the two races stamped 'the coloured race with a badge of inferiority,'[95] asserting that any such idea resulted solely from the coloured race's choice to place such a construction on it. This denial of the social and legal process by which race is created and constructed also ignored the social power imbalances of the *status quo* such segregation upheld. It attempted to present race in neutral terms, as something which inhered in people, distinguishing them in essential ways through their morphology: 'Legislation is powerless to eradicate *racial instincts* or to abolish *distinctions based upon physical differences*'.[96] Race was thus reduced to instinct and physical characteristics.

This approach concurs, in part, with a more conservative trend evidenced in the 'race jurisprudence' of the Rhenquist Court, which has tended to reject the legal recognition of race:[97] like the Court in *Plessy*, it essentialises race through conflating race and biology, and through ignoring the context of race. Thus, despite its professed 'colour-blindness',[98] it simultaneously denies the significance of race while reinforcing the existing context of race; this contradiction is epitomized by the way in which the Court simultaneously deploys a definition of race and denies the central role a court can, and does, play in constructing race.

The foremost example of a contextualised, social construction of race emerges in

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[93] 100 US 303, 343, quoting CJ Shaw in *Roberts v City of Boston* (1850) 5 Cush. 198, 206.

[94] F Schauer 'Generality and Equality' in G Postema (ed) *Racism and the Law, The Legacy and Lessons of Plessy* (1997), 59.

[95] 163 US 537, 550.

[96] Emphasis added, 163 US 537, 550.

[97] See e.g.: *Hopwood v Texas*, (5th Circuit, 1996) F 3d 932 . Related to federal affirmative action programs in government contracts and the use of 'strict scrutiny' in respect of *any* classifications based on race, *Adarand Constructors v Pena* (1995) 115 S Ct 2097.

[98] A rather misleading term coined in *Washington v Davis* (1976) 426 US 229 (Burger Court). [Case concerned a verbal test requirement for hiring in the DC police department A class action was taken by unsuccessful black applicants, challenging the requirement under due process clause of 5th am. The Supreme Court found the test not to be racially discriminatory or unconstitutional on the basis of its racially disproportionate impact, and disregarded discriminatory purpose because the test was neutral on its fact. The relationship between the test and training school performance was held sufficient to validate the test despite the absence of job relatedness. Marshall J dissented joined by Brennan J..

Brown v Board of Education.[99] In *Brown*, a central premise of the historic judgment outlawing segregation in public schools was the notion that race was something determined and even created historically and culturally in social contexts, which could be viewed as the product of past and present discrimination.

The judgment recognised the ways in which race and racial classifications *gain meaning*; holding that segregation based on race be outlawed because of what such separation *has come to mean* in social, political and economic terms: 'separating the races is usually interpreted as denoting the inferiority of the Negro group'.[100] Thus, even if 'separate but equal' were a reality in terms of tangible factors or facilities in schools, it is the stigmatic harm which separation symbolises that is targetted. 'To separate them from others [...] solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone.'[101]

Later cases which applied a 'disparate impact' or 'indirect discrimination' analysis to race discrimination likewise endorsed a social and contextual approach evidenced in *Brown.* Within this legal paradigm, race is openly viewed in terms of context and effects, which tacitly supports the idea of of race as a construct and rejects any essentialism or neutrality in the identification of race discrimination. This perspective opens the way for viewing discrimination as direct *or indirect*[102] and as something which afflicts groups as much as individuals since the perspective of victim rather than perpetrator becomes pivotal to the construction of race.[103]

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[99] *Brown I* (1954) 347 US 483; the parallel case applying to D.C. in respect of the 5th amendment *Bolling v Sharpe* (1954) 347 US 497.

[100] 347 US 483, 494.

[101] 347 US 483, 494.

[102] E.g. *Griggs v Duke Power Co.* (1971) 401 US 424. This case concerned the challenge of employment practices for violation of the equal protection clause because of requiring high school education and an IQ test for transfers to certain jobs. The requirements had no job relatedness and disqualified Blacks at a higher rate than whites; the jobs in question were filled by whites. CJ Burger held that (1) equal opportunity under Civil Rights Act should remove barriers that *operated* to exclude; (2) even formally neutral or neutral intent cannot be sanctioned if it operates to freeze the status quo of prior employment discrimination; good intent does not redeem; (3) not all requirements are outlawed: only those which are artificial, arbitrary, unnecessary and operate invidiously to discriminate on the basis of race or other impermissible classification; (4) this includes not only overt discrimination, but also discrimination in operation despite being fair in form ("built in headwinds"); (5) requirements must be significantly related to successful job performance. Further, S 703 (a) of Civil Rights Act. S. 703(j) permits affirmative action. See *Watson v Forth Worth Bank and Trust Co.* (1988) 108 S Ct 277 which left the burden of proof with the Plaintiff at all times in cases of disparate impact. Congress reversed this, mandating a return to the *Griggs* standard in Civil Rights Act 1991, S 105. This generated debate as to whether this amounted to equality of opportunity or equality of results.

[103] It is worth noting that the victim perspective, in terms of the inferiority felt as a result of segregation,was dismissed outright in *Plessy*; see quotation above n91 at 15.

What is important about the foregoing in respect of the construction of race is what it illustrates of the courts' role in that construction and, depending on the approach taken, the way they can embrace or deny that function. It is also clear that where courts acknowledge their role in constructing race, they will tend to have a more fluid and contextual conception of what race is, and in substantive legal terms, adopt a more expansive vision of anti-discrimination law. The content of the law may therefore not always be determinative in regard to race, since it is often the manner in which the courts view race and their role in regard to its construction which will determine the nature of the racial construct in judicial outcomes. That it is constructed, by history, society and the law is the conclusion defended here.

III. THE SOCIAL AND POLITICAL CONTEXT OF RACE AND RACISM IN THE EUROPEAN UNION

1. INTRODUCTION

Given the centrality of context to the conception of race defended in the foregoing chapter, a discussion of aspects of the European 'race context' is warranted before an analysis of the construct the of race within EU *law* can be undertaken.

This chapter also discusses the 'politics' of race in Europe: the putative causes of the rise of the extreme right and of racist/xenophobic and anti-immigrant sentiment in Europe. The social dimensions of European racism are explored with emphasis on the socioeconomic condition of migrant workers and that of ethnic and racial minorities, highlighting the 'intersectionality' of economic subordination and membership of racial or ethnic groups. Issues related to the representation of ethnic and racial minorities in Member State and EU policies will be examined, as will existing conceptualisations of minority status in political and social discourse. This discussion highlights facets of European social, political and economic contexts which create an exclusionary racial construct, to which the EU itself contributes.

2. RECENT MIGRATION PATTERNS OF RACIAL AND ETHNIC MINORITIES IN EUROPE

The history of racism and xenophobia, and the evolution of racial minority constructs in Europe implicate a number of portentous themes in European history evoking some of its most ignominious eras.[1] This history has been written about authoritatively elsewhere, and will not be considered again here. This section discusses recent historical evolution of racial and ethnic minority constructs as they relate to European migration, analysing international and intra-European immigration, and the migration of indigenous European minorities. Minority migrations to European states have occurred in different phases, loosely aligned with trends in immigration policy of traditional host states.

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[1] MW Davies, A Nandy, A Zianddin *Barbarian Others: A Manifesto on Western Racism* (1993); C Delacampagne *L'Invention du racisme: Antiquite et Moyen Age* (1983); I Hannaford *Race: the History of an Idea in the West* (1996); MC Horowitz *Race, Class & Gender in Nineteenth Century Culture* (1991); P Shipman *The Evolution of Racism; Human Difference and the Use and Abuse of Science* (1994).

(1) The pre-1974 phase: the era of guest workers.

This era was dubbed the 'industrial phase' because of the 'positive approach' adopted towards immigrants into European industrialised societies in response to labour shortage and the economic prosperity of host states, alongside the dissolution of colonial empires. Post-1945 immigration until the mid-1970's was dominated by of semi-skilled and unskilled manual labour and was determined by uneven capitalist development. With some notable exceptions, the host states of this era explicitly promoted and legitimated immigration as a political and economic necessity.[2] This phase included immigrants of different origins: the first immigrants to Western European states were, 'intra-European migrants', from Mediterranean Europe (Portugal, Italy, Spain, Yugoslavia and Greece); a later wave of immigrants within this phase emanated primarily from colonies and ex-colonies of the north-western European nation states, including the Maghreb, Turkey and a number of African and Asian countries.

(2) Second phase: 1974-1988 The second identifiable phase, beginning in the immediate aftermath of the 1973-1974 oil crisis, was marked by a significant overall reduction in the number of incoming migrants, rising unemployment and political tensions rooted in social unrest. Conflicting views of this era exist. Some maintain that the halt on immigration and the gradual completion of family reunifications in former 'guest worker' states provided conditions of stabilization under which the newly ethnic communities could settle and form their own communities. Others view this era as corresponding with the time when crude assimilation defined immigration policies: 'the integration of migrant populations was essentially a means of classifying those populations and rendering them inferior by distinguishing them from national citizens.'[3] This was a period of retrenchment, during which the distinctions and their concomitant disadvantage took root in European societies. This retrenchment was exacerbated by the new types of migration of the era: skilled international migration, asylum seekers and clandestine migration. The full panoply of distinctions between 'insiders' and 'outsiders' was yet to evolve along racial and ethnic lines: distinctions still lay along lines of national ethnocentrism, rather than broader European versus non-European lines.

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[2] R Miles *Racism after 'Race Relations'* (1993) 201.

[3] A Rea 'Social Citizenship and Ethnic Minorities in the European Union' in M Martiniello (ed) ***Migration, Citizenship and Ethno-National Identities in the European Union*** (1995)179, 182.

(3) Third phase: 1988-present This phase is defined by increased migration,[4] and high (and rising) unemployment in all EU Member States. Migrations grew from Asia and Africa into southern countries which had, until the early 1970's, experienced mass *emigration.* This phase is one of spontaneous movements often taking the form of illegal or refugee movements, and one defined by the emergence of increasingly restrictive immigration policies in western European states, most especially, the traditional host states of the first phases.[5]

Increased migration in this latter phase stems from family reunifications for settled immigrants, escalating poverty in Africa and other regions, as well as the political turmoil and refugee crisis in former Eastern block states, particularly ex-Yugoslavia. The economic, social, and demographic disparities between sending and receiving states are not the sole factors in causing migration since these movements are an expression of the interdependence between sending and receiving *areas* within the political economy of the world market.[6]

'Migrants' in the third phase do not constitute a uniform category in any significant respect, due to the 'increasing participation of women workers, and the emerging polarisation of skills with both unskilled and very highly qualified personnel participating.'[7] Beyond the broad popular conception of migrants comprising single, male unskilled or semi-skilled workers from underdeveloped states in Africa, Asia or Eastern Europe, there exist other substantial categories of immigration. 'The category of 'foreigner' is homogeneous.'[8] A more nuanced breakdown of the generic 'migrant category'[9] is required to understand politics and values involved in increased immigration, and assist in identifying the real targets of restrictive immigration, integration policies and discriminatory laws in the EU today.

One important category of new migrant results from reunifications of relatives with a family member already present in the Member State. Many of these were aliens originally granted temporary entry on the basis of a legal contract (in order that they might sell their

[4] The UK emerges as an exception to this phenomenon of increased migration, R Cohen *Frontiers of Identity: The British and the Others* (1994). This commentator contends that the UK's tightening of immigration controls might even be in breach of its obligations under the Geneva Convention relating to the Status of Refugees 28 July 1951 (Cmnd 9171) as extended by Article 1(2) of the 1967 Protocol 31 January 1967 (Cmnd 3906)

[5] The UK began enacting restrictive immigration laws earlier.

[6] S Castles 'Migrations and Minorities in Europe. Perspectives for the 1990's: Eleven Hypotheses' in J Solomos and J Wrench (eds) *Racism and Migration in Western Europe* (1993) 20.

[7] S Castles above n6, 18.

[8] R Miles above n2, 186.

[9] The use of generic 'categories' of migrant is aimed at highlighting the heterogeneity of migrants as a group; it does not imply a strict demarcation between different migrants, since their characteristics are fluid and can be overlapping and inter-related. 'Previous distinctions between types of migration are becoming increasingly meaningless' since their categorisations are collapsing, S Castles above n6, 19.

labour), who now retain and exercise a legal right of entry in order to facilitate 'family reunion'.[10] Most EU states are seeking to tighten the criteria for eligibility of these 'dependents',[11] although humanitarian considerations may constrain them.

Another important migrant category comprises refugees and asylum seekers which soared in the 1980's[12], and in 1990, asylum seekers numbered 200,000 to 300,000.[13] Despite the popular conception of this category as a 'massive influx',[14] it remains proportionately small.[15]

A third, growing category is constituted of foreign migrant workers, recruited to fill *specific positions* in the European labour market.[16] For economic and demographic reasons this category increased through the 1990's,[17] and it is likely to grow as a result of labour shortages in semi-skilled and unskilled manual labour and in the service sector in states like Italy, Spain, Portugal and Greece. This economic growth depends upon 'Third World' migrant workers,[18] often from the Maghreb, who enter the EU illegally.[19] Despite the *de facto* reliance on these migrants, the Member States have aimed at restricting it *in legal terms*.

A fourth category is that of managerial, professional, technical and scientific workers, a large proportion of whom originate from economically advanced capitalist states; 'these, too, are foreign migrant workers, although in comparison to the movement of manual labourers they are a very privileged category.'[20]

A fifth category, closely aligned to the former, is a shorter-term migration, principally of

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[10] D Maillat 'Long-term aspects of international migration flows: the experience of European receiving countries' in OECD *The Future of Migration* (1987)43-9; SOPEMI 'Systeme d'observation permanente des migration OCDE, Paris *Continuous Reporting System on Migration: 1990* (1991) 1; *1989* (1990) 7

[11] E.g. UK immigration policy since 1962 aimed at tightening these eligibility criteria. P Gordon *Fortress Europe? The Meaning of 1992* (1989) 16.

[12] R Cohen and D Joly 'Introduction: the "new refugees" of Europe' in D Joly and R Cohen (eds) *Reluctant Hosts: Europe and its Refugees* (1989) 11. According to SOPEMI (1991) 122 the number of asylum seekers coming to European OECD countries per year increased from 65,000 in 1983 to 289,000 in 1989.

[13] PL Martin, E Honekopp and H Ullman 'Europe 1992: effects on labor migration' *International Migration Review* (1990) 24(3) 591, 601.

[14] Some charge that these are economic migrants, seeking entry solely to obtain paid work and social assistance.

[15] R Cohen and D Joly above n12, 11; SOPEMI (1990) above n10, 3.

[16] SOPEMI above n10 (1990) 7-13.

[17] OECD, *Migration: The Demographic Aspects* (1991) Paris, OECD.

[18] EU Commission *General Report The Member States of the EU and immigration in 1994, Less Tolerance and tighter control policies; Information network on Migration from third countries RIMET* (1995) 13. Confirming that the trend in the employment of foreigners is away from industry and towards services.

[19] SOPEMI (1991) 21-5; EU Commission *Social Europe: The Social Dimension of the Internal Market: Interdepartmental working party.* Special Edition COM (1988) 8/89 at 22

[20] R Miles, above n2, 186.

business persons.[21] These migrants are often from states such as the US, Canada and Japan, and they enjoy more favourable conditions of entry.[22]

The fact that there exists some correlation between the racial and ethnic constitution of the migrant category and their treatment raises a presumption that certain patterns of European immigration may indeed be discriminatory. This is supported by the stratified treatment of TCN as a group, indicating that distinctions in legal status and treatment of TCN are made along lines of 'relative otherness.'[23] This translates into racial and ethnic distinctions, such that there are 'special status non-Europeans' and true 'TCN'. The stratified treatment of Association Agreements with Eastern countries creates an intermediate category of 'special status non-European'. This emerges also in ECJ jurisprudence on Association Agreements, and that on Council Regulation EEC 1612/68[24] on free movement for workers within the Community, Council Regulation 68/360/EEC[25] on the abolition of restrictions on movement and residence within the Community for workers of member states and their families, and 1408/71[26] on the application of social security schemes to employed persons, to self-employed persons and to members of their families moving within the Community. Moreover, the Resolution of the Interior and Justice Ministers of the EU of 20 June 1994 stipulates that work permits shall not be granted to TCN except in cases where the job could not be filled by a citizen : *citizens of the EFTA countries and those states which have concluded an agreement with the European Union on the right to work are not affected by this restriction.*[27]

There is also a special, hybrid category [28] who are residents of a non-EU state and are

[21] In the UK for instance, foreigners are permitted to enter Britain 'for business purposes' *without a work permit* for up to 12 months.

[22] R Pennix and P Muus 'No limits for migration after 1992? The lessons of the past and reconnaissance for the future?' (1989) 27(3) *International Migrations* 373, 384; SOPEMI (1990) note 10, 11; SOPEMI (1991) n10 32-33.

[23] A Brah 'Black Women and 1992' in A Ward, J Gregory and N Yural-Davis (eds) *Women and Citizenship in Europe: borders, rights and duties* (1992) 23.

[24] [1968] OJ L 257/2. Tamara Hervey also notes the Recommendation on combating illegal employment of TCN which does not cover certain 'special status categories': the family of EU citizens, EEA nationals, TCN in 'a situation covered by Community law', TCN's covered by bilateral or multilateral agreement; she also notes the EU's soft law measures on long term resident TCN's. T Hervey, 'Putting Europe's House in Order: Racism, Race Discrimination and Xenophobia after the Treaty of Amsterdam', in D O'Keefe & P Towny, *Legal Issues of the Amsterdam Treaty* (1999) 329, 336

[25] [1968] OJ L 257/13

[26] [1971] OJ L 149/2; amended (EEC) No. 1248/92, [1992] OJ L 136/7; consolidated version [1992] OJ C 325/1

[27] EU Commission, *The Member States of the EU and immigration in 1994, Less Tolerance and tighter control policies. RIMET*; EU Commission, *Proposal for a Council Decision establishing a Community action programme to promote the integration of refugees* [1998] COM (98) 731 final.

[28] Under British law, for instance, a person whose parent or grandparent is born in the UK is entitled to enter, and settle in Britain, irrespective of their current nationality or citizenship status; A Dummett and A Nicole *Subjects, Citizens, Aliens and Others: Nationality and Immigration Law* (1990) 216-219; 245.

entitled to residence in, or the nationality of a Member State such as nationals of Commonwealth states.[29]

Finally, intra-European[30] migration[31] comprises 'immigrants' to EU states who share some European commonality with their hosts, either because they possess EU citizenship, or are of 'European origin' or both. Their migration grew initially from the demand for labour and services in more industrialised European states, drawing migrant workers from other, less affluent European states.

The lack of attention afforded this category[32] as an immigration issue is likely imputable to its centrality to EU integration policy as the 'operationalising' of one of the four freedoms of the Single market. EU integration has advanced such that this migration is no longer viewed within a traditional (and largely negative) 'immigration rubric', indeed it is positively conceived of as movement of a 'common European people' *qua* EU citizens through a 'common European' space. It is accepted as non-alien and non-threatening. However, the consequence for this is positive 'within the category' but negative 'outside it': 'foreign' is equated with 'non-EU'. The correlation between the racial and ethnic constitution of this category and the level of acceptance it enjoys raises a presumption that racist and xenophobic sentiment are shaping the attitudes of Europeans to migrants generally.

3. EU IMMIGRATION AND ASYLUM POLICY

Immigration and asylum law are jealously guarded national competence.[33] Policy in the areas of immigration, visas, asylum and refugees has developed to different extents and in different fora, compounding the complexity of this area of law. EU immigration policy has emerged incrementally, evolving *away* from exclusive national competence, through

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[29] E.g. one million white residents of South Africa also have such a right; A Dummett and A Nicol (1990) above n28, 279.

[30] Between the Member States of the EU.

[31] According to Miles by the mid-1980's there were 4.75 million people resident in Member States who were nationals of other Member States (especially in France, Germany and Britain). R Miles above n2, 188.

[32] Intra-Community mobility has not been as extensive and the number of EU nationals exercising free movement now is minimal compared with pre- EEC era; L Hantrais *Social Policy in the European Union* (1996) 168-190.

[33] States like Germany, have developed policies for recruiting contract guest worker populations; France has a combination of what is termed 'immigration for settlement' of populations judged 'suitable for assimilation', and 'strict contract labour'; Britain's policy has focused mainly on settlement immigration, with contract labour playing a very minor role. C Lloyd 'National Approaches to immigration and minority policies', in J Rex and B Drury *Ethnic Mobilisation in a Multi-cultural Europe* (1994) 69,73.

intergovernmentalism, to incipient communitarisation[34].

European immigration policy evolved in the late 1970's and 1980's in loosely coordinated patterns, first under the Coordinators Group[35], and later under the Schengen paradigm from which the Schengen Convention[36], Trevi[37] and the 'Ad Hoc Group: Immigration'[38] emerged covering the harmonization of visa policies and the coordination of crime prevention.[39] The Dublin Convention[40] covers asylum procedure, and though it involved all the Member States it was not concluded under the aegis of the EU[41]. Dublin and Schengen clearly constitute a 'preliminary codification'[42] of immigration policy between Member States .

Despite SEA Declarations placing clear boundaries on EC competence[43], the Single European Act[44] advanced the coordination of immigration policy. These Declarations concretised a corollary principle to free movement of persons: *controlling immigration from third countries*. 'Internal free movement has been achieved by the creation of a 'fortress Europe', justified by the 'problem' of migration flows.'[45]

The strict control of the external borders has remained a priority to ensure that opening

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[34]The role of the state in migration policies is difficult to identify because of the division of responsibilities between national and supranational authorities with regard to immigration, the reordering of the public and private in social policies. S Castles, above n6, 25.

[35] This Group comprised Member States committed to furthering co-operation on matters related to free movement of persons.

[36] Schengen Convention of 14 June 1985; Trb.1985 No.102., 'Agreement [...]on the gradual abolition of controls at the common borders'. It was only a framework procedure which culminated in the Schengen Accords.

[37] 'Trevi' is an acronym for terrorism, radicalism extremism and violence, established in 1976 at the instigation of the British Government aimed at co-ordinating policy on terrorism, and later all policing and security aspects of free movement.

[38] The intergovernmental Ad Hoc group's mandate concerned primarily immigration and asylum. It drew up the draft European Borders Convention which contains clauses almost identical to those of the Schengen convention providing for strict controls on the entry of TCN, with a list of countries for which visas will be required, where race and wealth, rather than humanitarian grounds are determinative: the USA, Australia, and Japan are exempt.

[39] Schengen was the 'laboratory of what the Twelve will implement by the end of 1992', though only 9 Member States participated. Ireland, Denmark and the UK did not sign the accord. D O'Keefe 'The Schengen Convention: a suitable model for European integration?' (1991) 11 *YEL* 185.

[40] 15 June 1990.

[41] It has been the subject of widespread criticism for its unrealistic and draconian terms

[42] D O'Keefe 'Can the Leopard Change its Spots? Visas, Immigration and Asylum - Following Amsterdam', D O'Keefe & P Twomey (eds) *Legal Issues of the Amsterdam Treaty* (1999) 271, 272.

[43] Declarations on Articles 13-19 SEA and the Political Declaration by the Governments of the Member States concerning the free movement of persons. The first reserves Member States 'the right to take such measures as they judge necessary for the purpose of controlling immigration from third countries...'; and the second that 'In order to promote the free movement of persons the Member States shall cooperate, without prejudice to the powers of the Community, in particular as regards the entry, movement and residence of the nationals of third countries...'. SEA [1997] OJ L 169; Treaty Series 31/1988 Cmnd 372.

[44] Treaty Series 86 (1990) Cmnd 1329.

[45] T Hervey 'Putting Europe's House in Order: Racism, Race Discrimination and Xenophobia after the Treaty of Amsterdam' above n24, 334.

Europe's internal borders did not entail the free entry or movement of non-Community nationals.[46] This was borne out in increased identity card checks, broader administrative detention procedures, wider databases on foreigners,[47] and tighter controls of family reunifications and international marriages.

The Maastricht Treaty[48] further advanced Member State coordination of immigration, with the Third Pillar of the Treaty covering Co-operation in Justice and Home Affairs (Title VI TEU). Its 'improved intergovernmentalism'[49] established a legal and institutional framework for formulating common positions under the aegis of the K-4 Committee and the Justice and Home Affairs Council, which has been criticized for its lack of transparency and the absence of ECJ judicial review or European parliamentary control.[50]

Although still programmatic, the Treaty of Amsterdam[51] effectuates far-reaching changes in closer Member State co-operation, creating 'an area of freedom, security and justice' within which *citizens* may enjoy free movement. 'Although not without their flaws, the new provisions represent substantial progress over the existing legal context and constitute one of the outstanding achievements of the Amsterdam negotiations.'[52] Amsterdam creates a programme for the adoption of policies *at Community level.* Title IV incorporates parts of the old Third Pillar linked to the internal market (ie immigration, visas and asylum, and parts of the Schengen *aquis*, under a Community paradigm).

Notwithstanding this, immigration and asylum remain within Member State competence. The Amsterdam provisions establish only a framework for new policy and not binding obligations[53]: 'there is a certain tension between the communitarised Title IV and the

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[46] HU Jessurun d'Oliveira 'Expanding External and Shrinking Internal Borders: Europe's Defence Mechanisms in the Areas of Free Movement, Immigration and Asylum' in D O'Keefe and P Twomey, *Legal Issues of the Amsterdam Treaty* (1999) 261; D O'Keefe 'Recasting the Third Pillar' (1995) 32 (3) *CMLRev* 893; D Curtin & H Meijers 'The Principle of Open Government in Schengen and the European Union: Democratic Retrogression' (1995) 32 (2) *CMLRev* 391.

[47] EU Commission 'The Member States of the EU and immigration in 1994: Less tolerance and tighter control policies RIMET' (1995) 10.

[48] Signed 7 February 1992 [1992] OJ C191 Treaty Series 12/1994 Cmnd 2485.

[49] Apart from common visa policy which is dealt by the EU itself, rather than the Member States within an intergovernmental structure (covered by Article 100c EC).

[50] D O'Keefe above n42 273.

[51] Treaty Series 052/1999, Cmnd 4434. The framework for immigration, visas and asylum has been inserted in Title IV (ex Title IIIa) Articles 61-69 EC with time limits established for the adoption of Community measures in this area.

[52] D O'Keefe above n42, 270.

[53] The will to act upon that framework was manifest at October 1999 during the EU Council in Tampere (under the Finnish presidency) which gave fresh impetus to the creation of a common European immigration and asylum system.

intergovernmental Title VI.'[54]

Still Amsterdam heralds the emergence of EU immigration policy. 'Article 62 provides that the Council shall adopt measures to abolish the internal frontier controls on citizens of the Union or nationals of third countries, in compliance with Article 14. *The compensatory measures for this are built on the reinforcement of the external borders* which shall establish standards and procedures to be followed in carrying out checks at entry.'[55] This lends credence to charges that EU law creates a Fortress Europe with its genesis in the Single Market.

Restrictive immigration policies support European integration.[56] The principle of free movement first explicitly enshrined in the provisions of SEA has a corollary principle: immigration control. 'The single market seems to require tighter control of external frontiers to allay security concerns.'[57] Thus, the emergence of a 'positive ideology of 'Europeanness'' is juxtaposed with the 'negative ideology of immigration.'[58]

The European Parliament has expressed grave concern at the restrictive nature of the resolution on immigration adopted by the Ministers of Justice and Home Affairs,[59] which drew a link between the level of unemployment in the EU and the presence of TCN. It noted that this might only encourage xenophobic feelings and extreme-right movements in the EU.[60] By contrast, a number of Commission communications tend to problematise the issue of immigration, pressing for a common immigration policy to control 'migration pressures.'[61]

The notion of 'Fortress Europe' cannot be dissociated from the establishment of the Single Market since the relevant impetus for these immigration policies emanates from within the EU. 'The creation of a single Europe will mean the virtual closure of the EU to non-EU

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[54] D O'Keefe above n42 272.

[55] D O'Keefe above n42 278. (emphasis added)

[56] CT Husbands 'They Must Obey our laws and customs!' : Political Debate about Muslim Assimilability in Great Britain, France and The Netherlands' in AG Hargreaves and J Leaman (eds) *Racism, Ethnicity and Politics in Contemporary Europe* (1995) 115-129; M Silverman 'Rights and Difference: Questions of Citizenship in France' in the same volume, 255-263; S Poulter 'Muslim Headscarves in School: Contrasting Legal Approaches in England and France' (1997) 17 *Ox JLS* 43.

[57] A Geddes 'Immigrant and Ethnic Minorities and the EU's 'Democratic Deficit' (1995) 33(2) *Journal of Common Market Studies* 197, 205.

[58] A Geddes above n57, 205, referring to M Livi-Bacci 'South-North Migration: A Comparative Approach to North American and European experiences' in *The Changing Course of International Migration* (1993 Paris, OECD) 37-46.

[59] Above n27.

[60] Resolution of the European Parliament on racism and xenophobia and anti-Semitism [1994] OJ C323/154.

[61] Noted by T Hervey above n24, who cites EU Commission *Communication on Immigration and Asylum Policies* SEC (1991) 1855, final; COM (1994) 23. See however EU Commission *The Member States of the EU and immigration in 1994, Less Tolerance and tighter control policies. RIMET*; or EU Commission *Proposal for a Council Decision establishing a Community action programme to promote the integration of refugees* COM (1998) 731 final.

nationals, and, therefore, the impact of Fortress Europe will be most sharply felt by people seeking asylum and refugee status in the countries of the EC.'[62] Thus, 'as national barriers within Europe have come down, so the walls separating the EC from the rest of the world have become higher and sharper.'[63] One concern raised by human rights and refugee NGO's is 'the real agenda is about making access to EU states for legitimate refugees more difficult.'[64] The European Council for Refugees and Exiles (ECRE) has appealed for a 'protection-orientated approach and not one that is control-orientated'. Similarly, Amnesty has argued that 'the trend over the last decade has been a closed-door attitude aimed at protecting Fortress Europe when the number of asylum-seekers reaching the EU is minimal'.

However, 'the immigration policy paradigm at EU level reflects policy responses at national level which make it increasingly difficult for immigrants to enter the Member States of the EU: *it is undeniable that the policy impulse in immigration is to restrict and exclude, particularly those who come from less developed areas of the world.*[65] Furthermore, 'non-White' immigration is particularly targetted,[66] and 'contemporary reactions to immigrants increasingly include much more than forms of simple restrictionism.'[67] This is accentuated because of the increased rate of migrations globally.[68] Such restrictionism results in indirect discrimination, lending credence to the sense that the emerging EU immigration policy is a racist and exclusionary one.

Notwithstanding the structural improvements of the Amsterdam Treaty, the emerging communitarised immigration policy reinforces indirect race discrimination[69] in the new asylum

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[62] N Piper *Racism, Nationalism and Citizenship: Ethnic Minorities in Britain and Germany* (1998) 24.

[63] C Shore 'Ethnicity, Xenophobia and the Boundaries of Europe' (1997) 4 *International Journal on Minority and Group Rights* 247, 249. Put differently, 'the liberal commitment to the free movement of peoples within the Community has been counterbalanced by the idea of concentrating and intensifying at external borders all the checks that formerly took place at each frontier'. M Spencer *1992 and all that: Civil liberties in the balance* (1990) 30.

[64] P Smyth *The Irish Times* October 16, 1999 p 14.

[65] It is indeed ironic that where Member State governments seek to justify their restrictive immigration policies, they rely also on the existence of racism and racial hostility on the basis that racial hostility is a function of the proportion of identifiably heterogeneous individuals within a society. This is based on an unproved (and even disproved) assumption that people become racist in response to an increased density of racial or ethnic minorities around them.

[66] CT Husbands above n56, 115.

[67] CT Husbands above n56, 115.

[68] According to Castles there are eighty million migrants (people living permanently or for long periods outside their countries of origin) - the equivalent of 1.7 % of the world population. Thirty million of these are said to be in 'irregular situations' and 15 million are refugees or asylum seekers. Castles above n6.

[69] T Hervey above n24, 334.

rules on safe third countries and processing asylum claims,[70] the 'one chance only' rule, or that on carrier fines. Because those seeking asylum are most likely to belong to racial and ethnic minorities, the EU policy supports indirect race discrimination.[71]

Finally, the area of visas, formerly covered by Article 100c EC, is now subsumed within Article 62. This allows for 'negative' and 'positive' lists of countries whose nationals are respectively exempt from, or required to have, visas to cross the borders of the Union. It is questionable whether the addition of 'negative lists' of exempt TCN can do anything but accentuate the existing indirect discrimination of Council Regulation 2317/95[72] which established a 'black list' of states whose nationals require visas to enter. States in Africa, the Indian subcontinent, the Caribbean and the Middle East are over-represented in this list.

The creation of a 'new European space' challenges settled, national conceptions of integrationism and multi-culturalism, but risks constructing new discriminatory forms. Immigration is sensationalised through its definition as a security or crime issue, rather than one of social justice, economic development or human rights.[73] Public opinion in the Member States already views immigration negatively. The 1993 Eurobarometer indicated that provisions on co-operation (and restriction) of immigration[74] were among the most popular in the Maastricht Treaty.

The advent of the EU's 'area of free movement'[75] has increased cross-border and *internal* immigration checks by immigration services and police[76] targeting racial and ethnic minorities in public and private spaces such as workplaces, socials welfare offices, at train and bus stations. This may be exacerbated by Amsterdam's 'area of freedom, security and justice' through the increased liberalisation of movement being accompanied by increased levels of

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[70] Dublin Convention (1990). Came into force 1.10.1997 (1997) OJ C 254 Articles 3-9; See also T Hervey, above n24, and M Spencer *States of Injustice: A Guide to Human Rights and Civil Liberties in the European Union* (1995) 61-62.

[71] See M Bell 'Mainstreaming equality norms into EU asylum law' (2001) 26 *ELRev* 63.

[72] Council Regulation (EC) 2317/95 determining the countries whose nationals must be in possession of visas when crossing the external borders of the Member States [1998] OJ C101/98

[73] Note the content and emphasis of the Third Pillar of the TEU on Co-operation in the fields of Justice and Home Affairs (Title VI) and that of provisions on Common Foreign and Security Policy (Title V).

[74] *Eurobarometer*, June 1993, No 39.

[75] I Forbes & M Meade 'Measure for Measure: A Comparative Analysis of Measures to Combat Race Discrimination in the Member States of the European Union (1992) *Employment Department Research Series* No 1, 4-5, 72.

[76] I Ward *A Critical Introduction to European Law* (1996) 149-152; D O'Keefe 'The Free Movement of Persons and the Single European Market' (1992) 17 *ELRev.* 3; D Curtin & H Meijers 'The Principle of Open Government in Schengen and the European Union: Democratic Retrogression?' (1995) 32 *CMLRev* 391. This critique holds generally for the lives and liberty of EU citizens. They are heightened for minorities, regardless of legal status.

internal checks.[77]

A critical issue is the degree to which EU immigration policy has a negative and disparate impact on the social context of settled (and even naturalized) immigrants who are members of racial and ethnic minorities.

External controls impact internal controls and bear on the lives of non-White ethnic minorities with the risk that their formal citizenship rights, including free movement, will not be respected by immigration authorities.[78] There are already 'indications of a relationship between stricter immigration policies and an intensified hostile climate within the general public against non-European peoples, [...] with serious implications for would-be immigrants and asylum-seekers as well as for settled ethnic minorities.'[79]

4. THE NEW EUROPEAN RACISM: CAUSES AND CATALYSTS

(1) Migration

Racism in Europe is inextricably related to migration.[80] 'Migration is also seen as a source of internal insecurity within receiving states.'[81] The negative relationship between migration and racism results from emphasising 'the negative effects of migration on security, democracy and the economy, and by considering migrants to involve more costs then benefits for the receiving countries.[82]

'In the early 1970's, racism appeared to have the same character towards immigrant workers in all the labour importing countries in western Europe, and did not depend primarily on phenotypical factors (skin colour, features) or origins (non-European as opposed to European periphery).'[83] Similar attitudes existed towards Italian workers in Switzerland as towards Black workers in Britain. By the late 1980's greater social acceptance of intra-European migrants had evolved, alongside increasingly hostile attitudes towards immigrants who were morphologically or phenotypically distinct.

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[77] T Hervey above n24, 337.
[78] T Bjorgo and R Witte above n78, 2.
[79] N Piper above n62, 25.
[80] M Martiniello *Migration, Citizenship and Ethno-National Identity within the EU* (1995) 2.
[81] M Martiniello above n80, 2.
[82] M Martiniello above n80, 3.
[83] S Castles above n6, 26.

Even within the first phase of encouraged migration,[84] categories evolved in distinct ways. The two principal groups to immigrate came first from the Southern European states (Mediterranean periphery),[85] and in a second wave, from North Africa (Maghreb), South Eastern Europe and a number of African and Asian states. The origins of these two migrant groups has created a dichotomy in terms of 'insiders' and 'outsiders' in the European polity. One group now possesses EU citizenship, free movement and labour market access equal to nationals of their host states.[86]

Ironically, immigrants of Mediterranean periphery states were 'aliens' in their host states, 'admitted conditionally and temporarily but, for now well-know reasons, permanent settlement was in fact the outcome.'[87] Immigrants from colonies and ex-colonies were, on the other hand, often citizens of the host states. The initial, legal belonging of the second category of migrants and outward or legal exclusion and isolation of the first has undergone a complete reversal. Mediterranean migrants, once legal aliens, have had their status transformed, and are now legally integrated within their host states owing. The latter group of migrants, technically 'colonial citizens' of their host states, have become Other in the modern European polity.

This transformation of 'Other' may be attributable to the reduction of migration from the European periphery; the absorption of older European migrant groups through citizenship or secure resident status; the mutation of individual European nationalisms due to an incipient European 'identity' or 'consciousness'. The danger with this is its potential to simply displace boundaries and create new 'difference' in an exclusionary and discriminatory way[88] which engenders ethnocentrism.[89]

(2) Economic Factors

Economic factors such an technical changes, unemployment, recession, and EMU have a significant impact on racism. Technical changes. Upsurges of racism may be rooted in 'cyclical volatility of national and international economic relations, intensified by the dramatic changes in

[84] This migration was even encouraged by some industrialised states as either permanent immigration (France and Britain), or impermanent rotational labour migration (Germany and Switzerland). S Castles and G Kosack *Immigrant Workers and Class Structure in Western Europe* (2nd edn 1985)

[85] R King 'From guest workers to immigrants: labour migration from the Mediterranean periphery' in D Pinder *The New Europe: Economy, Society and Environment* (1997) 263

[86] U Levelt 'The European Union as a Political Community Through the Lens of Immigration Policy' in M Martiniello *Migration, Citizenship and Ethno-National Identities in the European Union* (1995) 199, 208-9.

[87] R Miles above n2, 186.

[88] R Miles above n2, 186.

[89] N Mayer 'Ethnocentrism and the Front National Vote in the 1988 French Presidential Election' in AG Hargreaves and J Leaman (eds) *Racism, Ethnicity and Politics in Contemporary Europe* (1995) 96.

the forces of production, in communications, consumption, productivity, capital intensity, capital concentration and centralisation as well as in 'scientific' management.'[90] Analogies can be drawn between 1980's -1990's and 1920's-1930's: both periods saw technological advances result in dramatic changes to the international forces of production, productivity, consumption, communications and managerial organisation, and both periods saw significant increases in forms of racism and xenophobia.

Currency instability, inflations and a major stock market collapse in October 1987 were accompanied by high unemployment in European industrialised countries, and by bankruptcies, especially in small businesses. Recession and the economic decline of the urban and rural lower middle classes is consistently linked to the formation and success of authoritarian racist parties.[91] Economic insecurity and poverty frequently accompany resurgences of racism.[92] 'The rise of racism, xenophobia and intolerance is connected to a large extent with the worsening of the economic and social living conditions of certain disadvantaged sectors of the population, and in particular with unemployment which marginalises both the potential victims and perpetrators of racial incidents.'[93]

EMU is relevant given the relationship of unemployment to racism. There is a risk that EMU convergence criteria 'designed to achieve stable currencies, low inflation and thereby economic growth may pose a threat to racial harmony if it results in high and continuing unemployment.'[94]

Economic pressures and structural shifts in the global economy[95] have resulted in the new racism targeting non-European racial and ethnic minorities as 'illegitimate rivals' in the struggle for scarce resources.[96] 'Inequality on racial grounds continues to be a major feature of European labour markets, as expressed, for example, in rates of unemployment and average pay

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[90] J King 'Ethnic minorities and multilateral European institutions' in AG Hargreaves and J Leaman (eds) *Racism, Ethnicity and Politics in Contemporary Europe* (1995)181.

[91] W Reich *The Mass Psychology of Fascism* (1969).

[92]Opinion of the Economic and Social Committee on the communication from the Commission on racism, xenophobia and anti-Semitism and Proposal for a Council Decision designating 1997 as European Year Against racism OJ C204, 23; Article 2.3.2.

[93] ECOSOC, above n92, 185 citing the *EU Consultative Commission Interim Report.* Noted by the European Council, Essen 9-10 December 1994.

[94] M Leat *Human Resource Issues of the European Union* (1998) 203.

[95] Shore suggests capitalist reconstruction and globalisation as causes of insecurity associated with racism and xenophobia C Shore, above n63, 249.

[96]Racism has thrived in traditional working class constituencies and among less educated. *Eurobarometer* (1989) 60. This is also supported by national studies of voting patterns and employment, N Mayer 'Ethnocentrism and the *Front National* Vote in the 1988 French Presidential Election' in AG Hargreaves and J Leaman (eds) above n99, 96.

levels.'[97]

Moreover the 'ethnicisation of the work force' in post-colonial industrial countries is a functional racism which maintains hierarchies, and reinforces prejudice towards minorities, and conferring social power on effectively powerless sections of the white work force.[98] It also provides a non-meritocratic basis to justify inequality.

The contradictions of this functional racism are multifarious, and its inability to stabilise labour and social relations clear in the disruptive resurgence of extreme right politics, and the polarisation of political cultures into racist and counter-racist movements.

(3) Political Alienation and the Rise of the Extreme Right

The rise of racist and xenophobic sentiment in Europe over the past two decades is an uncontroverted phenomenon. It pervades the growth of support for political parties of the extreme right, and in the dramatic increase in racist violence[99] throughout Europe.[100]

While few political parties openly describe themselves as racist, their rhetoric is 'anti-immigrant' or 'anti-foreigner' belying racist and xenophobic politics. The popular appeal of such rhetoric is clear from the substantial electoral support for the extreme right parties in

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[97] A Hegewisch & L Mayne 'Equal Opportunities Policies in Europe' in C Brewster and A Hegewisch (eds) (1994) *Policy and Practice in European Human Resource Management* (1994) 190.

[98] E Balibar and I Wallerstein *Race, Nation, Class: Ambiguous Identities* (1991).

[99] The UK has high levels of racially motivated violence. In 1995/6 for example, 12, 199 incidents were reported. Human Rights Watch / Helsinki, *Racist Violence in the United Kingdom* (1997). A notorious example was the racist murder of Stephen Lawrence, which was exacerbated by the post-inquest (February 1997) findings of institutional racism within the Metropolitan police. Section 46.25; 6.34 defines institutional racism as 'consist[ing] of the collective failure of an organisation to provide an appropriate and professional service to people because of their colour, culture or ethnic origin. It can be seen or detected in processes, attitudes and behaviour which amount to discrimination through unwitting prejudice, ignorance, thoughtlessness, and racist stereotyping which disadvantage minority ethnic people' *The Stephen Lawrence Inquiry* http://www.official.documents.co.uk.

[100] Evrigenis Report,*Committee of Inquiry into the Rise of Fascism and Racism in Europe: Findings on the Findings of the Inquiry* (1985) Strasbourg, EP [1986] OJ C36/142; Ford Report,*Committee of Inquiry on Racism and Xenophobia: Report on the Findings of the Inquiry* (1991) Strasbourg, EP; European Parliament, *Report on Racism, Xenophobia and Anti-Semitism and the European Year Against Racism* (1997) G Ford and A Oostlander [1997] OJ C 55/17.

France,[101] Austria, Italy,[102] Belgium,[103] Sweden, and to a lesser extent, Germany.[104] Even in Britain, while the BNP typically takes less than 1% of the national vote, it still manages to win local election seats[105] and provoke social unrest as seen in the recent riots in Oldham, Aylesbury[106] and Bradford.[107] Austria,[108] however, represents a most extreme example, where on the 4th of February, 2000 members of an extreme right party entered government, with members of Jorg Haider's Freedom Party party occupying at least 6 ministerial posts in the coalition's 12 person cabinet, led by Wolfgang Schuessel, leader of the conservative Austrian People's Party. This provoked an outcry among EU states, with most taking immediate diplomatic action by removing representatives, imposing an immediate ban on all bilateral meetings with Austrian Ministers, calling for various forms of international and European sanctions, and vowing not to back any Austrian nominations for international posts.[109] It seems certain that the EU will demand undertakings from the VOP regarding democratic values, human rights and non-discrimination to safeguard their participation in EU institutions.

[101] Le Pen's Front National, has regularly claimed between 9 % and 14% of the French national vote for presidential, parliamentary and regional elections. In 1994, his party took 10.52% of the French vote for the European Parliament. Owing, at least in part, to the rivalry with the newly formed Mouvement National lead by Bruno Megret, Le Pen's party took only 6% of the vote in the 1999 EP elections *Le Monde* 15 June 1999, 6. The Mouvement National has since been renamed as 'Mouvement National Republicain' *Le Monde* 6 October 1999.

[102] In 1993, Alessandra Mussolini, granddaughter of fascist dictator Benito Mussolini, won 44% of the vote standing as Movimento Sociale Italiano (MSI) candidate in Naples. In 1994 the revamped right-wing coalition led by MSI, but open to the centrist parties, joined forces with Silvio Berlusconi's Forza Italia and Umberto Bossi's Northern League, and entered government in May 1994. Under the leadership of Gianfranco Fini, MSI obtained nearly double the vote neo-fascist parties had ever won in post-war Italy winning 13.4% of the vote, up from a mere 5.4% in 1992 (C Ruzza and O Schmidtke 'Towards a modern Right: Alleanza Nationale and the 'Italian Revolution' in S Gundle & S Parker (eds)*The New Italian Republic* (1996) 147. Italy also has a Fronte Nazionale though the party holds no seats in the national or European Parliaments; it remains marginalised through not having effectuated a 'rapprochement' like MSI.

[103] The Flemish extreme right in Belgium, De Vlaams Blok regularly win approximately 13% of the Belgian national vote. In Antwerp it took 25 % of the vote in the 1991 national elections (H Gijsels *Le Vlaams Blok* (1993). The French-speaking, Walloon analogue of the VB is the Front National, modeled closely on the Front National in France.

[104] Schonhuber's Republikaner party enjoys small but steady representation on the German electoral scene. In the 1999 Euro-elections, it gained only 1.7% of the vote, winning no seats.

[105] E.g., 34% of the vote in the Isle of Dogs local council by-election in 1993

[106] *The Guardian* 29 May 2001, <http://www.guardian.co.uk/racism/Story/0,2763,498166,00.html>

[107] *The Washington Post* 10 July 2001.

[108] Austria's Freedom Party lead by Joerg Haider took 17% of the national vote for parliamentary elections in 1990, and just under 18% in the country's presidential elections in 1992. In 1999, the FPO took 23,5% of the vote in the European Parliament elections, winning 5 seats (down 1 from 1994); *Le Monde* 15 June 1999. In the Austrian national elections (3 October 1999) the FPO took 27,2% of the vote, capturing 52 seats in the parliament and becoming part of a coalition in the Austrian government; *Le Monde*, 6 October 1999. In an op ed of the same paper, Luc Rozenzweig describes the FPO as a 'refuge for Nazi nostalgia' and claims that the victory of Haider's party is evidence that Austria was poorly 'de-Nazified' post-World War II. Beyond the expected emphasis on a xenophobic campaign, Haider appears to have appealed to an anti-European, and anti-immigrant sentiment in his pre-election platform.

[109] *International Herald Tribune* 5-6 February 2000.

The Council's swift enactment of the EU Race Directive[110] was a welcome sign that equality laws may survive in the Council notwithstanding the current constitution of the Austrian government. That notwithstanding, few EU Member States have failed to register the influence of extreme right parties or the racist and anti-immigrant sentiment that animates it[111]. The European Parliament elections show significant extreme right support, although there was a marked decrease in their representation between 1994 and 1999.[112] Beyond parliamentary or local elections, popular opinion polls reveal widespread ethnocentricity,[113] and support for the extreme right and 'anti-immigrant' ideology[114].

Moreover, conservative and traditional centre-right parties have taken cognisance of this, adopting tougher stances on immigration issues to tap into popular sentiment. Both the extreme[115] and centre right parties have become skilled at exploiting this whilst avoiding prosecution under anti-racist laws.[116] This may result in the incorporation and legitimation of racist and xenophobic sentiment within mainstream political discourse,[117] and risk entrenching racist attitudes among mainstream voters.

(4) The Incidence of Racism in Europe

'Measuring' racist attitudes is beset with methodological problems and variables,[118] furthermore, open expressions of racism are outlawed in most EU states. Opinion polls conducted in various European countries showed that respondents were nevertheless open in

[110] Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin; [2000] OJ L180/22.

[111] AG Hargreaves and J Leaman *Racism, Ethnicity and Politics in Contemporary Europe* (1995) 9.

[112] MEP's of Belgium, France and Italy dropped from 37 to 18 seats between the 1994 and 1999 Euro-elections. However, the record-high number of abstentions in the 1999 EP elections was comprised of extreme right supporters; *Le Monde* 15 June 1999, 1 & 34.

[113] 87% of 'Lepenists' described themselves as ethnocentric N Mayer 'Ethnocentrism and the Front National Vote in the 1988 French Presidential Election', in AG Hargreaves and J Leaman (eds) above n99, 98. Resentment linked to decolonisation in North Africa and the rise of Islamic fundamentalism in these countries has resulted in Arabs being particularly targetted as 'threats to national identity' within this segment of the electorate.

[114] One in ten respondents to a French opinion pole in 1991 expressed support for Le Pen's Front Nationale; while four in ten expressed approval of his anti-immigrant policies SOFRES 1993, 67-69. In Germany, the Republikaner had the support of one in ten people polled, while four out of 10 sympathised with their extreme right views on immigrants and foreigners EMNID 1992, ALLBUS 1990; SINUS 198).

[115] The Austrian Freedom Party lead by Jorg Haider illustrates the success of appealing to issues generating popular anxiety such as the EU and immigration, while tempering the fascist overtones and racist language in its campaigns, thereby securing an even wider share of the national vote. Haider's model is thus one more akin to Berlusconi than to Le Pen; W Baryli Op./Ed. *Le Monde* 6 October 1999.

[116] AG Hargreaves and J Leaman *Racism, Ethnicity and Politics in Contemporary Europe* (1995) 8.

[117] AG Hargreaves and J Leaman above n116; 10; J King 'Ethnic Mobilisation and Multilateral European Institutions' above n90, 183.

[118] This renders the comparison of surveys or opinion poles on a Europe-wide basis particularly difficult.

expressing racist attitudes,[119] and the rise in these attitudes was uncontroverted.[120]

The only large scale attempts at a cross-European assessment of racist attitudes were those initiated and administered by the European Commission in 1988,[121] 1993[122] and 1997[123] and that commissioned by the European Monitoring Centre on Racism and Xenophobia in 2000.[124]

The 1988 pole concerned attitudes towards racist and anti-racist movements: low approval rates of racist movements and a concomitant high approval of anti-racist movements were found in Greece, Spain, the Netherlands, Italy and Luxembourg. Higher approval rates of racist movements, and a relatively low level of support for anti-racist movements was found in Belgium, France, Germany, the United Kingdom, Denmark, Ireland and Portugal.

With the exception of the Netherlands, the first group of states showed the smallest proportion of the population of Third Country Nationals,[125] the majority of whom are non-White; states exhibiting the lowest rates of approval of anti-racist movements possessed the highest concentration of TCN. Exceptions of a different sort emerge in the cases of Ireland[126] and Portugal, whose TCN proportion of the population was comparatively low, yet the responses showed only average support for anti-racist movements and a relatively high level of sympathy for racist ones.

While the majority of states' responses displayed *some* correlation between racist sentiments and the existence of a substantial visible minority, important exceptions to this general trend refute the inference the presence of minorities *caused* racism.[127] Ireland and the Netherlands are cases in point: in Ireland, despite very low numbers of TCN, the racist sentiments were found to be high; conversely, the Netherlands displayed low levels of racism

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[119] The Commission Nationale Consultative des Droits de l'Homme has conducted an opinion poll on a yearly basis since 1990 ; two thirds of interviewees said they were racist to some degree.

[120] In Italy it was reported that Sports Minister Giovanna Melandri threatened forcing top Italian soccer teams to play behind closed doors if they did not clamp down on racist chants and rid their stadia of antisemitic banners; she claimed that the country's soccer grounds were nurturing neo-Nazi extremism. *International Herald Tribune* 29 November 1999, 18.

121 *Eurobarometer* 30 'Immigrants and Outgroups' (1988) October-November 1988; 'Racism, Xenophobia and Intolerance' (1988) (special edition) Brussels, EU Commission.

[122] *Eurobarometer* 39 'Public Opinion in the European Community' June 1993, Brussels EU Commission.

[123] *Eurobarometer* 47.1 Racism and Xenophobia March - April 1997, Brussels EU Commission. It was conducted as part of 1997 as European Year Against Racism (1997)

[124] *Eurobarometer* EB53 (2000) European Monitoring Centre for Racism and Xenophobia.

[125] Hereafter TCN

[126] Ireland's rate of approval for racist movements was roughly equal to that prevailing in Belgium. Ireland is the only EU state not to have ratified the International Convention on the Elimination of Race Discrimination.

[127] AG Hargreaves and J Leaman above n116; 12.

where the TCN population was proportionately high.[128] The Netherlands also supports the contention that a state's fostering of policies of tolerance and mutual respect among different ethnic groups can reduce the level of racist sentiment substantially.

The 2000 Eurobarometer confirmed similarly high feelings of insecurity about minorities and in many states, a negative attitude towards their presence, participation and assimilation. Countries like Belgium, Germany and Greece showed more negative attitudes towards foreigners than the European average. More Germans responded favourably to repatriation programmes than respondents in other countries. Countries like Finland, Denmark, Sweden and the Netherlands demonstrated positive attitudes towards minorities. Respondents in the Netherlands show consistent support for policies promoting equality of opportunity and the respect for other cultures and lifestyles. Respondents in the UK supported policies aimed at improving social coexistence between members of different ethnic groups, however multicultural optimism is on the decrease.

The 1997 poll showed a similarly strong show of racist sentiment. 33% of all those questioned openly described themselves as 'quite racist' or 'very racist.'[129] The European average found those sentiments evenly spread across the different age groups, educational levels, occupational status, political affiliation and gender. Belgium, France and Austria showed the 'highest degree' of racism;[130] the countries with the lowest number of declared 'very racist' people were Spain and Ireland (4%),[131] Portugal (3%) and Luxembourg and Sweden (2%).

Other studies demonstrate that co-existence with minorities in urban areas did not correlate with racist or xenophobic sentiment. In France, the greatest support for the *Front National* came from those who had little or no contact with immigrants. Indeed, the study showed that *co-existence with* racial or ethnic minorities *reduced* racist, xenophobic or ethnocentric sentiment.[132] Prejudice and xenophobia has rarely been found to be based on

[128] Luxembourg has the highest proportion of resident foreigners. The Netherlands, takes a positive view of immigration with much popular support for the country remaining a receptive state for refugees. EU Commission, *The Member States of the EU and immigration in 1994; Less tolerance and tighter control policies RIMET* (1995) 93.

[129] *Eurobarometer Report Racism and Xenophobia in Europe* (1997) EU Commission; Introduction; 4, paragraph 1. Hereafter *Eurobarometer* (1997).

[130] Belgium led with 22% of those questioned openly stating they were 'very racist'; next was France with 16%, after which, Austria with 14%. *Eurobarometer* (1997); 6-7 (graph 1).

[131] This represents a significant turnaround from the results of previous Eurobarometer results in Ireland with the lowest number of immigrants and a high level of xenophobia and racism: the new result may reflect an increased tolerance as a result of recent increases in its immigrant population. Such a result does not reflect the well publicized, rising levels of popular intolerance and racism; R O'Connell 'Ireland: Myths of Innocence' in B Baumgartl & A Favell (eds) *New Xenophobia in Europe* (1995) 78.

[132] N Mayer above n99, 103, quoting G. Allport *The Nature of Prejudice* (1954) on studies relating to 'inter-ethnic' or 'inter-racial' contact and anti-immigrant sentiment.

actual problems of co-existence with visible minorities, leading some to contend that the key explanatory factor in the rise of the extreme right vote stemmed less from the size of visible minorities, and more from the fear of these populations' expansion.[133] 'Proximity to ethnic minority communities [..] is neither a necessary nor sufficient condition of the Le Pen vote.'[134]

Racism results from factors such as feelings of powerlessness,[135] fear and insecurity[136] (especially relating to urban crime, drugs and unemployment), the trivialization of violence by the media, the shortcomings of educational systems and the lack of understanding of different cultures, dissatisfaction with the operation of democracy[137] or government,[138] 'political alienation and disillusionment with mainstream political parties.'[139] Other factors include social isolation, mistrust, and orientation toward the private or domestic sphere, or even to myths about 'Other' and that which is considered alien.[140] '[These factors] contribute substantially to the spread of xenophobic attitudes and a psychotic fear of anything foreign or simply 'different' [...].'[141] Those feelings of insecurity regarding unemployment, the decrease in social welfare and concerns over educational standards has increased, as has number of people blaming these changes on minorities.[142]

The foregoing challenges the 'immigration causes racism' notion, discounting the 'complacent and erroneous belief that the source of the problem is outsiders, that there is no real problem *within* the country. In practical terms, restrictive measures relating to immigration, nationality, citizenship and asylum are based in racist assumptions, lead to racist official practice and legitimise general racist views in society as a whole.'[143]

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[133] C Husbands 'The "Threat" Hypothesis and Racist Voting in England and the United States' in R Miles and A Phizacklea (eds) *Racism and Political Action in Britain* (1979) 147-181.

134 N Mayer above n99, 103.

[135] E Fromm *The Fear of Freedom* (1942).

[136] Other factors include dissatisfaction with life circumstances, fear of unemployment, insecurity about the future and low confidence in public authorities

[137]The countries with the highest levels of 'very racist' responses were also those with the highest levels of dissatisfaction with the way democracy worked in their country: Belgium 19% were very satisfied, 43% in France, compared with 86% in Denmark. The Belgian case illustrates the correlation in stark terms and support the contention that insecurity and general 'malaise' contribute in significant part to racist attitudes.

[138] Eurobarometer (1997) also showed a startling correlation between high levels of racist attitudes and a low approval of the governments and politicians: Belgians approval rate was only 7%, while the Danish soared at 61%.

[139] W Duncan 'Racism and Xenophobia in Europe' in G Barrett (ed)*Justice Cooperation in the EU* (1997) 185.

[140] N Mayer above n99, 102.

[141]European Parliament Resolution on the resurgence of racism and xenophobia in Europe and the danger of right wing extremist violence OJ C150, 127.

[142] Eurobarometer EB53 (2000) commissioned by the European Monitoring Centre on Racism and Xenophobia.

[143] I Forbes 'Institutionalising Anti-Discrimination in Europe' in AG Hargreaves and J Leaman (eds) *Racism, Ethnicity and Politics in Contemporary Europe* (1995) 196. (Emphasis added)

The Eurobarometer survey conducted in relation to 'outgroups' or those perceived of as 'Other' in terms nationality, race, religion, culture or social class, showed a variant perception of 'Other' between countries, and not based solely on 'racial indices'. When interviewees were asked which outgroups living in their countries were 'too large', only in Belgium and Portugal did the respondents offer the group a racial definition. In Britain and France, racial and national 'outgroups' were ranked in roughly equal terms, while in Germany, the Netherlands and Italy, 'foreigners' were regarded as too numerous more often than racially defined groups. It is also clear that certain 'non-racial' terms employed in these responses mask racist and xenophobic sentiments. This latent racism emerged in the responses to the question of which groups respondents found most disturbing in their daily lives. Race defined the groups ranked most disturbing in Belgium, Germany, France, Ireland and the Netherlands.[144] A follow-up survey was conducted in 2000, known as Eurobarometer 2000 which showed some improvement with an increase in favourable attitudes to policies designed to improve the coexistence of majorities and minorities in Member States.[145]

5. EUROCENTRISM

(1) Ethnocentrism and Eurocentrism

The tendency for a community to demarcate 'self' from 'others' is a pervasive feature of almost all groups and communities. 'A social boundary is the means by which people classified as 'similar' are separated (or separate themselves) from those perceived as 'different.''[146] Indices of difference such as race, ethnicity, religion, language, customs, and convention or nationality have all served as 'boundary defining markers,' subjectively deployed to distinguish the in-group and other 'out-groups.'[147] 'Ethnocentrism denotes both the insiders and outsiders distinct from [the community]. The boundary drawn between in-group and out-groups, between 'us' and 'them' has a double significance: it is both cognitive and evaluative delimitation. 'They' are not only dissimilar from the in-group (cognitive) but also inferior to it

[144] A more limited follow-up survey showed race as the most disturbing group factor for respondents in Spain, Italy and Portugal, all of which had experienced heightened influx of TCN migrants, primarily from Africa.
[145] Eurobarometer EB53 (2000) commissioned by the European Monitoring Centre on Racism and Xenophobia , April - May 2000 conducted by SORA <www.sora.at>
[146] C Shore above n63, 247.
[147] M Weber *Wirtschaft und Gesellschaft, Grundriss der verstheenden Soziologie* (1972) Tubingen, JCB Mohr (5th edn) 234; as cited by D Fuchs, J Gerhards and E Roller 'Nationalism Versus Euro-centrism? The Construction of Collective Identities in Western Europe' in M Martiniello (ed) *Migration, Citizenship and Ethno-national identities in the European Union* (1995)165.

(evaluative).'[148] Thus, 'through a cognitive and evaluative construction [...] of 'us' and 'them' through internal attraction and external rejection, the identity of a collectivity is constituted.

It may be that, as Habermas maintains, such inclusion and exclusion, or belonging and alienation are distinctive features of all modern polities.[149] Indeed it is often assumed that a 'societal community' is defined by a boundary, as a necessary component of all societies. The constitution of Other in this context is compounded by marginality: ''marginality' however, also carries a strong implication of deviance, [and] marginals are often represented as those who are distanced from *social values*' [emphasis added].[150] Marginality and exclusion are therefore never normatively neutral phenomena, since they reinforce a stronger message about the otherness of those excluded. That holds most true for racial and ethnic Other.

'Racism differs from other forms of inequality, in that it rationalises these asymmetries through the identification of a group ad the assertion that certain traits essential to that group justify its inferiority and consequent marginalisation and denigration.'[151]

Increasing EU integration may have precipitated a new nationalism and ethnocentrism or 'Euro-centrism'. The Single Market has a corollary principle of immigration control directed especially towards minorities because of a 'mood of race hate within Fortress Europe' and the palpable European *'continental nationalism.'*[152] While antagonism *between* nationals of the different Member States of the EU has decreased,[153] ethnocentrism or Euro-centrism has become more prevalent *within* Member States with respect to 'Other' within their boundaries. 'European unification is undermining the old 'centered' nationalisms of the west while simultaneously encouraging new forms of nationalism in the peripheries and in the east.'[154] A ''European' dimension [may] explain the increase in racism and cultural chauvinism.'[155]

'Increasingly porous boundaries can pose a threat to the identity of Europeans. Physical borders, along with their legal and political significance, can assume psychological meanings which are eroded when such radical events as the fall of the Iron Curtain and the projects of the EU for 'an ever closer union' take place. A result of such shaken identities may

[148] D Fuchs, J Gerhards and E Roller above n147, 165.
[149] J Habermas *The Transformation of the Public Sphere* (1989).
[150] P Spicker 'Exclusion' (1997) 35 (1) *JCMS* 136
[151] D Chalmers 'The Mistakes of the Good European' in S Fredman (ed) *Discrimination and Human Rights: The Case of Racism* (2001) 192, 226; J Murphy and J Min Choi, *Postmodernism, Unraveling Racism and Democratic Institutions* (1997) 85-87.
[152] A Montaqim *The Weekly Journal* 2/6/1994, cited in J King n90, 181 (emphasis added).
[153] Fuchs *et al.* above n147, 175.
[154] C Shore 'Ethnicity, Xenophobia and the Boundaries of Europe' above n63, 257.
[155] C Shore above n63, 248.

be the triggering of primitive psychological defence and the transfer of aggressive emotions onto vulnerable groups.[156] Outbursts of racial violence and xenophobia may be symptoms of this, as well as an attempt to single out a non-European other.'[157]

With the process of European integration, the emergence of a supra-national entity and the decreasing significance of nation states has come a redefinition of the boundaries between 'us' and 'them'. That redefinition has been accompanied by new identity. Is this new community sociation 'eurocentrism' with referents in a supranational state and the awareness of partaking in a shared European culture.[158] The boundary between 'self' and 'other' within the EU is no longer anchored in a territorial state entity, but to cultural, 'non-European' 'otherness'.

Eurocentrism emerges in the dissolution of boundaries between Member States giving way to new boundaries which exclude that which is perceived to be non-European. 'The nationalist boundary definition within countries thus paradoxically contains the seeds of eurocentrism.'[159] While EU integration brings supra-national cohesion, modernity and the transcendence of parochial, nationalist attachments, it also breeds insecurity and encourages new identities (ethnic, religious, regional - even European) which are often just as regressive and chauvinistic as the nationalism it hopes to supplant. By undermining the centered nation-states, it has encouraged the rise of submerged peripheral nationalisms and separatist movements.'[160]

This Eurocentric representation of European identity appeals to the traditions of Ancient Greece, Rome, Christianity, Enlightenment, Industrialism and Democracy as its foundations and has 'always been challenged by those whose histories, cultures and political perspectives that are excluded by this social representation. These groups point to 'the other story' that of slavery , colonialism, the cultural imposition, of a socio-economic system of economic exploitation at home at abroad.'[161]

Fuchs *et al.* conducted a study of what EU citizens of the various Member States considered 'other' along two different axes: cognitive and evaluative. Collective identity is has a cognitive and evaluative dimension. In the cognitive dimension, respondents identified the most

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[156] A Falk 'Border Symbolism' (1974) 43 *Psycho-Analytic Quarterly* 650.
[157] S Douglas-Scott 'The Common Foreign and Security Policy of the EU: Reinforcing the European Identity?' in P Fitzpatrick & J Bergeron (eds) ***Europe's Other: European law Between Modernity and Postmodernity*** (1998)
[158] D Fuchs, J Gerhards and E Roller above n147, 167.
[159] Fuchs *et al.* above n147, 176.
[160] C Shore above n63 258.
[161] A Brah above n23.

heavily represented minority in the country concerned, but if the largest minority group was a European one, and the second largest a non-European one, the latter was more often named.[162] The evaluative dimension ranked the following minorities with the highest negative evaluation of 'others': Asians (49%); Arabs (48%); Turks (47%) followed by Eastern Europeans (42%) and Latin Americans (41%).[163] Fuchs *et al.* identified a 'clear connection between the number of foreigners living from non-EU countries present in a given country and negative evaluation of foreigners.'[164] They conclude that 'the point of reference for defining 'us' and 'others' is no longer the other, extraterratorial European nation state collectives', and that 'nationalism opposing the countries of Europe, no longer plays a role.'[165] The cognitive and evaluative dimensions come together to provide the new referents: minorities as other and inferior.

A new type of ethnocentrism has emerged: 'a nationalism with a specific type of boundary definition. The boundaries between 'us' and 'them' are drawn *not between* individual countries but *within* countries between natives and immigrant foreigners. The foreign ethnic communities provide the distinction between 'us' and 'them' is the foreign ethnic communities within countries'.

Considering ethnocentrism as a social, cultural or psychological issue, one can identify ''cultural racism' [...] implicit in the discourse and policies of many Western European leaders and EC officials.'[166] This 'Euro-racism' is founded an identity which 'conflates citizenship with ethnicity, and makes invisible the contribution of people of non-European origin the the economic, cultural and social life of Europe, so that non-Europeans are viewed as intruders.'[167] It has been identified as 'the new racism': 'We are moving from an ethnocentric racism to an Eurocentric racism, from the different racism of the different member states to a common, market racism , without losing out on the racism necessary to manage the insurgent black populations within each nation state.'[168]

This supports 'a selective and inaccurate representation of the integrated Europe might

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[162] Fuchs *et al.*, above n147, 169. The example offered was that of Britain where the Irish comprise the largest group of resident foreigners, and yet 'Indians' were identified as the largest 'other-group'. People of Indian subcontinent origin are in reality only the second largest group of foreigners residing in Britain.

[163] Statistics of the *Eurobarometer* No 30 (1988). The figures refer to the percentages respondents who named the given group as belonging to another nationality and also believed there were too many people of other nationalities living in their country.

[164] Fuchs *et al.*, above n147, 173.

[165] Fuchs *et al.*, above n147, 175.

[166] C Shore above n63, 252.

[167] E Kofman and R Sales 'Towards Fortress Europe?' (1992) 15 *Women's Studies International Forum* 29.

[168] A Sivanandan The New Racism *The New Statesman and Society* 4/11/88

be a white, prosperous and loyal democrat, an image often associated with the EC/EU.'[169] This also allow EU integration represent a process from which non-Europeans are presumptively excluded in both economic and political terms. 'The concept of exclusion has become intimately linked with maintaining the perpetual motion of integration, in particular with one of its current manifestation, the identity issue.'[170] This identity is often constructed in opposition to 'Other',[171] where ''Other' comprises 'undoubtedly ingrained, historically determined, race related aspects of the EU's alterity politics?'[172]

Euro-racism is '*Euro*centric' because Other is homogenised as non-belonging to a (new) imagined European community[173] whether it refers to 'Auslander' in Germany, 'Arabe' in France or 'Extracommunitario' in Italy.[174] The homogeneity of Other is mirrored in that of Self: 'everywhere in the new Europe [...] the most heterogeneous peoples cobble together some unitary cultural identity as a shield against Muslims, North Africans, Turks and other people drawn to Europe from the peripheries.'[175]

(2) The EU Dimension

Racism melds easily with supra-nationalism, and the commonality of their constituent features is not insignificant: shared culture, general history, descent, tradition, language, and even values, 'which do not, as a general rule, coincide with historical states, even though they always obliquely refer to one or more of these.'[176] It is therefore not inconceivable that Euro-centrism align itself to supra-nationalism, translating as a new form of institutionally endorsed racism.

Has EU law precipitated the emergence of Eurocentrism and the policies of 'Fortress Europe'? Some identify a 'new, European racism' in what is 'new' and 'European' about EU integration. 'Despite its claims to promote progress and civilization, the EU has also provided a catalyst for xenophobia in Europe [...] Deregulation, a decade or more of neo-conservative

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[169] C Lyons 'The Politics of Alterity and Exclusion in the European Union' in P Fitzpatrick & J Bergeron (eds) *Europe's Other: European law Between Modernity and Postmodernity* (1998) 157.

[170] C Lyons above n169, 158.

[171] The fraught Turkey- EU relations present an illustrative example of the EU's understanding of 'outsider' in the EU's selective and flexible attitude to what 'European' means and because of the hybrid insider/outsider character which Turkey represents. C Lyons above n169, 171.

[172] C Lyons above n169, 158.

[173] S Castles above n6, 29.

[174] 'Excluding non-Europeans might also be exploited to create a sense of 'togetherness' among the traditionally nationalistic and fiercely competitive peoples of Europe.' C Shore above n63, 252.

[175] S Hall 'Our mongrel selves' *New Statesman and Society* (1992) 5 (207) 6-8, 7.19/6/1992.

[176] E Balibar 'Racism and Nationalism' in E Balibar and I Wallerstein *Race, Nation, Class: Ambiguous Identities* (1991) 61.

policies, the spill-over effects of the single market, the growing number of intergovernmental groups and agreements (including Schengen and Trevi) to co-ordinate restrictions on asylum and immigration into the Union, coupled with EU policies towards promoting a 'European' culture and identity, have all contributed to sharpen the divisions between Europeans and non-Europeans.'[177]

It is important to recognise the ways in which the fortification of outside borders reinforce an exclusive culture inside. 'Policies such as the Schengen agreement [...] underline the impression that there is still an Other who must be kept at bay. [...] and strengthens the perception of an external threat against whom protection is required on a unified European level.'[178]

Sivanandan describes it as Eurocentric or 'pan-European' racism emerging from the 'interstices of the old 'ethno-racism.'[179] The new racism ad the old are markedly similar:[180] 'the objects of the new racism are the migrants, refugees and asylum-seekers displaced from their own countries by the depredations of international capital as 'Third world immigrants', as 'blacks.''[181] These are however the same groups which have been targetted in the past, whose alienation has not changed, and has perhaps been exacerbated with the advent of European integration. The exclusion at Member State level is replicated in EU law because the supra-national territorial border, erodes the distinction between national Self and Other.

The partial dissolution of the national - foreigner distinction in EU rights, such as free movement rights, reinforces the disadvantage of non-EU migrants who have permanent residence in the Union. This gradual erosion of 'difference' between citizens of EU Member States 'refracts the increasing rightlessness' of the residents of non-EU origin within the territory of the EU.

Euro-racism emerges in the differential conditions offered TCN from developing countries, and those from developed capitalist nations who are both less likely to seek the benefits of EU citizenship and free movement (given the nature of their conditions of entry and 'migration purposes'), and far less likely to need legal protection against discrimination offered by that citizenship.

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[177] C Shore above n63, 258.

[178] S Douglas-Scott above n157, 133.

[179] A Sivanandan above n168.

[180] R Miles 'The Articulation of Racism and Nationalism' in J Solomos and J Wrench *Race and Migration in Western Europe* (1993) 35, 36-7.

[181] A Sivanandan above n168.

The racial politicisation of immigration results in part from the 'closure on the meaning of the categories of 'immigration' and 'immigrant''[182] such that they no longer apply to all who are technically migrants, and refer only to *particular groups of people* in a manner that reinforces Euro-racism.[183] These groups 'originate from nation states beyond the European definition of the boundary of Europe and from nation states which are included in the diffuse notion of the 'Third World' [...] an immigrant is therefore, by definition a person who was previously a poor peasant producer, a (at best) semiskilled wage labourer, or unemployed in the periphery of the world capitalist system.'[184] Second, are distinguished by 'signified cultural (e.g. Muslim) and somatic (e.g. black skin) characteristics which constitute further signs of difference, if not inferiority.'[185] These definitions do not include persons of European states industrialised and developed nations.[186] 'Immigrant' is thus a 'closed' category because of applying to a specific category of migrant which is not racially neutral.

The Single Market and EU dimensions of this Euro-racism exist as corollaries to restrictive immigration policy. Some predicted that the effect of the Single European Act on racial and ethnic minorities '[would] be the establishment of a 'Fortress Europe' in which they have no part except as a rigidly controlled work force ... the main issue being confronted by the EC in opening the borders is how to close them to black people, not to lose their labour but control it along with their lives.'[187]

Others charge that 'shifting the boundaries across and between European states - all in the name of economic rationality, a bigger market or the free movement of capital and labour - the EU has intensified those processes of social dislocation and anxiety that were already evident in recession-hit Europe.'[188] It has done so without taking specific account of the harms suffered by minorities since, until very recently, the emphasis of community policy was on tightening border controls rather than combating racism. In this, the EU overlooked the heavy social costs of dislocation and heightened social exclusion which accrue on certain minority

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[182] R Miles above n2, 207.

[183] These groups vary from one Member State to another depending on their immigration or colonial histories, e.g. Caribbean and South Asian origin in Britain, ' Arabes' in France, 'Turks' or 'Ausseidler' in Germany and Albanians in Italy.

[184] R Miles above, note 2, 207.

[185] R Miles above, note 2, 207.

[186] Since 1989 new cultural modes of differentiation have developed for the new Eastern *European* migrant minorities in EU Member States.

[187] R Miles above n2 212; quoting Greater Manchester Immigration Aid Unit *Imagine There's No Countries* (1990) 5,12.

[188] C Shore above n63, 259.

groups as a result of integration and the Single European Market.

Another, more flagrant area of neglect is that of the negative effects of Euro-racism on EU citizens of racial and ethnic minority origin, who suffer discrimination in the exercise of their EU law rights.[189]

6. SOCIAL EXCLUSION OF RACIAL AND ETHNIC MINORITIES

EU law rests on distinctions between Europeans and non-Europeans, which is reinforced by the legal demarcation between EUN and TCN supported in EU citizenship and incipient EU immigration policy.

The demographic composition of the groups affected by a European vs non-European dichotomy has a clear racial dimension. Most racial minority TCN arrive into contexts of economic marginalisation which becomes social exclusion and political invisibility. 'Immigrants are consciously channeled into a kind of Community sub-species, which has all the anticipated wider cultural effects.'[190] Put differently, 'members of racial, ethnic or religious (and indeed other) minorities are likely to be over represented in socially disadvantaged groups.[191] This social exclusion restricts access to income and other social benefits, such as health protection, housing and education, perpetuating patterns of disadvantage[192] .

Despite the dearth of statistical evidence on this and the complete absence of a systematic assessment of the extent to which EU policies impact racial and ethnic minorities, the dichotomy founded EU citizenship translates as generalised poverty, diminished opportunities, lower pay,[193] higher unemployment, greater allocation to the secondary labour market, lower levels of occupational attainment for a given level of education.[194]

'Those patterns of disadvantage already in existence are likely to be exacerbated by European economic integration.'[195] While the earlier waves of European migrants suffered exclusion and a lower socio-economic status in the immediate aftermath of their migration, they gradually rose in their host societies, and were replaced in their former position migrants of non-European origin.

[189] This is the subject of Chapter V, below.
[190] I Ward *The Margins of European Law* (1996) 114.
[191]TK Hervey above n24, 333.
[192] P Spiker 'Exclusion' (1997) 33 *JCMS* 133.
[193] Studies conducted in the UK show discriminatory pay differentials of about 10% N Adnett *European Labour Markets: Analysis and Policy* (1996).
[194] These patterns persist and are inexplicable other than as the product of discrimination. EFILWC Report (1996) above n198.
[195] TK Hervey above n24, 333.

The social and economic implications of racism for racial and ethnic minorities are sometimes conceptualised as the evolution of an 'underclass' referring to people permanently removed from the labour market, with no power or stake in the economic system: in the United States it refers primarily to the black urban poor.'[196] While disagreement exists about the transferability of the term from the US to Europe, some parallels exist.[197]

Ethnic or racial minority immigrants origin undeniably occupy disadvantaged socioeconomic and employment positions in the EU.[198] Yet despite their lower income and relative poverty, welfare dependency and despair are not the norm, distinguishing them from an 'underclass'. However, it is also said that the isolation and alienation of second and third generation descendent of immigrants in Europe has increased, particularly with the growth in unemployment.[199]

The pattern of 'racialised' inequality has become entrenched since the 1980's: 'racial and ethnic minorities constitute much smaller proportions of the labour force in EU member states than do women.'[200] This is partly explained by the changing international economic and political order, including 'changing strategies of capital and the state to make profits in a context of increasing unemployment the transformation of labour markets and companies (...) making them more competitive and with a greater demand for credentialed workers.'[201]

The political invisibility of migrant workers is another important factor affecting their social relations.[202] Political decisions on the distribution of resources occur by means of an ideologically constructed hierarchy of social categories constructed by attaching positive or

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[196] J Solomos and J Wrench (eds) *Racism and Migrations in Western Europe* (1993) 9.

[197] On the process of racialisation in the US and in Europe, S Small 'Unraveling Racialised Relations in the United States of American and the United States of Europe' in J Solomos and J Wrench *Racism and Migrations in Western Europe* (1993) 233.

[198] Migrant and visible minority populations in Europe tend to be disproportionately represented in poor and insecure work and among the unemployed. This applies, in predictably cyclical manner, to second and third-generation migrant descendant populations who are born and raised in Europe. In southern Member States however, these minorities have been the subject of a variety of 'positive discrimination' in that, rather than being unemployed, they tend to be over-represented in certain types of employment where they are actively preferred because they are cheaper, more vulnerable and more pliable; they remain less resistant to work exploitation or lower working conditions because they are often illegals who would have no recourse to the legal system's protection anyway. Report of European Foundation for the Improvement of Living and Working Conditions (1996) *Preventing Racism at the Workplace A Summary*. EFILWC

[199] J Solomos and J Wrench (eds) *Racism and Migrations in Western Europe* (1993) 9.

[200] M Leat *Human Resource Issues of the European Union* (1998) above n94, 206.

[201] S Small above n198, 241.

[202] More 'micro-economic' axes of explanation for the existence of discrimination in terms of pay differentials include: discrimination is the product of socially derived prejudice or taste which employers are prepared to pay for in terms of lost efficiency and profit; or discrimination is the product of imperfect information and insider/outsider models of economic behaviour and outcome.

negative meaning to the signified characteristics in the various collectivities, and, in the case of migrant workers, the characteristics central to their specific social formation are those associated with race.[203] In Britain, for example, migrant workers from the Caribbean or the Asian sub-continent are represented according to generic, popular constructions of race, but are also negatively evaluated by characteristics attached to the 'black race', with their presence in British society viewed as causing severe social problems.[204] A consequence of this is the relegation of specific categories of migrant workers and their children to lower positions in the social hierarchy.[205]

Similar trends were identified in the 'immigratisation' of Italian migrant workers newly arrived in Belgium.[206] These migrants were represented as a threat to the fragile relations between two communities in a linguistically divided state, and as newcomers, their loyalty to one or other community was uncertain. By placing them ideologically and politically outside the imagined community of Belgians, the perceived disruption of the social balance and the public order was neutralised, undermining the migrant workers political empowerment in Belgian society.

'Ethnic minoritisation'[207] emerges in the Netherlands where the construction of ethnic minorities occurs more along socio-cultural and class lines, facilitating regrouping according to 'desirable' or 'non-desirable lifestyles'. In reality, the lower one's class position, the more negatively one's non-conformity is evaluated. Furthermore, the objects of this process are Turkish and Moroccans, not American, Japanese or German migrants who generally occupy higher class positions. The socio-cultural non-conformity of the former group correlates with their 'foreign' racial or ethnic origin, from which 'ethnic minoritisation' positions them outside privileged social positions as people who do not conform adequately to the Dutch way of life, and are not members of the 'imagined Dutch community',[208] thus receiving less access to scarce resources.[209]

While collective identification is founded on cleavages other than those of a strictly

[203] J Rath 'The Ideological Representation of Workers in Europe: A Matter of Racialisation?' in J Solomos and J Wrench (eds) *Racism and Migration in Western Europe* (1993) 215, 216-7.

[204] Yet, as Rath correctly contends, the particular problematisation of this category of migrant workers occurs on ethno-cultural grounds linked to language, territorium or even religion above n203.

[205] J Rath above n203, 218.

[206] J Rath above n203, 221 (relying on a study by M Martiniello)

[207] Rath contends that minoritisation differs from ethnicisation in its ideology of dominance, while ethnicisation treats ethnic belonging on a *per se* equal basis.

[208] The notion of an imagined community was coined in B Anderson *Imagined Communities: Reflections on the origin and Spread of Nationalism* (1991)

[209] J Rath above n203, 222.

socioeconomic nature, 'the third worldisation' of immigration[210] is flagrantly manifest in the socio-economic realm. Bastenier maintains that this occurred due to economic crises in Europe which revealed the increasingly dualistic nature of industrialised societies in terms of class. Since the advancement of societies through interventionist Keynesian policies,[211] and the systems of social protection, the new consumerist ideology in a more individualised society enables new forms of capitalism with the vast majority of Europeans viewing themselves as belonging to a universal middle class society. Old social antagonisms have disappeared leaving behind a weak group of outcasts, on the margins of society, unable to associate with the mainstream due to lack of skills, participation and determination. 'The third worldisation of immigration and the tendency towards its social exclusion have paralleled the rise of 'chauvinism of affluence.'[212]

Owing to their relatively late arrival, their lack of training and their uncertain legal status, these immigrants were particularly affected by the separation between the mainstream and the margins of European capitalist societies. High unemployment, reliance on welfare, and a drift towards deviant behaviour raised feelings of insecurity in urban areas, with a consequent rise in hostility towards foreign workers. 'In various spheres of social life, the situation and future of immigrants came to depend more upon the fact that they were from the Third World than they they were immigrants pure and simple.'[213] Thus, 'immigrants as a category lost much of its applicability whereas analysis based upon behaviour linked with cultural identification held greater significance'.

Ethnicisation and racism support the new stigmatization of minorities by the indigenous majority connecting 'lesser number' to 'lesser cultural legitimacy' . Is the transformation of immigrant groups into new ethnic *minorities* (with all that imports) an inevitable phenomenon? Castles maintains that in a non-racist society immigrants could become equal members of civil society while maintaining their own culture and identity. 'The experience of discrimination and racism in western European countries forced immigrants to constitute their own communities and to define their group boundaries in cultural terms.'[214] In this way, 'ethnicity, as a form of social differentiation, provides, as did class antagonism in different circumstances for a long time, an interpretation of reality for those who live in societies of immigration who can then use

[210] A Bastenier 'Immigration and the ethnic differentiation of social relations in Europe' in J Rex and B Drury (eds) *Ethnic Mobilisation in a Multi-cultural Europe* (1994) Research in Ethnic Relations Series 48, 52.
[211] JM Keynes, *The General Theory of Employment, Interest and Money* (1936).
[212] A Bastenier above n210 , 52.
[213] A Bastenier above n210, 52.
[214] S Castles above n6, 28.

such an interpretation to move towards and possibly mobilise those societies on the basis of having won their status rather than having it imposed upon them.'[215]

This community formation operates to reinforce majority fears of separatism and 'ethnic enclaves', but so ingrained is the experience of discrimination, isolation and alienation, that the reversal of racist and exclusionary policies would no longer be sufficient to bring about cultural and political integration of minorities, in the sense of eliminating the need for some degree of autonomy, especially cultural.

7. THE POLITICAL CONSTRUCTION AND REPRESENTATION OF RACIAL AND ETHNIC MINORITIES

The exclusion of racial and ethnic minorities is connected to the representation of minorities in the domestic polity, and to emerging debates on citizenship and multi-culturalism.[216]

One of the gravest consequences of socioeconomic disadvantage for minorities is political powerlessness and exclusion from participation in civic life. Their political position is partly determined by their characterisation through assimilation and diversity, or integration versus some from of multi-culturalism.[217] The two 'models' most often contrasted in Europe are those embraced by the UK and France respectively.[218] The UK model, embodied in the 1976 Race Relations Act[219] is defined by what the Haut Conseil à l'Integration in France calls the 'logic of minorities'[220] or 'race relations' policy. It is criticized in France as being separatist, rather than egalitarian in import. The French model, enshrined in the 1972 Law Against Racism tends to 'avoid the term 'race' altogether, much of the discourse is framed in terms of culture[...] and links to the greater importance in France of uniformity and assimilation.'[221] It self-consciously adopts a race neutral approach to equality as referable to its universalizing conception of citizenship.

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[215] A Bastenier above n210, 55.

[216] J Rex 'Conclusion: The place of ethnic mobilisation in Western European democracies' in J Rex and B Drury (eds) *Ethnic Mobilisation in a Multi-cultural Europe* (1994) 155-165.

[217] CT Husbands above n56, 115-129; M Silverman above n56, 255-263; S Poulter above n56.

[218] C Lloyd, 'Universalism and Difference: The Crisis of Anti-Racism in the UK and France' in A Rattansi and S Westwood (eds) *Racism, Modernity and Identity on the Western Front* (1994).

[219] This drew on UK race relations legislation of 1965 and 1968, as well as the 1963 US Civil Rights Act.

[220] First Report of the HCI 'Liens Culturels et integration' (1991) *Journal Officiel* 10

[221] See C Lloyd 'Concepts, models and anti-racist strategies in Britain and France' (1992) 18(1) *New Community* 63, 67.

This raises questions regarding minorities place and role in a multi-cultural society,[222] and the role legislation, interest groups and social movements can play in fostering diversity and integration, a fuller conception of citizenship and richer form of democracy in the new Europe.[223] This also challenges the legitimacy of imposing duties without the concomitant endowment of rights, contributing to a host state and not being afforded equal rights or, in the case of TCN, being subject to EU law without being afforded enforceable legal protection under it.[224]

The imbalance of power relations and relative socio-political status between indigenous populations and newcomers often non-negotiable for the former, and not relative once the latter are in a position to claim citizenship.[225] Thus, dismantling racist and exclusionary laws, or even enacting laws outlawing racism and xenophobia may not be enough to combat the profound social, political and cultural isolation of minorities. Policies designed to positively include minorities are needed in all the Member States, and they will need to be tailored to the specific needs of their resident minorities as well as their immigration history,

Cultural pluralism may be the way forward since exclusionary definitions of nationality (e.g. German model) or the crude integrationist or assimilationist models of citizenship (France) are neither acceptable or effective models. Integration, of whatever sort, recurs in discussions of minority cultures and rights. 'The problematic of integration occupies a central place in contemporary analyses [...] of the consequences of post-1945 migration into Europe.'[226] A number of definitions of 'integration' exist, some refer to 'a process of mixing or amalgamation of a previously external population with another, pre-existing population in a nation state. The process is defined *a priori* as problematic, if not conflictual.'[227] This is so at least in part because it assumes that the newer population is not an equal participant in social relations. These policies assume that the newer population remains *outside* the social fabric of the host state. 'The notion of integration [...] *exteriorises* in thought, and in politics, those populations which are already, indeed have always been, a constituent element of the social formation.'[228]

[222] D Chalmers discussing multiculturalism above n153, 225-231.

[223] These three areas are noted by Solomos and Wrench, above .n196, 11-12; European Parliament Evrigenis Report (1985) and Ford Report (1991) above n100.

[224] This unjust contradiction is summed up as 'no taxation without representation' alluding to one of several basic contributions made by immigrants to their host states.

[225] A Bastenier above n210 'Immigration and the ethnic differentiation of social relations in Europe' in J Rex and B Drury (eds) *Ethnic Mobilisation in a Multi-cultural Europe* (1994) Research in Ethnic Relations Series, 48.

[226] R Miles above n2, 175

[227] R Miles above n2, 175

[228] R Miles above n2, 175.

However, more positive definitions of integration exist,[229] as a process which allows 'individuals participate in collective life by their professional activities, apprenticeship into norms of consumption, adoption of family and social behaviour and the establishment of relations with others. It does not mean the interiorisation of norms imposed from outside.'[230] Roy Jenkins famously defined integration 'not as a flattening process of assimilation but as equal opportunity, accompanied by cultural diversity in an atmosphere of mutual tolerance'.[231] The Council of Europe has promulgated its own conceptualisation of the immigration / integration quandary. It sets forth a number of principles supporting a positive conceptualization of integration a new sense of belonging to society and rejecting crude assimilationist models.[232]

A distinct perspective is that of multi-culturalism, although it too admits 'a variety of different policies in different spheres and with different aims.'[233] Multi-culturalism aims for full political, economic and social participation of all members of society whatever their background. It requires a number of anti-discriminatory policy initiatives including Member State citizenship or even quasi-citizenship (bestowing essential rights but stopping short of naturalisation) for permanent settlers and their children, and where they do not wish to relinquish their former citizenship, dual citizenship may also be considered. Access to basic social, legal and political institutions must be safeguarded, and educational measures secured to protect different linguistic and cultural backgrounds.

Immigration into the EU should therefore be viewed as a *positive contribution* at a time when most Member States have with aging indigenous populations and a shrinking work forces. This explains the increasing reliance on younger immigrant populations in various sectors,[234] and a dependency on these migrants' social security contributions to sustain the

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[229] In Belgium the report of the Centre pour l'Égalite des Chances et la lutte contre le racisme *Égaux et Reconnus: Bilan 1993-1999 et perspectives de la politique des immigrés et de la lutte contre le racisme* (1999) adopts this interpretation of integration, as participation in, and access to, political life, education, civil administration, employment and even health ('politiques d'intégration'). The definition emerged from 'pragmatic consensus' incorporating 'l'ordre publique' (by that one should understand, the assimilationist, civil law notion) while also respecting cultural diversity and pluralism (p267). For a critique H Cools 'Fragile Identity(s) and the Elusive Multicultural Society' in B Baumgartl & A Favell (eds) *The New Xenophobia* (1995) 28, 41. The Commission's definition became vague: The concept puts an emphasis on the obligations of the allochthonous people rather than on their rights.'

[230] C Lloyd above n33, 71.

[231] R Jenkins, Speech of 23 May 1966 to a Meeting of the National Committee for Commonwealth Immigrants in A Lester (ed) *Essays and Speeches of Roy Jenkins* (1967)

[232] Report of the European Committee on Migration (1991).

[233] C Lloyd above n33, 72 .

[234] Particularly in jobs that the indigenous population is unable or unwilling to fill.

needs of those in receipt of pensions and other social welfare benefits.

An alternative, more theoretic conceptualisation is the characterisation of minority policy as universalism versus communitarianism. The universal approach favours according equal rights to citizens, the liberal granting of nationality, and the treatment of foreigners as a relatively uniform group. The French integrationist model is an interpretation of the universalist approach , defined by the idea of the 'one and indivisible Republic', animated by universalist principles of the Enlightenment, as enshrined in the Declaration of the Rights of Man and Citizen, and as transposed into the Jacobin model of the centralised state which respects the principle of strict secularism.[235]

However, the Haut Conseil a l'Integration (HCI) states that the model rejects 'the logic of ethnic or cultural minorities' in favour of the 'logic of equality',[236] although it later stressed that this did not amount to the neglect of legitimate desires of individuals or groups to develop their own cultures in their '*private, personal or associative life*'.[237] The French model nevertheless rejects a 'discourse of difference'.

In contrast, the communitarian approach is underpinned by the 'logic of minorities'[238] under which, specific policies respond to different needs of minority groups. A weakness of this approaches lies in the definitional problems presented by the fluid nature of minority communities, and their relationship to society as a whole. The 1991 UK census on race / ethnicity illustrated some of these difficulties, most especially, the fraught question of *which* communities ought to be accorded the status of 'ethnic minority' (e.g. Irish, Rastafarians etc.).

While these approaches are distinct, most national policies combine elements of universalism and communitarianism,[239] or integrationism and multi-culturalism. The definition and self-definition of minorities is problematic and compounded by the the absence of 'access' and 'voice'. 'The 'participatory gap - an important aspect of the democratic deficit - is compounded for people from ethnic and immigrant minority groups in the EU.'[240] These issues exist in domestic host contexts, but are amplified by the secretive and non-transparent nature of

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[235] C Lloyd above n33, 74.

[236]HCI (1991). The HCI was established to examine the limits of cultural expression which will not endanger the cohesion of French society.

[237]HCI (1993) 'Immigration, Identités, Integration' *Ethnologie française* 23(2)

[238] C Lloyd above n33, 74.

[239] Even in France, there exist state measures to assist immigrants with their specific needs such as Fond d'Action Sociale (FAS). The Jewish community in France has, since the Revolution, had its specific rights and institutions recognised.

[240] A Geddes above n57 'Immigrant and Ethnic Minorities and the EU's 'Democratic Deficit' (1995) 33(2) *Journal of Common Market Studies* 197.

deliberation and decision-making on immigration and asylum (e.g. Schengen). The political needs of immigrants and TCN are more often catered for by formal and informal organisations outside of the state's direct remit, and the EU has no direct role.

The political mobilisation of minorities has nevertheless occurred in some Member States, particularly those with a history of immigration. 'The various types of political mobilisation seen among ethnic minorities correspond more to the different stages of migration and settlement than to the evolution of racism itself.'[241] In many of the early host states racism was fought as a type of discrimination in the workplace. From the early 1980's, the focus shifted from workplace to social and political issues, and with this came the debates regarding the integration-diversity / difference problematic. Demands for respecting difference have gained prominence, as have the 'politics of difference'.[242] These approaches pervade official discourse, in the now widely deployed notions of 'multi-culturalism' and 'multi-racial society'. These are also the ideals which define the era of the second generation 'immigrant'.

In France, for example, from the early 1980's onwards, the class-based discourse of old immigrant associations was gradually supplanted by that of new youth-based associations. This new wave of ethnic and political mobilisation championed 'ideas of universalism, human rights and citizenship with reference to distinctive ethnic identities sometimes shading into communautarism.'[243] It also took *new forms* focused on public protests, urban violence, electoral mobilisation through citizenship rights and political mediation by associative leaders.

For this generation, the tension persists between grass-roots orientation and racial-ethnic partisanship celebrating difference, and the meritocratic, assimilationist and integrationist impulses within immigrant racial or ethnic communities. The former emphasises the contextual reality of subordination and 'victimhood', while the latter presents immigrants as successful actors, and accomplished participants in national public life. Moreover, the locus of struggles for equality and social justice has shifted from politics, to more localised social, economic and cultural activities in the suburbs or inner-city.

Despite this 'there has been little pro-migrant mobilization attempts at EU level.'[244] At

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[241] C Withol de Wenden 'Ethnic Mobilisation Against Racism in France' in AG Hargreaves and J Leaman (eds) *Racism, Ethnicity and Politics in Contemporary Europe* (1995) 240.

[242] I Young, *Justice and the Politics of Difference* (1990)

[243] C Withol de Wenden above n241, 245.

[244] V Guiraudon, *International Human Rights Norms and their incorporation: The Protection of Aliens in Europe* EUF No 98/4 EUI Working Papers 32.

the IGC only two Brussels-based NGO's (The Starting Line[245] and Migration Policy Group) lobbied for the inclusion of racial discrimination and a common status for third country nationals to be included in the agenda, and they 'cannot be likened neither in size, means nor influence to other EU lobbies.'[246]

The Commission-sponsored Migrants' Forum[247] was established in 1989 in response to European Parliament demands that there be a 'structure at European level which would allow migrants to have a "voice of their own, because they have no political voice".'[248] The absence of a formal political voice was the primary basis for creating Migrant's forum. The Forum excludes naturalized citizens of Member States and associations of EUN resident in other Member States than those of their nationality (e.g. Italians in Germany or Belgium) on the basis that as EUN they have a political voice in the European Parliament elections.[249] Some exceptions are made for a 'marginal case' such as minorities of Indian sub-continent origin residing in the UK[250] on the basis that while they have rights 'to vote and of free movement, that does not mean that their problems have stopped.'[251] While this is undoubtedly a valid observation, it is not one confined to the designated populations of the UK, and could hold true for Algerians in France or Italians in Germany etc.. The anomaly indicates that while the Migrant's Forum remains 'status orientated', it attempts, through its exceptions, to incorporate discrimination-orientated issues, rendering its aims unclear. Moreover the formulation of a common agenda has proved difficult because of the diversity of their situations and internal conflicts between its constituent groups.

A contrast exists between the discourse of political (and legal) European immigrant lobbies which rely solely on citizenship and legal status, and that of groups which prioritise the

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[245] Established in 199, the Starting Line was one of the most vociferous groups in the campaign for EU competence to act against race discrimination. It was an umbrella network for 200 or so non-governmental organisations. Starting Line Group, *A Proposal for a Draft Council Directive Governing the Elimination of Racial Discrimination* (1993); I Chopin 'The Starting Line Group: A Harmonized Approach to Fighting Racism and to Promote Equal Treatment' 1 *European Journal of Migration and the Law* (1999) 111. It has now dissolved and been replaced by the European Network against Racism.

[246] V Guiraudon, above n244.

[247] See ELAINE (European Local Authorities Interactive Network for ethnic minorities policies) and, in the field of youth, training and education SOCRATES, Leonardo da Vinci and Youth for Europe III.

[248] C Neveu 'Is 'black' an exportable category to mainland Europe? Race and Citizenship in a European context' in J Rex and B Drury *Ethnic Mobilisation in a Multi-cultural Europe* (1994)102, quoting an interview with Mr Kendall, Commission of the European Communities, Brussels, June 1991.

[249] Another term used is 'denizen': immigrants settled in Europe who enjoy a stable legal status.

[250] This is all the more perplexing given that these migrant have Member State nationality, reside in their country of nationality and possess the political rights.

[251] Interview with Mr Kendall, above n248, 102-3.

fight against race discrimination, since these are 'strategically different issues.'[252] A prominent discrimination-orientated group is the Standing Commission on Racial Equality in Europe, SCORE. In 1994, SCORE launched what it called 'The Black Manifesto for Europe', in which it called for the amendment of the Treaty of Rome[253] to outlaw race discrimination,[254] the adoption of the Directive proposed by The Starting Line. It called for free movement for all EU residents whether citizens or not, a ban on incitement to racial hatred and the eradication of racial violence, the creation of a positive immigration policy in conjunction with representatives of the communities most affected, the granting of independent legal status to Black women. It proposed ensuring the political voice of Black, migrant and minority residents of the EU through granting them the right to vote in all elections, and guaranteeing them equal rights to housing, education (in their own language and culture), health care and social services, and the right to family reunion.[255] Other notable examples of politically mobilised minority groups include the 'Campaign Against Racist Laws', CARL[256] which also proposed a Charter of European Community Rights to apply to all *residents* of the EU and irrespective of race, colour, ethnic or national origin, nationality, sex and religion. The Charter of Fundamental Rights of the EU[257] has achieved this in some ways since it contains an equality provision which applies to 'everyone'. The Charter is, however, neither enforceable nor does it afford the entirety of its rights to residents since special provision is still made for the superior rights of EU citizens[258] .

8. THE CONSTRUCT OF RACE IN EU OFFICIAL POLICY

The EU has a varied policy history on the subject of minorities which had developed

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[252] C Neveu above n248, 103.

[253] UK Treaty Series 1973 No.1 Cmnd 5179-II .

[254] This would have been a far more progressive amendment than Article 13 is in its present form. *The Black Manifesto*, quoted by J King, above n90, 186. Rights of access and representation were also claimed for asylum seekers.

[256] CARL was launched in 1979 and comprises several organisations, of which the Indian Workers Association Great Britain (AWGB) is one.

[257] Charte 4422/00 [2000] OJ C 364/01

[258] Charte 4422/00 [2000] OJ C 364/01; Chapter V.

primarily, though not exclusively, in EU soft law,[259] rather than justiciable law.[260] These measures possess aspirational value and even some normative force. Multiculturalism, diversity and a positive, non-assimilationist integration comprise the dominant values and theoretic underpinning of this body of law.[261] This outlook is also evident in the recurring connections made between minority integration issues and race discrimination.

In 1977 a Joint Declaration was adopted by the European Parliament, the Council and the Commission on Fundamental Rights[262] which, by its incorporation of the ECHR, included provisions relevant to the elimination of race discrimination, most particularly Article 14.[263] In 1986 the EC institutions adopted the Joint Declaration against Racism and Xenophobia[264] in the aftermath of the findings of the European Parliament's Committee of Inquiry into the Rise of Fascism and Racism in Europe, the Evrigenis Report.[265] It recognised, *inter alia*, that 'the elimination of forms of racial discrimination is part of the common cultural and legal heritage of all the Member States' and calling for recognition 'of the positive contribution which workers who have their origins in the other Member States or in third countries have made, and continue to make, to the development of the Member States in which they legally reside, and of the resulting benefits for the Community as a whole'. It condemned all forms of intolerance, hostility and use of force against persons or groups of persons on the grounds of *inter alia* racial differences and rejected any form of segregation of foreigners. The Social Partners also adopted a Joint Declaration on the prevention of racial discrimination and xenophobia and the promotion of equal treatment at the workplace,[266] reaffirming the importance of anti-

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[259] The Parliament has consistently called for the transition to enforceable legal measures. It has called for Article F TEU regarding human rights to be made operational in respect of racism and xenophobia, and it has been vociferous in calling for action on racism and xenophobia. Resolution of the European Parliament on racism and xenophobia, [1993] OJ C342, 19.

[260] A premise of this discussion is that soft law is extremely important for the development of '*opinio juris*' and customary international law, heralding the existence of an unwritten enforceable laws, which is often later enshrined in a Treaty. In the EU context, this has been borne out in the slow process of responding to race discrimination with enforceable legal measures from the declarations of the 1970's to the Race Directive in 2000 under Article 13 EC of the Treaty of Amsterdam. R Higgins, *Problems and Process: International Law and How We Use it* (1994) ch 2; DJ Harris, *Cases and Materials on International Law* (1991) ch 2.

[261] It is interesting to note that this same outlook is manifest in the result of the Eurobarometer 2000 poll, which found that most Europeans are optimistic about multiculturalism, the majority reject repatriation programmes, though only one in five supports the assimilation of minorities.

[262] [1977] OJ C103.

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

[264] [1986] OJ C/158.

[265] Ford and Evrigenis reports, above n100.

[266] Adopted at the Social Dialogue Summit in Florence, 21 October 1995.

discrimination in employment and social affairs, and recognising the grave impact racism has on people as workers.

Perhaps the most expansive of all pre-Amsterdam measures is the Joint Act 96/443/JHA on action to combat racism and xenophobia, enacted beyond the strict Community law rubric.[267] It required Member States to criminalise a number of racist acts such as the incitement to discrimination, denial of the Holocaust, public condoning of crimes against humanity, the dissemination of racist literature and participation in racist groups. It also committed Member States to greater administrative and judicial cooperation against race discrimination.

(1) European Parliament

The European Parliament has traditionally been active in regard to race discrimination[268] and has passed a number of subject-specific resolutions, focusing on particular types of racist crime or political extremism.[269] The 1993 Resolution on the Resurgence of Racism and Xenophobia in Europe and the danger of Right Wing Extremist Violence[270] is representative of the uncompromising approach adopted by the Parliament. Having recourse to international measures relevant to racism and race discrimination,[271] it 'vigourously and categorically' rejected all notions of an *ethnocentric* Europe,[272] and called on the 'Council, the Commission and the Member States to cease discriminating against the citizens of third countries compared with the EU citizens, by offering voting rights in local elections to those who have been legally resident in a Member State for a period of five years or more.'[273] The resolution linked the discriminatory treatment of immigrant TCN with ethnocentrism and race discrimination.[274]

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[267] OJ (1996) L185/1.

[268] The Commission's Communication on racism and xenophobia and anti-semitisim[1995] COM (95) 653 final acknowledges the Parliament's prodigious contribution . Article 2.3.7. states that calls for Europe-level legislation under the first Pillar of the Community Treaty against race discrimination have come '*first and foremost* - but by no means exclusively from the Parliament.' (emphasis added).

[269] Resolution on Racism and Xenophobia(1994) (EP B4-0261/94); Resolution on Racism, Xenophobia and anti-Semitism (1995) (EP B4-1239/95) and the Resolution on Racism, Xenophobia and anti-Semitism and the result of the European Year Against Racism (1997) OJ C056 23/2/1998.

[270] [1993]OJ C/150, p127. Other EP resolutions were passed on this subject: [1990] OJ C/149, p123; [1990] OJ C175, p178; [1990] OJ C284, p57; [1990] OJ C324, p219; [1991] OJ C280, p146; [1992] OJ C94, p269; [1992] OJ C284, p99; [1992] OJ C305, p590.

[271]Universal Declaration of Human Rights UN Declaration on the Elimination of all Forms of Racial Discrimination (20/11/1963) and the International Covenant on the Elimination of all Forms of Race Discrimination (21/12/1965). Council of Europe recommendations Nos 453, 583, 963, 968, 982 and resolutions 68(30), 72(22) and 743.

[272] Article 3.

[273] Article 8.

[274] The Parliament and the Starting Line favour extending Union citizenship to TCN with *residence* in the Union to help ensuring their equality and fight racism.

In a later resolution on racism, xenophobia and anti-Semitism, the European Parliament endorsed multi-cultural and multi-ethnic conceptions of European societies as being 'in line with the ideals of the EU', [275] regarding such societies as 'an expression of civilization and as offering support to the European ideal.'[276]

The European Parliament has been among the strongest proponents of enforceable and comprehensive legislative action against race discrimination,[277] calling repeatedly on the Commission to propose an anti-discrimination measure, and on the Council and Member States to support such measures.[278] During the 1997 European Year Against Racism,[279] the EU's Consultative Commission on Racism and Xenophobia proposed a Charter of European Political Parties for a Non-Racist Society. The Charter was drafted and, according to the European Parliament, signed by all European parties, pledging to defend basic human rights and democratic principles, to reject all forms of racial violence, incitement to racial hatred and harassment and any form of racial discrimination. The Charter provides for defensive actions,[280] as well as positive actions.[281]

(2) Commission

The Commission has made significant contributions to the fight against racism, proposing many of the most auspicious initiatives of recent years. Among these was the 1998 Action Plan on the Fight against Racism[282] which advocated a comprehensive approach, highlighting the importance of mainstreaming the fight against racism in all European policies and promoting partnership between all governmental and non-governmental actors. Then Commissioner Flynn's speech at the 'Closing of the European Conference on Anti-

[275] Resolution of the European Parliament on racism, xenophobia and anti-Semitism [1995] OJ C308 p140; Recital A.

[276] Resolution of the European Parliament on racism, xenophobia and anti-Semitism [1994] OJ C323, p154; Recital F.

[277] In its opinion on the Commission's White Paper on Social Policy, the Economic and Social Committee stressed the need to enshrine citizens' rights in the Treaty by including a Treaty Provision banning discrimination on the grounds of sex, colour, race, opinions and beliefs'.

[278] European Parliament report on the Communication from the Commission on 'An Action Plan against Racism' [1998] (COM (98) 0183 - C4-0253/98) by the Committee on Civil Liberties and Internal Affairs A4-0478/98.

[279] EU Commission DG V *Newsletter for the European Year Against Racism* (1997) outlining the various forms of racism and the contexts of their manifestation.

[280] E.g. recommending not working with parties which propagate xenophobia.

[281] E.g. the encouragement of minority groups to play an active role in political affairs. European Parliament, Report on the proposal for a Council directive implementing the principle of equal treatment between persons irrespective of racial or ethnic origin COM (1999) 566 [2000] EP Session Document, A5-0136/2000. Rapporteur KM Buitenweg; Amendment 10 for a new Recital 8a of the Preamble.

[282] COM (1998) 183 final.

Discrimination: The Way Forward'[283] clenched the prospect of enforceable legislation, outlining the Commission's approach to Article 13. It placed great emphasis on diversity and inclusiveness, invoking the values of difference and individuality in all realms of the anti-discrimination struggle. Of greatest substantive importance was the Commissioner's outlining of the form Commission proposals would take: a framework directive covering all grounds of discrimination, an action programme for increased co-operation between member states,[284] and a Directive dealing specifically with racism. The Race Directive stood alone as the broadest and most detailed measure in the tripart package, indicating the high political priority now afforded it. 'There is undeniable political momentum here. Strong expectations have been raised by the European Year Against Racism. That momentum is an opportunity which should not be missed.' [285]

(3) Council

The initiatives of the Council and the European Councils[286] are of paramount importance. The Council's approach has rarely been substantive as those of the Council or Commission.[287] Some declarations, however, indicate a stronger characterisation of the issues[288] and revealing a non-assimilationist approach to integration and promoting national mediation measures[289] in a manner consistent with the Parliament's multi-culturalist, diversity-based model.[290] Its education measures refer to the values of pluralism and tolerance, and the role education can play in intensifying awareness of diversity and eliminating stereotypes.[291] The Council has recognised

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[283] Vienna, 4 December, 1998

[284] Mention was made of a future social policy initiative under the Structural Funds to be named EQUAL to be linked to the tripart package of proposals and to build on the experience of exiting programmes such as NOW, ELAINE, HORIZON and INTEGRAL to promote more effective transnational co-operation on effective measures to combat discrimination and inequality in the labour market.

[285] P Flynn, Closing Address at European Conference on Anti-Discrimination: The Way Forward', Vienna 4/12/1998.

[286] *Declaration on Anti-Semitism, Racism and Xenophobia* (Dublin European Council) 25 & 26 June 1990; *Declaration on Racism and Xenophobia* (Maastricht European Council) 9 & 10 December 1991.

[287] Epitomised in the tone and content of the Council Resolution on the fight against racism and xenophobia in the fields of employment and social affairs, 5 October 1995; OJ C296; p13.

[288] Resolution on the Fight against Racism and Xenophobia (1990) OJ C157.

[289] Council Resolution (1990) OJ C157 Recital 2 (d).

[290] Council Resolution (1990) OJ C157 Recital 4 (b) (i).

[291] This is further evidenced in resolutions inviting Member States to draw attention to the role that the media can play in *inter alia* promoting harmonious relations between the various communities living in Europe, Resolution of the Council on the response of educational systems to the problems of racism and xenophobia, 23 October 1995 (1995) OJ C312; Declaration by the Council and the Representative of the Governments of the Member States, meeting within the Council on the fight against racism, xenophobia and anti-Semitism in the youth field [1997] OJ C368. Section I, Recitals 2 and 3

that political, cultural and linguistic pluralism characteristic of the EU has helped emphasise respect for the value of diversity, and that pluralism is an enriching factor and part of what distinguishes Europe. A number of other Council measures link the promotion of diversity to combating race discrimination.[292] Racism and xenophobia have been regularly raised in proceedings of the European Council, and since 1990, can be found, in various forms, in its Presidency Conclusions.[293]

An important development was the establishment of the Consultative Commission on Racism and Xenophobia,[294] which was charged with making recommendations on cooperation between governments and various social bodies to encourage tolerance, understanding and harmony with foreigners[295]. Its first met on the 19th of September 1994 and has since promulgated an Interim Report[296] and a Final Report.[297]

The Consultative Commission has dealt with diversity and mutual loyalty; training of occupational groups and measures addressed to 'difficult districts'; employment and

[292] [1998] OJ C 001; Joint Action adopted by the Council on the basis of Article K3 of TEU concerning action to combat racism and xenophobia [1996] OJ L185.

[293] Dublin, 25&26 June 1990 (*Bulletin of the EU*, June 1990); Maastricht 9&10 December 1991 (*Bulletin of the EU*, December 1991): condemning racism and xenophobia. Edinburgh, 11&12 December 1992 (*Bulletin of the EU*,; December 1992): calling for vigorous and effective measures to be taken to combat the phenomena of racism and xenophobia. Copenhagen, 21&22 June 1993 (*Bulletin of the EU, June 1993*); it pledged to intensify its efforts to identity and root out the causes of racism. Corfu, 24&25 June 1994 (*Bulletin of the EU*, June 1994) : accepts the Franco-German initiative against racism and xenophobia deciding to set up a Consultative Commission "charged with making recommendations on co-operation between governments and the various social bodies in favour of encouraging tolerance and understanding, and decides to develop a global strategy at the union level aimed at combating acts of racist and xenophobic violence. Essen, 9&10 December 1994 (*Bulletin of the EU*, December 1994) European Council takes note of the interim report of the Consultative Committee approving the guidelines contained in it and calling upon the Commission to step up its discussions in particular in the various areas of education, training, information and media and in areas of policy and justice. Refers also to the work of the Justice and Home Affairs, Education and Youth Councils which it saw as a "good basis for further progress with a view to elaborating an overall Union strategy against racism and xenophobia"; Cannes, 26&27 June 1995 (*Bulletin of the EU*, June 1995) Consultative Commission and the Justice and Home Affairs Council present their reports to the Cannes European Council which invited the Consultative Commission to extend its work in order to study, in close cooperation with the Council of Europe and the feasibility of a European Monitoring Centre on Racism and Xenophobia. This was followed through with in 1997 when Member States and the European Parliament agreed to the setting up of a Monitoring Centre in Vienna which should have a dual role: to take stock of and evaluate racist and xenophobic phenomena and analyse their causes and to formulate concrete and practical proposals to combat them; Madrid, 15&16 December 1995 (*Bulletin of the EU*, December 1995); Encouraging the approximation of Member State laws to combat racism and xenophobia and enhance judicial assistance between them under Article K3 TEU. Florence, 21&22 June 1996 (*Bulletin of the EU*, June 1996) reaffirming the Union's determination to combat racism and xenophobia and approving the establishment of a European Monitoring Centre.

[294] Established by the Council at its meeting in Corfu, 24-25 June 1994 in response to a Franco-German initiative on racism and xenophobia.

[295]It is composed of 'eminent persons' from each member state, with two MEP's, two Commission representatives and two Council of Europe representatives as active observers.

[296]EC Council (1994) 11138/94.

[297]EC Council [1995] 6906/1/95 RAXEN 24.

unemployment, freedom of movement, harmonisation of legislation and the role of the police, the criminal justice system and the distribution of racism material. Of particular importance were its proposals on freedom of movement, particularly that of TCN. It recommended a right of free movement for *all persons legally resident* within a Member State to travel freely within the Union, a right for non-EU citizens residing and working legally in a Member State to travel within the Union for purposes connected with such work; a full right of free movement within the Union for persons permanently and legally resident in a Member State for five years; and a proposal for extending Union citizenship based on five years' permanent residence in a Member State. Its final report recommended amendment of the Treaty to provide explicitly for Community competence in respect of discrimination, emphasising the moral and political dimension to this, the threat posed to stability and democracy and the need to protect fundamental human rights.

The Council decision[298] designating 1997 as the European Year Against Racism[299] foreshadowed the Race Directive.[300] This measure established the principles to guide the Commission in its proposals, outlining key areas for action which included promoting integration through improved the accessibility of vulnerable groups to public services, developing grass-roots, community based political inclusion, and providing training.[301] It was designed to highlight the threat posed by racism to fundamental rights and to economic and social cohesion, and to encourage reflection and discussion on the action required at local, national and European level, and to elucidate the benefits of integration.[302] The Economic and

[298] The legal basis was Article 235 TEU. Resolution of the Council of 23 July 1996 concerning the European Year against Racism (1997) OJ C237.

[299]Communication from the Commission on racism, xenophobia and anti-Semitism and Proposal for a Council Decision designating 1997 as European Year against Racism COM (1995) 653 final. The Commission had first announced its intention to designate 1997 as the European Year against Racism in its *Medium-term Social Action Programme* 1995-1997 COM (1995) 134, 12 April 1995, para. 6.5.1.. The Commission discussed complementing national integration initiatives, opening pathways for inclusion, promoting equal opportunities and reducing discrimination; raising public awareness and combating prejudice; preventing racist behaviour and violence; monitoring and punishing racist crime; promoting international cooperation; strengthening anti-racist legal provisions including those on a European level

[300] The Commission had repeatedly emphasised the need to strengthen the Treaty provisions and announced its intention to 'press for specific powers to combat racial discrimination to be included in the Treaty' European Commission, *European Social Policy - A Way Forward for the Union* COM (1994) 333, Ch IV, para 25. Another relevant initiative of the Commission was the Proposal to amend the Community Staff Regulations and Conditions of Employment to provide that officials shall be entitled to equal treatment without reference to race, political , philosophical or religious belief, sex or sexual orientation COM (1996) 77 final.

[301] Proposal for a Council Decision designating 1997 as European Year against Racism COM (1995) 653 final, Article 2.3.1.

[302] Resolution of the Council and the Representatives of the Member States, meeting within the Council of 23 July 1996 concerning the European Year against Racism (1997) OJ C237, Article 1.

Social Committee echoed this in its report, which noted the value of pluralism and diversity,[303] the 'heterogeneity of today's Community'[304] and the population of the EU as 'a human mosaic, unarguably enriching our existence.'[305]

The establishment of the European Monitoring Center for Racism and Xenophobia[306], proposed by the Commission in 1996[307] and established by a Council Regulation no. 1035197 in 1997[308] represented another remarkable development. The EMC has the tasks of data collection and analysis of good practices on race discrimination and xenophobia, for use by the European institutions and the Member States; the development of information networks (e.g. RAXEN) and 'round tables', and the application of Consultative Commission proposals.

[303] Opinion of the Economic and Social Committee on the communication from the Commission on racism, xenophobia and anti-Semitism and Proposal for a Council Decision designating 1997 as European Year Against Racism [1996] OJ C204, p23.
[304] ECOSOC Report above n303, Recital 2.2.2.1
[305] ECOSOC Report above n303, Recital 2.2.2.3
[306] Hereafter EMC.
[307] Proposal for a Council Regulation (EC) establishing a European Monitoring Centre for Racism and Xenophobia; 27/11/1996 COM (96) 615 final; Commission Proposal to the Council concerning the relation between the Community and the COE in the working of the Monitoring Centre COM (1998) 255; [1998] OJ C171/10.
[308] Established by Council Regulation 1035/97 [1997] OJ L 151.

IV. THE EU LEGAL CONTEXT: THIRD COUNTRY NATIONALS AND THE CONSTRUCT OF RACE

1. THE CONSTRUCT OF RACE IN EU LAW

The *de facto* race discrimination engendered through the operation of EU law is the subject of this chapter and the following chapter.[1] Previous chapters have considered race as a construct, and as a construct in the social, political and policy contexts of the EU. This chapter examines race in the EU *legal* context, and the the ways in which the operation of EU law provisions support race discrimination through legal constructions of 'outsider', most especially the construct of Third Country Nationals.[2] The following chapter considers the same discrimination from the perspective of 'insiders' with the attributes of 'outsiders': EU nationals who are members of minorities. This sets the stage for the ensuing discussion of the substance and form of a legal model against race discrimination, and its normative bases. In particular this chapter, and the next focus on different aspect of the EU's 'particular responsibility with regard to racism and xenophobia.'[3]

There are a number of features which make the race construct approach set forth in chapter II effective for the analysis of EU law. First, the *sui generis* nature of EU law and the heterogeneity of the cultures and contexts it binds require a contingent definition of race which emanates from the context and operation of EU law. Discrimination based on race or ethnicity manifests itself differently according to the legal, social, historical, political and even economic situations of groups within the EU. That diversity is also evident in the *de jure* and *de facto* based distinctions in EU law, calling for the premise that difference is not essential, but rather constructed in a manner which is relational.[4]

Second, EU law fosters race discrimination through its *effects* rather than its stated aims or the explicit content of its rules. The race construct approach facilitates an analysis of the effects and contextualised results of the rules. It tends towards more subjective analyses of discrimination, and away from formalistic analysis.

Third, the 'race construct' elucidates the implications of the near 'legal invisibility' of

[1] Chapter V examines the 'central case' of racism and EU nationals. Chapters IV and V are twin facets of the same issues viewed, in Chapter IV from outside EU law, and in Chapter V, from the within it. These chapters are therefore corollaries to one another and should be read together.

[2] Hereafter TCN.

[3] T Hervey, 'Putting Europe's House in Order: Racism, Race Discrimination and Xenophobia after the Treaty of Amsterdam', in D O'Keefe & P Twomey, *Legal Issues of the Amsterdam Treaty* (1999) 329, 331.

[4] A Harris' Race and Essentialism in Feminist Legal Theory' in K Bartlett and R Kennedy (eds) *Feminist Legal Theory* (1991) 250, 352-3.

race discrimination within EC law[5] prior to the Amsterdam Treaty,[6] the Race Directive and the Charter of Fundamental Rights of the EU.[7] That apparent invisibility has had serious ramifications for EU law in terms of positing race outside of, if not in tension with, prioritized EU policy. A more contextual perspective expands the inquiry through its emphasis on impact, and the factual creation of racialised categories. The absence of an explicit race construct within EC law hitherto, and the putative neutrality of categories deployed within it, are precisely what has created race discrimination within EU law.

Patent evidence of this 'neutrality' was the absence of any enforceable measures to combat race discrimination.[8] Though the issue of race discrimination had not been entirely ignored, it had been accorded less political and legal relevance than other issues. In some respects, the existence of soft-law measures and declarations may have exacerbated this by highlighting that the Member States retained the power to frustrate institutionalised anti-discrimination initiatives, and by signaling an awareness of the problem and the lack of political will to redress it.[9]

Commentators have noted that the putative colour-blindness and formalism of EU law masks a particular political position, and viewed it as 'clear proof of its general lack of commitment to matters of 'race'.'[10] Others charged that 'Community anti-racist measures are notoriously slack'[11] and that its soft law measures comprised 'a series of largely meaningless pronouncements'[12] which, rather than combating racism, perpetuated it by allowing the exclusion be legitimated. Others noted the complete absence of any systemic assessment of the extent to which EU policies impacted racial or ethnic minorities.[13] 'The concern for the cultural, linguistic and ethnic integration of aliens may send a signal which accentuates both the

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[5] This emerges in the way the existing legal categories of the Treaty do not lend themselves to accommodating the issue of race discrimination or categories such as racial minorities; eg the concept of worker contained in Article 39 (ex 48-51 EC) or the concept of discrimination on the basis of Member State nationality contained in Article 12 (ex 6 EC).

[6] With Amsterdam came the enabling Article 13 and Article 62 regarding discrimination and TCN respectively.

[7] Charter of Fundamental Rights of the EU (proclaimed at the Nice European Council 7 December 2000; Charte 4422/00 [2000] OJ C 364/01. That is not to discount the importance of the soft law measures promulgated, or action in the field of Justice and Home Affairs such as Joint Action 96/443/JHA (1996) OJ L185/1.

[8] D Curtin and M Geurts 'Race Discrimination and the European Union Anno 1996: From Rhetoric to Legal Remedy?' (1996) 14/2 *Netherlands Quarterly of Human Rights* 147.

[9] Eg *European Parliament, Council and Commission Declaration against Racism and Xenophobia*; OJ C 158/1, 15.6.1986.

[10] F Milburn 'Adult Education and Training Issues for Ethnic Minorities and Migrants in Europe' in AG Hargreaves and J Leaman (eds) *Racism, Ethnicity and Politics in Contemporary Europe* (1995)209, 216.

[11] I Ward *The Margins of European Law* (1996) 113.

[12] M Spencer *States of Injustice* (1995) 131-2

[13] T Hervey above n3, 345.

otherness of the alien and an intolerance of the dominant culture towards such otherness.'[14]

The European Parliament also claimed that EU soft law responses exacerbated the assumed link between illegal immigration, crime and racial minorities.[15] Its own soft law measures allude to this, noting the inadequacy of Community policy on racism, reaffirming the duty of Community authorities to take effective action against race discrimination in order to protect democratic values and the achievement of objectives in Articles 17-22 EC (ex 8a-8e), considering that the issues of racism and xenophobia are issues of 'common interest.'[16]

This chapter examines the ways in which the long neglect of race discrimination in EU law has generated or supported a negative race construct and how 'the main thrust of the policies and activities of the European Union exacerbate[d] the exclusion of minorities, including racial and ethic or religious minorities.'[17] It also examines EU law's creation of legal categories which exclude racial and ethnic Other, constituting concentric circles of belonging, from EU citizenship (contingent on full Member State nationality), through the various intermediate levels of 'belonging', to the outermost margins of EU law.

The ostensibly even-handed application of EU law and its formal equality conceal the racially exclusionary nature of its constructs, and obscure the values operative within its legal categories (eg the primordial importance of the market or a racially exclusive conception of 'European') and the subordination they entail.[18] The apparent universal applicability of its 'social law' provisions conceal that 'the relevant provisions of Community law[...] are based on presumptions which further marginalise members of groups already neglected by national legal systems, and who are excluded from protection at European Union level.'[19] This 'false claim of equality' has an adverse impact on minorities, *in addition to* disadvantages they suffer within

[14] JHH Weiler 'Thou Shalt not Oppress a Stranger: On the Judicial Protection of the Human Rights of Non-EC Nationals - A Critique' (1992) 3 *EJIL* 65, 67.

[15] M Bell EU Anti-Discrimination Policy: From Equal Opportunities between Men and Women to Combating Racism (1998, European Parliament) LIBE 102 EN 45-47; A Geddes 'Immigrant and Ethnic Minorities and the EU's 'Democratic Deficit'" (1995) 33 (2) *Journal of Common Market Studies* 197; J Rex 'Race and Ethnicity in Europe' in J Bailey (ed) *Social Europe* (1992) 116.

[16]Resolution of the European Parliament on the resurgence of racism and xenophobia in Europe and the danger of right wing extremist violence [1993] OJ C150, 127 .

[17]TK Hervey above n3, 330. Hervey rightly claims that the Community should therefore put in place policies to counteract this tendency, and concedes that that assertion is founded in an (accurate) assumption that the European Union is more than an economic organisation concerned with factors of production. She notes that as the EU claims more and more badges of statehood, so must it accept the responsibilities incumbent on the nation state.

[18] KW Crenshaw 'Race, Reform and Retrenchment: Transformation and Legitimation in Anti-Discrimination Law' (1988) 101 *Harvard Law Review* 1331; RJ Araujo 'Race Relations and Conflict in the United States: Critical Race theory: Contributions to and Problems for Race Relations' (1996) 32 *Gonzaga Law Review* 537.

[19] TK Hervey 'Migrant workers and their families in the European Union: the pervasive market ideology of Community law' in J Shaw and G More (eds) *New Legal Dynamics of European Union* (1995) 91, 92.

national legal systems[20].

2. SOURCES OF *DE JURE* DISCRIMINATION IN DOMESTIC LAW ON CITIZENSHIP AND NATIONALITY

The foundational *de jure* distinction is that between EU nationals and TCN.[21] While these legal distinctions are rooted in Member States laws on immigration, nationality and citizenship, they translate, in EU law, to a general exclusion founded on a distinction between EU nationals -TCN distinction, or between 'Europeans' and 'non-Europeans', having serious ramifications for persons of racial and ethnic minorities. Beneath the concept of EU citizenship and the generic distinction it connotes lies the diversity Member State traditions and policies, many of which have a racially exclusionary effect. Where Member State law exclude, EU law replicates and reinforces that exclusion.

Immigration laws covering non-European migration or the status of 'foreign workers' are particularly pertinent. Because the Community has limited (albeit increasing) competence with regard to immigration, and none in regard to naturalisation, Member States regulate these matters independently, according to their domestic traditions, rules and ideology. Their divergence creates additional barriers TCN since the rights, freedoms and benefits of EU citizenship accrue on those who are Member State nationals, and because the 'transferability' of rights between Member States has generally been more difficult for non-EU nationals.[22] EU has no independent citizenship policy and EU citizenship remains an entirely contingent concept.[23] The plight and status of TCN at large, and most especially minority TCN illustrate in stark terms how severely limited EU citizenship actually is.

Rules related to residence, naturalisation and nationality vary substantially between different Member State national orders. Nationality is granted on a variety of bases ranging from place of birth (*jus soli*); to descent (*jus sanguis*) or parental nationality. In all cases the state retains the discretionary power to grant naturalisation, which can depend on a number of

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[20] Hervey, above n19, 94.

[21] This distinction has been replicated, and perhaps exacerbated by the new Charter: Chapter V enshrines rights reserved to Citizens beyond those afforded 'everyone'. Enacting a Charter of Fundamental Rights which reinforces a distinction with de facto discriminatory effects under the legitimating guise of a self-consciously human rights based instrument could be attacked as not just replicating, but reinforcing of discrimination.

[22] Examples of rights subject to this 'transferability' include social welfare, pensions, cumulative insurance benefits (eg paid sick leave, maternity rights, income-related pensions).

[23] The Consultative Commission on Racism and Xenophobia did propose disaggregating the concept of EU citizenship and Member State nationality by proposing that the EU afford EU citizenship to TCN with 5 years legal residence in the EU.

factors, and the number of years of legal residence required for it varies significantly; some states, such as Germany, impose additional requirements such as language, attitudes and employment. The sheer complexity of such laws, their perceived centrality to state sovereignty and the variations which prevail between them have thwarted efforts to harmonize laws this area. Examples of the different Member States legal models on nationality and citizenship will help illustrate the diversity and complexity underlying EU citizenship.

The UK embraces a model of citizenship based on territory *with ethnicity*. Until 1962 all members of the British Commonwealth enjoyed citizenship rights on the same basis as British citizens born in the United Kingdom under the 1948 Nationality Act. As such, they availed of rights of entry, and once in the UK, enjoyed the full plethora of political and social rights. From 1962, the Commonwealth Immigration Act restricted entry for Commonwealth citizens. Further restrictions followed with the 1968 Immigrants Act: only those who could establish a close connection with the UK (eg British resident grandparent) could enter, and later legislation restricted the entry of wives and children of persons already in the UK.[24] All immigration legislation was superseded by the 1971 Immigration Act,[25] along with a set of immigration rules revised in 1980. The Act created an important distinction between 'patrials' with strong blood-ties to the UK, and 'non-patrials' without such ties, who could enter only under restricted circumstances.[26]

UK nationality law has evolved from reliance on territory (*jus soli*) and decent (*jus sanguis*) being gradually replaced by descent exclusively, meaning that persons born in the UK do not automatically obtain UK nationality. The 1981 Nationality Act[27] sought to bring UK citizenship law in line with changes effected by immigration legislation creating five separate categories.[28] Only the first category, composed of *patrials*, has full full rights of entry into Britain. The second is composed of permanent residents of the remaining colonies who have the right to settle in the dependency in question, but not in Britain. The third category, British Overseas Citizens, despite holding a form of British passport, they have no right to settle

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[24] The ECtHR found the UK's 1968 Commonwealth Immigration Act to be racially discriminatory and in breach of the European Convention; S Allen & M Macey, 'Minorities, Racism and Citizenship: The impact of the single market', (1991) 2(2) *European Journal of Intercultural Studies* 5.

[25] In force from 1973.

[26] The potential for arguing this to be *de facto* discrimination is clear.

[27] It abolished the terminology of patriality, many claim because of its racist overtones, and replaced it with the obfuscatory notion of 'strong connections to Britain' as the terms have the same substantive connotations.

[28] British citizenship, British dependent territories citizenship and British overseas citizenship, British Protected Persons and British subjects.

anywhere.[29] The 1988 Immigration Act repealed the right of unrestricted access for the wives and children of Commonwealth citizens settled in the UK prior to 1973, introducing financial criteria through a points system for Hong Kong citizens wishing to re-enter the UK, and removing the right of appeal for people refused admittance at the port of entry.

Although the UK model is not entirely contingent on nationality, since one can obtain extensive citizenship rights without full British nationality, it remains a central referent. Territorial rights and residence are important to the acquisition of citizenship, but territory is narrowly defined, and increasing reliance is placed on 'blood right'. Such restrictions are apparently aimed at preserving the identity and purity of 'nationality', while running counter to both liberal doctrine and the needs of the economy.[30] The UK model now relies heavily on the principles of territoriality and patriality.[31]

Despite the access to welfare, legal and political rights accrued through gaining citizenship rights, the disadvantage suffered by non-patrials(primarily members of racial and ethnic minorities) prevails to a large extent.[32] More recent UK immigration laws '[normalise] differential treatment for Black and Asian people, [and] they have served to reinforce and codify racist assumptions about others in general and negatively label minority ethnic people.'[33]

The German model is unequivocally ethnicity-based, and founded upon a conception of 'belonging to a people with a common origin.'[34] The 'German people' includes those returning Germans identified as '*Ausseidler*',[35] who have settled in another country, and may even have lost German nationality and language (eg ethnic Germans in Russia, Rumania or Hungary). *Ausseidler* generally avail of far better treatment than 'guest workers' (*Gastarbeiter*) or 'foreign employees' (*auslandischen Arbeitnehmer*) who, despite often long-term residence struggle to obtain even the most basic social rights. Germany has passed legislation forbidding recruitment from non-EC countries, and has introduced a repatriation scheme and strengthened

[29] Although some hold dual nationality and have rights in another state, many do not. Many of these resided in new states which refused to allow joint nationality to their newly created citizens, and many Asians permanently resident in Black African countries retained their British nationality rather than accept the new local alternative. This category has suffered most from the new legislation: during times of crisis in their country of residence, they found themselves effectively stateless.

[30] DM Smith and M Blanc above n29, 80.

[31] This is also said to to be evidenced in its poor treatment of asylum seekers, *Guardian Unlimited*, Special Report Refugees <www.guardian.co.uk/Refugees_in_Britain>.

[32] DM Smith and M Blanc above n29, 80.

[33] I Forbes 'Institutionalising Anti-Discrimination in Europe' in AG Hargreaves and J Leaman (eds), I Forbes 'Institutionalising Anti-Discrimination in Europe' in AG Hargreaves and J Leaman (eds)*Racism, Ethnicity and Politics in Contemporary Europe* (1995) 196.

[34] DM Smith and M Blanc above n29, 81.

[35] Similar to the 'Pieds-noirs' in France or Jewish people vis-à-vis Israel.

the government's deportation powers; it has also established a computerized register for monitoring purposes.[36]

Provided they can prove their German origin, 'German people' can obtain near automatic naturalisation under Article 116 of the Grundgesetz - though their admission is set to cease by 2010. These newly settled Germans obtain substantial assistance learning the German language, finding housing and obtaining employment, though some hierarchy exists between those *Ausseidler* who speak German fluently, known as *Uebersiedler*, (typically from the former DDR), and those who could not. The latter experienced discrimination because of experiencing difficulty demonstrating their linguistic, cultural and 'ethnic' affinity, and therefore, their position among the German people.

Furthermore, the reliance on 'blood right' restricts obtaining German nationality, and while naturalization to persons born abroad exists, it remains a fraught process. Since 1978, a child with just one German parent, even if raised abroad, can obtain German nationality. The new nationality law signals a discernible shift from the pure ethnicity model, though it remains decidedly assimilationist. The Staatsbürgerrecht of 1 January 2000 provides that children born of foreign parents in Germany, at least one of whom was legally resident in Germany for eight years, are automatically considered German citizen, even if they are nationals of their parents' country. Before age 23 these children have to give up their parents' nationality or lose their German nationality.[37]

Although EU law grants many economic and social rights afforded German nationals to EU nationals from other Member States, the political rights of all foreigners in Germany are limited and only the Maastricht Treaty has improved the political rights of EU nationals in Germany.

The French model of citizenship combines of ethnicity and territoriality. Before the 1993 Nationality Act[38], all persons born in France (to foreign parents) were automatically entitled to French citizenship upon reaching 18 years of age: since 1993, one must *apply* for citizenship, though the same criteria are operative. France, like many EU states has, since the 1950's, relied on migrant workers from the Maghreb, without increasing their political rights:

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[36] S Allen & M Macey above n24, 9

[37] The official website of Beauftragte der Bundesregierung für Asuländerfragen on the new law <www.einbuergerung.de>

[38] Loi no.93-1027 du 24 août 1993 relative a la maîtrise de l'immigration et aux conditions d'entrée et de séjour de étrangers en France. (see also loi du 30 decembre 1993). Known as loi Pasqua after the Minister of the Interior who proposed it. It was passed by the French National Assembly and established an 'immigration zéro' policy, supplanting the loi de 1973 which had prevailed before it. See also loi Debré of April 1997.

the French model, like the German, treats nationality and political rights as inseparable. It places EU nationals at the top of its foreigner hierarchy because it views them as more easily assimilable than TCN of mainly non-European origin, and more entitled to participate politically.

The 1993 law restricts access to France and French nationality, limits rights of asylum and increases police controls of ethnic minorities. It allows police check the identity papers of 'foreigners' to assess the legality of their status; ironically, the amendment allows police to do so on any ground *other than race*! The reality of this law is however a flagrantly racist one, manifest in the infamous 'Poiteaux affair' concerning the dismissal of a French policeman who refused to obey an order to harass ethnic minority businesses[39].

The impact of reliance on 'blood right' and descent in many EU Member States should be assessed in terms of its racialised impact. Most Member States laws take some cognisance of the need protect racial minorities from discrimination which, considered in light of the foregoing, creates an unusual legal contradiction. It displays a recognition of the context of resident immigrants belonging to racial and ethnic minorities, which stands in marked contrast to the draconian restrictions on the entry and status of migrant workers, particularly acute since the mid-1970's. Despite the improvement of the legal rights of foreigners in most Member States during the 1970's, few of these advances enjoyed constitutional footing, leaving a significant normative and qualitative difference between their rights and the rights of citizens .

The EU Member States are all social democracies, which creates a tension between the aspirations of a community restricting membership and tightening immigration to safeguard its entitlements and resources, on the one hand, and an aspiration of multi-culturalism, diversity and social justice embracing new members.[40] Similarly, there exist compelling, self-interested reasons why states seek to encourage immigration related to the economy and the welfare state, and there are equally self-serving reasons why they seek to limit it.

Member State rules and traditions on naturalisation and citizenship have resulted in the status of TCN being contradictory and unclear,[41] such that 'there is no coherent set of rights for third country nationals in European Community Law.'[42] This incoherence results also from the

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[39] DM Smith and M Blanc above n29, 83, citing the English reporting of this *The Guardian* 14 November 1994.

[40] U Levelt 'The European Union as a Political Community Through the Lens of Immigration Policy' in M Martiniello (ed) *Migration, Citizenship and Ethno-national identities in the European Union* (1995) 207.

[41] S O'Leary 'Nationality Law and Community Citizenship: A Tale of Two Uneasy Bedfellows' (1992)*YEL* 353.

[42] S Peers 'Towards Equality: Actual and Potential Rights of Third Country Nationals in the European Union' (1996) 33 *CMLRev* 7.

replication of national - non-national distinctions made in Member State laws being mirrored at a European level through the concept of Euro-citizenship, and the fact that it remains contingent on Member State citizenship. The result is at best a contradictory one: EU citizenship embodies a unitary aspiration, and yet remains contingent on multiple rules and interpretations of citizenship. There are, nevertheless, some general features shared by Member State laws. One such feature is an increasingly restrictive approach to immigration and naturalization, in terms of their access to, and status in, the domestic legal order, rendering the EU open in theory and closed in practice. That situation has been compounded by Member States affording foreign workers legal status short of citizenship, reinforcing their weakened legal position. Where those rules exclude *de facto* on the basis of race or ethnicity, so too does Euro-citizenship, given its wholly contingent nature.

3. EU CITIZENSHIP AND THE REPLICATION OF MEMBER STATE LAW DISCRIMINATION

The initial *de jure* discrimination is rooted in the laws of the Member States: this discussion considers the *de facto* nature of that discrimination as it is replicated by Community law.

The generic category of TCN comprises those who fall on the 'outer side' of the foundational concept of EU citizenship. That citizenship is founded upon the distinction between EU nationals and non-EU nationals, which relies on the possession or non-possession of Member State nationality. EU law is not the source of that distinction, but its buttress 'complementing and not replacing'[43] Member State distinctions.

EU citizenship represents a cluster of benefits entirely contingent on Member State nationality. Among those benefits are social protection rights which have become central to intra-Community free movement: the distinction between those who have social protection and those who do not is thus a stark one, reinforced by EU law[44]. 'For immigrant minorities, access to national citizenship is the key to the attainment of rights at Union level'[45].

Given the origin of the majority of those EU citizenship excludes, and considering the preferential treatment afforded certain categories of TCN carved out of citizenship, Euro-

[43] Article 17 (ex 8) EC.

[44] W Duncan 'Racism and Xenophobia in Europe' in G Barrett *Justice and Cooperation in the EU* (1997)183.

[45] A Geddes above n15, 203.

citizenship effects a disparate impact on racial and ethnic minorities. Articles 17-22 EC[46] and the popular conception of Euro-citizenship 'displace discrimination, but do not do away with it.'[47] Euro-citizenship fosters a *new type of discrimination*,[48] with Treaty provisions symbolizing the 'constitutionalisation of discrimination'[49]. This constitutionalization creates two categories of foreigners within Member States: both having rights of residence, but in all other respects, unequal rights.[50]

While it is clear that Euro-citizenship does not exist as a free-standing concept, and while it remains something intended to 'complement not replace national citizenship',[51] it reinforces difference and fails to alleviate injustice facing permanent resident TCN.[52] Its importance as a mode of distinction, and therefore exclusion, should therefore not be underestimated, as it may, in time, replace the emotional, legal and cultural significance of national citizenship.[53] Habermas contends, in defence of 'post-national' citizenship, that disaggregating nationality from citizenship may help to counter the discrimination suffered by minorities as a result of Western European conceptions of the citizen.[54] In the context of Euro-citizenship, and all the discrimination it entails, this is apt.[55]

Beyond bolstering difference and entrenching disadvantage, the Union offers *lower* protection to TCN than they enjoy under certain ECHR and ECJ jurisprudence embodying

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[46] Article 8.1 reads, 'Citizenship of the Union is hereby established. Every person holding the nationality of a Member State shall be a citizen of the Union. Citizenship of the Union shall complement and not replace national citizenship'.

[47] A Rea 'Social Citizenship and Ethnic Minorities in the European Union' in M Martiniello (ed) *Migration, Citizenship and Ethno-national identities in the European Union* (1995) 179.

[48] E Balibar *Les Frontiers de la democratie* (1992).

[49] C Lyons 'The Politics of Alterity and Exclusion in the European Union' in P Fitzpatrick and J Bergeron (eds) *Europe's Other: European Law Between Modernity and Postmodernity* (1998) 160.

[50] However, four categories of resident can be identified in the TEU: citizens of the Member State, denizens from other EU states, denizens from outside the EU, and foreigners with no rights of residence. A Rea 'Social Citizenship and Ethnic Minorities in the European Union' in M Martiniello (ed) *Migration, Citizenship and Ethno-national identities in the European Union* (1995) 180.

[51] Article 8 EC.

[52] A Follesdal 'Third Country Nationals as Euro Citizens: The Case Defended' (1998) *ARENA Working Papers* No 9/98, 2-3.

[53] JHH Weiler, U Haltern and F Mayer 'European Democracy and Its Critique: Five Uneasy Pieces' (1995) *EUI Working Papers RSC* No 95/11.

[54] EU citizenship could then offer benefits based on residence, free of the current prerequisite of Member State citizenship. As such, it might foster a more inclusive, holistic conception of membership and community, and exist in contradistinction to the exclusive forms of membership that persist in Member State nationality. For an excellent analysis of the relationship between nationality and citizenship in the EC context, C Closa 'Citizenship of the Union and the Nationality of the Member States (1995) 32 *CMLRev* 487.

[55] J Habermas 'Citizenship and National Identity: Some Reflections on the Future of Europe' 12(1) *Praxis International* (1992).,

international human rights norms,[56] or in many Member States under whose laws they enjoy basic human rights protection[57] and often local voting rights. Under current EU law, they are denied *all rights of EU citizens*. Denying TCN substantial citizenship rights[58] in Community law denies them the opportunity to influence institutions that affect them, which is anathema to the principle of equal respect.[59] The disadvantages of being denied Euro-citizenship extend far beyond political equality, and touch the whole plethora of substantive rights and benefits[60] which are, in most cases, denied TCN.[61] While TCN are affected in many ways by EU law, their human rights[62] are not directly and substantively protected by it.[63]

The significance of the TCN / EU national distinction, and the concept of citizenship which has crystallized around it, is its normative and symbolic import. When considered in the light of agreements which afford substantive rights associated with EU citizenship to non-EU citizens, Euro-citizenship 'creat[es] two sorts of person within the territory of the [E]EC: EC citizens on the one hand and persons who can be regarded as second-class residents on the other.'[64]

Euro-citizenship is a powerful mode of cultural distinction which fosters a conception of

[56] V Guiraudon 'International Human Rights Norms and their Incorporation: The Protection of Aliens in Europe' (1998)*EUI Working Papers* EUF 98/4. However, Guiraudon also notes, in conclusion, that the ECHR has been reluctant to use its judicial capital in such a politically explosive dossier and have rather ruled on specific areas such as family life and the protection against cruel and inhuman treatment or punishment.; furthermore, the incorporation of European norms varies across cases and time depending on the national legal culture, and attitudes of judges towards international law and the activism of public interest law organisations.

[57] For a discussion of the 'inclusive impact' of international human rights law on the welfare status of non-EU citizens in Europe, D Jacobson *Rights Across Borders: Immigration and the Decline of Citizenship* (1996).

[58] This is so despite the existence of certain privileges afforded TCN, eg the right to petition the Ombudsman for maladministration, though only in respect of Community (as opposed to Union) institutions.

[59] A Follesdal above n52, 2-3.

[60] M Baldwin-Edwards 'Third Country Nationals and Welfare Systems in the European Union' (1997) *Jean Monnet Working Papers in Comparative and International Politics* 12/97.

[61] Examples of such agreements include EU /Turkey Association Agreement and related Decisions or the EU/Maghreb Co-Operation Agreements, both of which give substantial rights to legally resident national in the EU, which usually approximate to nationals' and EU nationals rights. However, the majority of such agreements are made with developed, rather than developing, countries, a fact which is attributed to the lack of political pressure from immigrant communities in developed countries along with a low priority accorded by the governments of developing countries: M Baldwin-Edwards, above n60, 11.

[62] This observation holds true despite the welcome emergence of the Charter of EU Fundamental Rights, which although it appears to be freed of the EU national / TCN distinction, the rights its proclaims remain non-enforceable.

[63] The paradoxal legal situation of TCN has prompted Andrew Clapham to observe that 'the Community has rights without responsibilities, rights to demand that the Member States create a frontier-free Europe but no responsibility to ensure that this is done in accordance with the protection of human rights; this task is left to national and international machinery'. A Clapham *Human Rights and the European Community: A critical overview* (1991) 17.

[64] T Hoogenboom, 'Integration into Society and the Free Movement of Non-EC Nationals' (1992) 3 *EJIL* 36, 38; citing Advisory Council for Ethnic Minorities, *Memorandum A Social Europe for One and All* (1989) 17 and 21.

'Other' along European versus non-European lines. This correlates with conceptions of racial or ethnic difference, thereby tacitly reinforcing a 'white' or 'western'[65] conception of what it is to be European. 'Confining rights to "citizens of the Union" will increasingly underpin hostility towards and rejection of minorities, whether or not they have obtained citizenship of a Member state. One cannot hope to build an ever closer union among the "peoples of Europe" while excluding over 10 million of them',[66] thereby creating what is, in effect, 'the [thirteenth] state of the EC.'[67]

The goals of Euro-citizenship support its need to exclude since these goals include the need to foster a sense of 'European identity' and a shared sense of the normative legitimacy of the European legal order.[68]

4. THE RIGHTS OF EU CITIZENS

The principal sources of the rights and distinctions of EU citizenship, are Article 17 *et seq.* EC[69] establishing citizenship and corollary rights, Article 12 EC[70] prohibiting discrimination on grounds of nationality, and Articles 39 *et seq.* EC[71] on free movement. These rights and the plethora of attendant rights and privileges[72] are *guaranteed to EU nationals.*

Secondary legislation reinforces both the rights of EU nationals, and the discriminations against legally resident TCN. The EU has developed an entire system of rights related to free movement and the completion of the internal market through the free movement of workers:[73] the relevant measures are EEC Regulation 1612/68[74] of 15 October 1968 on free movement for workers within the Community, Regulation 1251/70[75] of 29 June 1970 on the right of workers to remain in the territory after having been employed in that state, Regulation 1408/71[76] of 14

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[65] The 'Western' conception of European refers to the new forms of exclusion emerging against immigrants from Eastern Europe, who, while not distinguished on the basis of colour, are clearly viewed as 'Other': this might properly be referred to as 'the new racism'.
[66] S Peers above n42, 50.
[67] P Gordon *'Fortress Europe'? The Meaning of 1992* (1989) 20.
[68] P Gordon, above n67.
[69] ex Article 8 EC.
[70] ex Article 7 EC.
[71] ex Articles 48-51 EC.
[72] Eg, rights to social security, education, health care, voting in local and European elections etc.
[73] O'Leary accurately notes, 'The Court's definition of worker does not higher, [...] on being a national of a Member State, but on objective aspects of the employment in question'. See case 66/85 *Lawrie-Blum* [1986] ECR 2121; case 53/81 *Levin* [1982] ECR 1035; case 139/85 *Kempf* [1986] ECR 1741.
[74] Journal Officiel [1968] L 257/2; OJ Special Edition 1968 (II) p 474.
[75] [1970] OJ No L 142; OJ Special Edition 1970 (II) p 402.
[76] [1971] J.O. L149/1 .

June 1971 on the application of social security schemes to employed persons and their families moving within the Community, and EEC Directive 68/360[77] on the abolition of restrictions on movement and residence within the Community of workers of Member States and their Families.[78] They include the right to move to another Member State and seek employment free from discrimination,[79] and to receive the same treatment as workers of the host Member State as regards employment, remuneration and other conditions of employment.[80] Once an EU national has found employment, her spouse, children and dependent parents have the right to join her regardless of their nationality.[81]

All of these rights and social advantages have been extended to the family members and dependents of the migrant worker. This extension is based on the belief that preventing migrants from being accompanied by their families would constitute a major obstacle to their free movement.[82] The EU national's dependents are entitled to participate in the host Member State's institutions (eg schools). EU migrant workers have the right to vote in local and European Parliament elections, the right to social welfare, pensions and medical assistance, and vocational training and retraining. The EU national *migrant*[83] worker is entitled to all of the above in a non-discriminatory way, and must be afforded the same treatment as that afforded nationals of the host state.[84]

This stark legal situation may change with the advent of Article 62 EC which provides for action to be taken to abolish internal border checks on all persons, be they EU nationals or TCN. While this is a welcome and progressive development, unaccompanied by a provision against race discrimination within Article 62 EC, it may not have the effect of preventing the discrimination described above. Even Article 63(4)EC on the definition of rights and conditions

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[77] [1968] J.O. L 257/13.

[78] Other relevant directives include Directive 73/148, [1973] OJ L 172/14 and Directive 75/34 [1975] OJ L14/10 on the self employed; Directive 93/96, [1993] OJ L 317/59; Directive 90/365 [1990] OJ L 180/28 and Directive 90/364 [1990] OJ L 180/26 on students, pensioners and those of independent means.

[79] Regulation 1612/68, above n 74, Title I, Article 1.

[80] This basic principle is supported by the right to remain in another EC state for up to three months in search of employment, and where employment is found, the host Member State must provide all necessary work and residency permits.

[81] Council Directive 68/360 above n77, Article 2.

[82] J Bhabha & S Shutter above n88, 207. These rights can be exercised only where an EU national has *moved* from one Member State to another while exercising a Community right, but she may also benefit from those EC rights upon return to her own Member State *after* having exercised Treaty rights.

[83] *R v Immigration Appeal Tribunal ex parte Surinder Singh* [1992] ECR I-4265.

[84] These rights are all, subject to limitations justified on grounds of public policy, public security or public health as provided for in Article 39.3 (ex 48) and Council Directive 63/221 EEC on the co-ordination of special measures concerning the movement and residence of foreign nationals ([1964] JO No 56 (OJ Special Edition 1963/1964 p117)).

under which TCN legally resident in a Member State may reside in other Member States, makes no provision for those rights to be expansive, and gives no indication as to what that 'definition' may entail.

The new Charter of Fundamental Rights of the EU likewise enhances the rights of EU nationals under EU law, but it explicitly provides for the TCN - EU national distinction at issue here, thereby reinforcing in new and unprecedented terms this *de jure* discrimination. The Charter provides for rights to which all people are entitled and, in addition to these, makes provision for rights reserved for EU citizens which include a range of political rights and due process rights as well as rights connected with free movement and establishment. In this it thwarts the norm that 'as a matter of principle basic human rights apply to everyone, citizens and non-citizens alike.'[85]

5. TCN RIGHTS

The EU has, even since Amsterdam, only very limited competence in respect of TCN.[86] An important distinction exists between competence over already legally resident TCN, and competence with respect to deciding who is entitled to that 'legally resident' status. Broadly speaking, the EU's competence is restricted to aspects of the former, and the Member States retain competence over the latter.

How the rights of TCN are increasingly EU law issues. First, because of inter-governmentally established rules or agreements which have always had *de facto* Community law relevance; and second, because those rules are now *partially* communitarised in the Amsterdam Treaty.[87]

TCN rights are founded on *de jure* discrimination which is amplified by *de facto* race discrimination. The rules governing TCN have emerged gradually in a variety of fora: some inter-governmental, some Member State, and since Treaty of Amsterdam, some under the aegis

[85] Charte 4422/00 [2000] OJ C364/01; T van Boven 'Discrimination and Human Rights Law: Combating Racism' in S Fredman (ed) *Discrimination and Human Rights: The Case of Racism* (2001) 111, 121 referring to *Declaration on the Human Rights of Individuals Who are not Nationals of the Country in which they Live* GA Res 40/144 13 December 1985.

[86] This is so despite numerous efforts on the part of the Commission to harmonize measures in respect of TCN. In 1985 the Commission attempted to ensure that governments communicate with and consult the Commission on any proposals for changes in their migration policies for TCN. The Member States challenged this move before the ECJ and the Court annulled the Commission's proposals on the basis that Commission lacked competence.

[87] Title IV of Amsterdam brings visas, asylum, immigration, and other policies related to external free movement under EU law. Article 62 EC (ex 73j) and Article 63 (Article 73k) which provide specifically for measures related to TCN. Article 62 covers internal and external borders, and Article 63 covers asylum, refugees, immigration and TCN rights of residency from one Member State to another.

of the EU. These rules are 'being harmonized across the EC in an increasingly restrictive, oppressive direction,'[88] and in substantive terms, 'legally resident TCN within the Community are relegated to an inferior legal status'[89] leaving their contexts 'both formally weak and materially unequal.'[90]

TCN rights have developed under the highly secretive, non-reviewable aegis of Schengen, TREVI and the Ad Hoc Group on Immigration.[91] The TREVI group, established in 1976, was the first forum to include all EC Interior Ministers; its focus remained on borders security and crime prevention. In 1986, the Ad Hoc Group was established, concerning itself with immigration and asylum, leaving the crime dimension to TREVI. Despite the apparent bifurcation, both bodies are comprised of the same ministers and their perspectives are aligned: 'secret and an overriding concern to restrict access to Community territory has continued to dominate the discussions on immigration and asylum.[92]

The Maastricht Treaty[93] began the process of communitarisation of a number of immigration related areas such as a common visa format, or the listing of non-EC countries whose nationals required visas. The issue of TCN immigration, however, was left to intergovernmental cooperation and therefore left beyond the remit of judicial review of the ECJ, or parliamentary scrutiny of any sort. The Ad Hoc Group drafted the External Borders Convention whose clauses are almost indistinguishable from the Schengen Convention of 1990, though unlike Schengen, once it is ratified, it will apply to *all* Member States. It provides for extremely strict controls on the entry of TCN, and for draconian sanctions for unlawful crossing of borders: all of which contribute to the legal fortification of 'Fortress Europe'. Moreover, the TCN excluded are selectively chosen: visas will be required from all TCN emanating from third

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[88] J Bhabha & S Shutter, above n88, 212. The authors note increasing internal controls, restrictive rules for family reunion, limited travel rights.

[89] J Bhabha & S Shutter n88, 212.

[90] T Hoogenboom above n64, 38.

[91] The Schengen Accords, agreed in 1985. A modified version of the original supplementary agreement, the Schengen Implementing Convention, was signed on 19 June 1990). Schengen's primary aims are the ending of checks at internal borders and the strengthening of immigration checks and controls at external borders; in its supplementary agreement, the Schengen group set out 4 main areas of policy to be developed: reinforcing external borders, a common visa policy, a common policy on refugees and asylum seekers and a data-base system for collection and exchange of information on immigration related issues.

[92] In 1988, the EC Council established a Group of Coordinators on immigration and asylum matters, known as the Rhodes Group. It reported on two types of measures: those indispensable to the suppression of internal borders, and those not indispensable, but desirable: the report they adopted in June 1989 was named the Palma Document.

[93] This communitarisation was foreshadowed by the 1986 SEA and the Political Declaration appended to it, although the commitment it contains was for co-operation *outside the formal EC Treaty.* That prevails, in large part in the TEU. SEA [1997] OJ L 169; Treaty Series 31/1988 Cmnd 372.

world countries, while those exempt include the USA, Australia and Japan.[94] The blatantly racialised *de facto* discrimination in this cannot be overlooked.[95]

One may question whether the newly transposed rules on TCN in Amsterdam regime[96] will have a positive impact on racial and ethnic minorities. 'Despite the advantages afforded by this partial transposition of the various elements of the regime applicable to aliens in the EU, the fragmentation brought about by this possible reworking of the Treaty leads to [...] a 'structural' separation of the provisions concerning the free movement of persons from those relating to the system governing the status of non-Community nationals concerned.'[97] Notwithstanding the potential for coherence heralded by Amsterdam the seminal *de jure* distinction persists.

(1) Free Movement

'Free movement of persons has developed around the notion that it is an 'insider' privilege and its new link with citizenship [...] renders this freedom a corner-stone of the exclusion order.'[98] Free movement is a constitutionalised mechanism[99] which distinguishes insiders from outsiders in the EU polity.[100] 'As far as free movement within the EC is concerned the difference between the rights of EC nationals an their families on the one hand and non-EC nationals on the other, covers all areas of immigration law, from entry formalities, to family reunion rights. These differences apply whether the non-EC nationals live outside or within the EC.'[101]

Free movement in EU law is premised on the exclusion of TCN, from which exceptions have been selectively carved.[102] TCN 'admittance to the club of free movers is essentially limited or exceptional, contingent upon visas, or Association Agreement rights or derivative and

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[94] Note the newly announced HSMP (Highly Skilled Migrant Programme) which will come into effect in the UK from 28 January 2002 allows highly waged workers move freely within the UK. Immigration and Nationality Directorate <www.ind.homeoffice.gov.uk/news.asp?NewsID=93>.

[95] Another Convention to result from the work of the Ad Hoc Group is the Dublin Convention determining the state responsible for examining applications for asylum lodged in one of the Member States of the EC [1997] OJ C254.

[96] Articles 61-69 EC (Title IV).

[97] B Vila Costa 'The Quest for a Consistent Set of Rules Governing the Status of non-Community Nationals' in P Alston (ed) *The EU and Human Rights* (1999) 432.

[98] C Lyons above n49, 160.

[99] This is *de jure*, however, but it excludes certain EU nationals in a manner that is *de facto*: that is, minorities whose exercise of free movement rights is compromised in context; see section 9 below.

[100] 'A liberal society cannot, with a clear conscience, inhibit free movement.' E Gellner Introduction in B Baumgartl & A Favell (eds) *New Xenophobia in Europe* (1995).

[101] Bhabha & Shutter above n88, 224.

[102] Bhabha & Shutter above n88, 224.

dependent on an EC national's primary right.[103]'

Even today, the basic discrimination presumptively borne by all TCN in respect of free movement has 'fostered a type of Euro-nimbyism which has created a living standards boundary between the privileged free movers and the non-movers in restricting the latter's ability to engage in even the most basic benefits of integration."[104] Moreover, 'this exclusion of resident third country nationals from the benefits of European free movement has no basis in logic or justice.'[105]

As the law stands, TCN *who are legally resident* suffer discrimination in terms of their rights of free movement,[106] since they have no (independent) right to move and permanently take up a position in another Member State.[107] Despite its positive potential, it is questionable whether Article 62 EC will remedy this basic discrimination, even if it facilitates the exercise of whatever rights TCN possess. Moreover, Article 62 EC relates only to border checks and does not provide for safeguarding other aspects of free movement, which, according to the logic of Regulation 1612/68[108] , may be as potent as the freedom to move itself in determining mobility.

Notwithstanding that Article 39 (1) EC[109] refers to free movement of *workers*, without specifying EU citizens, the Court has confirmed that the Article 39(3) covers EU citizens only,[110] and that a worker's right to continued residence in a Member State is reserved to EU citizens.[111] The lack of mobility of TCN within the EU is directly linked to their integration in the host society: 'integration is primarily a means of removing gross inequalities between various

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[103] C Lyons above n49, 160; Lyons goes on to question how, even from a purely economy-based view of integration, such exclusion could be justified as it effectively amounts to the exclusion of 18 million EC residents from full participation in the market and related generation of the EC economy. The single market is created for free movement and yet it does not allow for the free movement of all who find themselves within the territory of the market.

[104] C Lyons above n48, 161; M Smith 'The European Union and a changing Europe: Establishing the Boundaries of Order' 34 (1) *Journal of Common Market Studies* (1996) 17.

[105] Bhabha & Shutter above n88, 224.

[106] Runneymede Trust, *A Summary of Alternative Approaches to the Problem of Protection Against Racism and Xenophobia in Member States of the European Communities* (1987), 21. The Report discusses the direct or indirect discrimination affecting people notwithstanding their being legally resident in the territory.

[107]The Commission's proposal for amendments to Council Regulation 1612/68 (COM (1998) 394 final) stated that 'As Community law now stands, family members do not have direct rights, but rather indirect ones depending on their status as family members; Case C-316/85 *Centre Publique d'Aide Sociale de Coucelles v Lebon* [1987] ECR 2811. It is therefore necessary to grant family members *their own rights* while maintaining the link between these rights and their status as family members.' 12

[108] Above n74

[109] Ex Article 48 EC

[110] Case C-355/93, *Hayriye Eroglu v Land Baden-Wüttemberg* [1994] ECR 1-5113.

[111] Apart from EEA citizens, and certain Turkish citizens: for a detailed discussion of Turkish workers' rights, S Peers, above n42, 19-27. The PCA's and the Tunisian EMA emphasise that nothing in either treaty gives a right to continued residence in a Member State.

population groups. Not allowing the free movement of persons is a structural factor confirming inequality.'[112] One may question whether this is even compatible 'with the fundamental principles of the Community on the one hand and with the idea of justice, which can be distilled from the Community's principles, on the other.'[113]

The disparities of free movement is reinforced in stark terms in Article 45 of Charter of Fundamental Rights of the EU[114] which enshrines the right of free movement and of residence as a right every citizen of the Union possesses[115]. It allows permissively for these rights to be granted to to TCN.

(2) Employment

Another dimension of TCN discrimination relates to *employment*. While most EU agreements grant workers the right of non-discrimination in employment compared with Member States own nationals,[116] these rights are strictly circumscribed, and only the Agreement on EEA[117] and Decision 3/80[118] protect against discrimination in *access* to TCN employment. The reality of TCN employment status is a discriminatory one: the value of TCN labour is admitted within the EU without the legal status or rights of the TCN worker being protected.

The Council has favoured upholding the equal treatment of the working conditions of legal immigrants, regardless of their place of origin. Similarly, the Commission's Communication on *Immigration and Asylum Policies* asserted that the logic of the internal market implied the elimination of nationality as a condition for the exercise of certain rights, particularly employment ones. The 1994 Commission *White Paper on European Social Policy* recognised that 'an internal market without frontiers in which the free movement is ensured logically implies the free movement of all legally resident third country nationals *for the purpose of engaging in economic activities*. The *White Paper on Social Policy* aired a similar concern about the status of non-European migrant workers and stated its intention to act in their

[112] T Hoogenboom, above n64, 38.
[113] T Hoogenboom, above n64, 38.
[114] Charte 4422/00 OJ [2000] C364/01
[115] Further, it does so under the rubric of citizens rights, reserved additionally and exclusively to EU citizens.
[116] Similar to that of Article 39 or Reg. 1612/68, above n74.
[117] Agreement on European Economic Area (1992) signed in Oporto 2 May 1992 [1994] OJ L 1; Cmnd 2073; in general terms extends the Single Market to three of the four EFTA states, Norway, Iceland Liechtenstein. Switzerland voted against member ship of the EEA but maintains its relationships with the EU through extensive bilateral agreements. See also Case 1/91 (re Draft Agreement on a European Economic Area) [1991] ECR I-6079. Its Protocol 15 covers transitional periods on the free movement of persons, and its Protocol 16 covers measures in the field of social security related to transitional periods on the free movement of persons.
[118] Case C-277/94 Decision 3/80 of the EEC-Turkey Association Council [1996]ECR 1-4085.

regard.[119]

(3) Establishment

With respect to the *right of establishment* under Article 43,[120] the cases of *Vander Elst* [121] and *Rush Portuguesa* [122] confirm that *employers* of TCN have rights under Articles 49 and 50 EC[123] to move their TCN employees in order to provide services.[124] Peers notes the potential for finding a right *of establishment for TCN* by analogy;[125] it may be argued that the right of establishment itself brings with it a right to hire TCN legally resident in another Member State or minimum, the right to transfer those already employed by a company.[126] Any restriction on such hiring or transferring could be considered a non-discriminatory rule hindering companies' right of establishment. However, Peers also notes that the Court would likely resist reaching such a conclusion 'except possibly for "key personnel" [...] because of the longer period of residence in the other Member State this would entail.'[127]

(4) Provision of Services

Finally, the *right to provide services* under Article 49 EC[128] applies only to EU citizens, thereby preventing the independent conferring of rights to TCN's, whether legally resident or

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[119] *White Paper on European Social Policy - a Way forward for the Union* (COM (1994) 333. A historical point of interest was the Commission's answer to a written question by members of the European Parliament, regarding clarification of the position of foreigners in relation to European citizenship. Jacques Delors answered that a constant factor of the Community approach was equality of treatment in living and working conditions for all migrants, whatever their origin. He added that this was in the spirit of non-discrimination, with a view to combating social exclusion. Written question No. 2071/90 by J Cabezón and J Alvarez de Pax of 5/9/1990 and answer 2/7/1993 [1993] OJ C 280/1. Finally, of more recent note is the Commission's proposal for a Council Regulation amending regulation 1408/71 extending social security to TCN, COM (1997) 561 final.

[120] Ex Article 52 EC.

[121] Case C-43/93 *Vander Elst v Office des Migrations Internationales* [1994] 1 CMLR 513

[122] Case C-113/89 [1990] ECR I-1417

[123] ex Articles 59 and 60 EC

[124]MCA's do not mention the right of establishment at all while the PCA's grant such rights only to companies of each party and not to individuals (Art.30 PCA). Europe Agreements provide most extensively for such rights affording companies or nationals of EA states the right of establishment under the same conditions as nationals of the Member States to 'take up and pursue economic activities as self-employed persons' or 'to set up and manage undertakings'. (Article 44(3) and 44(4)(a)(i).

[125] The Court itself has asserted that 'it is obvious that the right of establishment and the right to provide services must require a right of entry and residence for those exercising it'. Joined cases C-100/89 and C-101/89 *Kaefer and Procacci* [1990] ECR I-4547.

[126] S Peers, above n39.

[127] S Peers, above n39

[128] Article 49 EC, second paragraph provides: 'The Council may, acting by qualified majority on a proposal form the Commission extend the provisions of the Chapter to nationals of a third country who provide services and who are established within the Community'. The Council has not yet acted on this power.

not. The *Vander Elst* judgment affords EU companies relying on Articles 49 & 50 EC the right to transfer TCN employees to another Member State without obtaining a work permit for them.[129]

Some tentative conclusions are warranted in this regard: one is that even if such rights were identified, the rights of TCN would remain utterly contingent on other 'primary rights', here the rights of companies. Second, such rights realistically vest only in key personnel, often the most educated and qualified of all the employees, who are those with long-term residence in an EU Member State. Finally, the rights remain contingent on purely commercial interests which must be questioned from a humanistic perspective, given the derivation of workers from corporate interests. That commercial, market prioritisation is not without problems.

6. CATEGORIES OF TCN

Despite the potency of the TCN-EUN distinction it is important to recognise its exceptions, and the diversity of *legally resident*. TCN.[130] The first, 'most privileged category' of TCN is constituted of spouses, dependent children and relatives of EU nationals. They are afforded clearly demarcated EU law rights on almost the same basis as EU nationals.[131] They remain *contingent beneficiaries*, and in this respect have subordinate status. The foundation for their rights is free movement, and as a result, the ECJ takes a robust approach to any impediments to these rights. These TCN[132] enjoy a right to live with the EU migrant, and may remain in the state after his or her death. However, they risk expulsion upon divorce,[133] but not

[129] Relevant international agreements treat the issue of provision of services differently: Maghreb Cooperation Agreements do not mention them at all; while the first two Euro-Mediterranean Agreements envision future negotiations on series movement for *firms only*. Eg Article 31 Tunisia EMA; Article 29(1) Israel EMA. Europe Agreements allow supply of services including supply of procurement services, commensurate with the opening of the services market.

[130] The following discussion is therefore note concerned with those persons not yet admitted to the Union, or involved in processes of seeking asylum or those who are refugees.

[131] Directive 1612/68, above n74. Article 12 of which makes explicit provision for dependents of and EU nationals migrant worker, 'even if they are not nationals of any Member State'.

[132] Relatives are defined to include an EU migrant's spouse, dependent children (or children under 21), and dependent relatives in ascending or descending line of the migrant or his/her spouse.

[133] The Commission has proposed that TCN who divorce their EU nationals spouse have an independent right of residence after a period of 3 years [1998] COM (98) 394 final (article 10(4)). Similarly article 11 stipulates that the family members shall keep the right to work in the event of dissolution of the marriage.

upon separation.[134] Beyond this, it is only spouses and dependent children who may work in the same Member State as the migrant.[135] The ECJ has also extended the rule of non-discrimination to 'social advantages' to migrant workers' family members,[136] but it is not clear whether family members apart from children are entitled to national treatment for educational grants.[137] Family members enjoy a derived, not autonomous, right to social security under regulation social security.[138] A permanent companion who is a TCN may also avail of a right of entry where the Member State grants such rights to its own nationals.[139] The exercise of free movement remains a prerequisite for invoking EU law rights.[140]

A second category of TCN, straddling both EU immigration policy and core Community law, is constituted of non-EU nationals who, under various international agreements concluded by the EU with third countries[141], may reside and work with limited rights of free movement in the EU. The foundation for the rights of such TCN is the Community's external relations policy, rather than free movement. The most comprehensive of these agreements is the EEA which extends the EU *aquis* to Norway, Iceland and Liechtenstein: EEA citizens have full rights of Union except the movement and residence rights of Article 8A EC.

Beyond the EFTA[142] covering the entire European Economic Area (EEA), the most extensive agreements on migrant workers and social security are Decisions 1/80 and 3/80

[134] Article 3, Regulation 1251/70 above n75; Article 3, Directive 75/34 above n79. On divorce and separation, Case 267/83, *Diatta* [1985] ECR 567 which illustrates in rather stark terms just how instrumental that derivation of rights is, and how racist the reality of losing them can be; JHH Weiler, above n14. Case C 370/90 *Surinder Singh* [1992] ECR I-4265 saw the ECJ tentatively enter the realm of domestic immigration law by holding that Member States are not entitled to apply their more stringent immigration rules when their own nationals have exercised Treaty (market) rights. In such a case EC law is activated and citizens have the same rights as other migrant EU workers. Until recently the *Singh* judgment was closely circumscribed by the requirement of market participation: mere movement to another Member State without market activity would not trigger EC law and its equal treatment requirement (ie residence alone would note suffice). Case C-85/96 Judgment of 12 May 1998 Martinez-Sala *v Freistaat Bayern*, heralds the possibility that a Union national maybe able to invoke the principle.

[135] Article 11, Regulation 1612/68 above n74.

[136]Article 7(2) Reg. 1612/68, above n74. Case 32/75 *Christini (Fiorini)* [1975] ECR 1085; Case 94/84 *Deak* [1985] ECR 1873.

[137] See S Peers above n42, 14 footnote 23.

[138] The social security regulation is Regulation 1408/71, J.O. 1971, L149/1, as consolidated by Regulation 2001/83 [1983] O.J L230/6; Case 40/76 *Kermaschek* [1976] ECR 1669; Case 238/83 *Meade* [1984] ECR 2631.

[139] Case 59/85 *Reed* [1986] ECR 1283.

[140] See eg proposed European Frontiers Convention

[141] Under Articles 300 and 310 EC (ex 228 and 238). It is said that by 1995 the EU had implemented, signed or initialed no less than 24 international agreements of this sort, granting some rights to TCN within the EU. The ECJ has, as a general rule, treated such agreements as directly applicable.

[142] EFTA is the European Free Trade Association; in existence since 1 January 1994, it grants free movement for nationals of all EFTA counties except Switzerland and Liechtenstein. Thus, non- resident EFTA nationals enjoy presumptively broader rights than resident TCN.

concluding the EEC-Turkey Association Council.[143] Other agreements affording rights to TCN include the Maghreb Cooperation Agreements with North African States,[144] the Euro-Mediterranean Agreements with Tunisia , Morocco and Israel,[145] and the Europe Agreements with ten Eastern European States.[146] In addition to these, EU Partnership and Cooperation Agreements[147] exist with six former Soviet republics and the EU has concluded a Customs Union and Cooperation Agreement with San Marino[148] and the Lomé Conventions.[149]

A third category of TCN with privileged rights is that of persons legally resident, with no citizenship or EU rights at all. These are people temporarily admitted with short-term or guest worker status, and they avail only of the status of mere denizens, though some initiatives exist to extend certain basic civil and political rights to improve their plight.[150]

The final category of outsider is composed of persons not formally or legally admitted in any way to the Union. Although there are important distinctions within this category as it includes asylum-seekers, refugees, and those who have illegally entered, or are illegally residing within the EU. The perception of this group is relevant because of the ways in which its size is exaggerated, and its 'negative social and political significance' is sensationalised to the extreme detriment of racial and ethnic minorities.

7. THE RACIAL DIMENSION OF DISTINCTIONS BASED ON TCN/EU NATIONALS

EU law upholds distinct treatment of *different categories* of 'outsider' in *different* ways. Just as the nascent and partly-communitarised EU immigration policy[151] demonstrates racial exclusion at the EU's outer borders, EU law itself creates racially stratified categories internally. The legal categories which exclude *de jure* (categories of TCN) reinforce *de facto* discrimination against ethnic and racial minority resident in the EU).

[143] EEC-Turkey Association Agreement, 'Ankara Agreement'; OJ 1973, C113/2; *EEC-Turkey Association Agreement and Protocols and other Basic Texts* (1992).

[144] MCA with Algeria, Morocco and Tunisia (1978) OJ L263, 264 and 265

[145] Proposed EMA's with Tunisia (COM (95) 235; Israel SEC (1995) 1719.

[146] EA's with Poland, Hungary, Rumania, Bulgaria and the Slovak and Czech Republics (1993) OJ L347 and 348; (1994) OJ L357, 358, 359, 360; Proposed EA's with Estonia, Latvia and Lithuania COM (95) 207 and Slovenia COM (95)341.

[147] Proposed PCA's with Russia, Ukraine, Kazakhstan, the Kyrgyz Republic, Moldavia and Belarus COM (94) 257; COM (94) 226; COM (94) 411; COM (94) 412; COM (94) 477; COM (95) 44.

[148] Proposed San Marino Agreement (1991) OJ C 302/12.

[149] Lomé Conventions II, III, IV (1980) OJ L347/1; (1986) OJ L86/3; (1991) OJ L229/3.

[150] The issue of extending the rights of such persons is a fraught one given the potential it presents for the creation of citizenship rights incrementally 'through the back door' in a way that alarms people because of appearing to be the thin end of the wedge.

[151] On EU immigration and asylum policies generally E Guild & J Niessen *The Developing Immigration and Asylum Policies of the European Union* (1996).

These are distinctions made at Member State level and at EU level, between citizens and non-citizens, and between EU nationals and TCN respectively. These *de jure* discriminatory categories develop a *de facto* discriminatory dimension because of the race discrimination to which all 'outsiders' are subject, and the way in which 'outsider' has taken on a racial minority significance with the majority of TCN being minorities.

A seminal question is the extent to which the distinction of European versus non-European, as EU nationals versus TCN, has a racialised effect because minorities[152] are over-represented within the generic TCN category.[153] While this distinction is not an *overtly* racial construction, its substantive effects may be argued to be racially exclusive by examining the demographics of TCN as a category.[154] In 1994 approximately 70 per cent of the then 10 million TCN within the Community were members of racial minorities,[155] and that proportion of the now 18 million TCN residing in Europe is said to be even higher. The racialised nature of this distinction is also compounded by the fact that those TCN availing of EC free movement rights under EFTA and association or cooperation agreements with third countries are usually white, and often affluent.[156] However, it should also be noted in this connection that even certain white Caucasian categories of TCN have become the target of a new and virulent forms of racism, such as Slavic minorities from Eastern European countries.

The racism extant in the TCN-EU national distinction is compounded by the fact that those sub-categories of TCN with the strongest substantive and independently held rights (EEA nationals - covered by EFTA or key personnel in companies)[157] do not generally belong to racial or ethnic minorities. EFTA may therefore represent another facet of the EC fortifying itself against immigration from outside Europe: 'in contrast to most settled non-EC residents within the Community, [that the beneficiaries] are white and affluent explains the almost total lack of public awareness of the immigration implications of the agreement.'[158]

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[152] Racial, ethnic, and religious minorities.

[153] TK Hervey above n3, 333.

[154] This argument is endorsed by I Forbes and M Meade 'Measure for Measure: A Comparative Analysis of Measures to Combat Racial Discrimination in the Member States of the European Union' (1992)*Employment Department Research Series* No 1, 74.

[155] *EUROSTAT:* 'Population and social conditions' (1994) Monthly No 7/94. Mac Ewan claims that at least two-thirds of resident non-EU nationals in Europe are members of visible minorities, M Mac Ewan *Tackling Racism in Europe: an examination of anti-discrimination law in practice* (1995), 4.

[156]J Bhabha and S Shutter above n88 225-226.

[157] On EEA nationals rights eg, Agreement on the European Economic Area Protocol 15 on transitional periods o n the free movement of persons (Switzerland and Liechtenstein) (1994) OJ L 001; Agreement on the European Economic Area - Protocol 16 on measures in the file of social security related to transitional periods on the free movement of persons (Switzerland and Liechtenstein) (1994) OJ L 001.

[158] J Bhabha & S Shutter above n88, 225

The differential treatment of EU nationals and TCN, and even within the category of TCN between EEA citizens under EFTA and other third world citizens is flagrant: 'the EC's differential treatment of these two groups could not be more stark. Discrimination on the basis of nationality slides imperceptibly into racial discrimination. It is hardly surprising then that, in the official eye, white has often become synonymous with EC national, non-white with non-EC national.'[159]

The discrimination suffered by TCN is 'institutionalised discrimination on the basis of nationality across the Community' [...] [since] nationality and race are closely connected, and this is particularly true of the TCN population in Europe.'[160] This lends credence to the reality of a 'legally reified stratification of those who belong more (special status non-Europeans such as EEA citizens) or less (true TCNs, such as those citizens of Third World Countries) to the European Union club.'[161] The potential for fueling discrimination and prejudice is clear since, in the very concept of Union citizenship a distinction is created that negates the common humanity of two comparable groups, namely those legally established and residing in a host Member State and those who are not. The danger of such blatant differentiation feeding xenophobia towards TCN is patent,[162] and it is the wrong starting point for any action against racial manifestations.[163]

Article 17 *et seq.* EC has the effect of 'implied legitimation of race-based nationalism and exclusion.[164] It does little to encourage the inclusion and participation of 'the peoples of Europe', and it has reinforced the exclusion of permanently resident non-nationals.'[165] These provisions symbolise the EU's failure to recognise, still less, encourage the multi-racial, multi-cultural and multi-ethnic composition of the 'actual European demos'. In its current form, EU citizenship serves to perpetuate 'discrimination towards both specific and wider groups of non-nationals':[166] specifically, these are TCN; more broadly, they are racial, ethnic and cultural minorities. The exclusivity of EU citizenship is confirmed and expanded in the Charter of

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[159] J Bhabha & S Shutter above n88, 225

[160] J Bhabha & Shutter above n88, 225.

[161] TK Hervey above n3 336

[162] This point was also made by the Consultative Commission ' as long as immigrants from non-EU countries are denied Community residential status the process of their integration will be retarded and their segregation prolonged. Segregation generates prejudice and nurtures preconceptions.'

[163] D Curtin & M Geurts above n8 165

[164] J Weiler 'European Neo-constitutionalism: In Search of Foundations for the European Constitutional Order' (1996) 44 *Political Studies*

[165] C Lyons above n49, 164.

[166] C Lyons above n49, 166.

Fundamental Rights of the EU. It affirms the exclusion because it contains a distinction between rights afforded all people, and those additionally afforded to EU citizens. It expands the exclusion by bringing it beyond Treaty rights and into the realm of due process,[167] rights to refer matters to Ombudsman,[168] to petition the European Parliament,[169] and rules of natural justice such as the right to be heard and the right.[170] On a more symbolic level, it amplifies the discrimination because it is presented as a human rights instrument, and yet explicitly provides for the distinction with respect to very important rights.

The legalistic nature of a distinction established by Member State nationality, and replicated in EU law should not immunise the racialised nature of the 'difference' created,[171] nor should the relatively objective criterion of nationality,[172] or the discourse of 'citizenship as nationality', legitimate the racial ramifications these have in reality, or the fact that 'millions of migrant workers, refugees and other aliens and ethnic minorities live in Europe, but are treated effectively as, at best, second class citizens.'[173]

These facts, coupled with the social disadvantage and exclusion TCN suffer, reinforced by the absence of any non-discrimination policies, constitute indirect race discrimination. The existence of indirect racial discrimination as a result of acts or omissions in the EU legal context is what makes the over-representation of racial and ethnic minorities in the categories of excluded person under EU law a live issue for the EU, and one it has a specific responsibility to address. The legal treatment of TCN in EU law reflects negatively not only on their plight as outsiders within the territory of the EU, but more fundamentally, on the European Union itself.[174]

8. 'FORTRESS EUROPE'

The problematic connection between liberalising movement inside the EU and fortifying the EU from movement from outside has not be adequately recognised. The newly

[167] Articles 47-50
[168] Article 43.
[169] Article 44.
[170] Article 41.
[171] Indeed there is an argument that the proscription on nationality discrimination in fact reinforces *de facto* discrimination on the basis of race or ethnicity, or at least serves to obscure the latter from of discrimination by focusing attention solely on 'intra-European' discrimination.
[172] Recall the discussion on the relative objectivity and 'neutrality' of the referent of nationality.
[173] D Curtin and M Geurts above n8, 150.
[174] 'For the European Community there is a special responsibility - not only the legal responsibility under Community law [...] towards non-Community nationals but also towards itself, its own identity, self-perception and ethos'; Weiler, above n14, 66.

'communitarised' immigration (and asylum) policies of the EU[175] have not sufficiently accounted for the negative impact of immigration policy on TCN within the EU. Moreover, the European consensus embodied in emerging common policies favours restricting immigration and tightening outer border controls while liberalizing rules within[176], and without effectively reinforcing the Union's power[177] to include TCN among the 'peoples of Europe' leaving the issue of TCN treatment largely un-harmonised.[178]

A very real threat for racial and ethnic minorities is, therefore,'Fortress Europe' evolving in contradistinction to the development of free movement[179] 'open only to the free movement of capital and white people at the expense of those referred to in much EC literature by the negative term non-white.'[180]. Some charge that 'the problem for an open Europe' [...] is how to close it-against immigrants and refugees from the Third World.'[181]

It has been clear in the development of intergovernmental immigration policy that 'as the internal borders become lower, the external borders become higher, both in terms of the 'Zollverein Europe' of the internal market and in terms of 'European identity.'[182] It is, in some

[175] Since the Treaty of Amsterdam, immigration and issues which had formed the two non-Community pillars of the Treaty of Maastricht, have now become consolidated as part of Community law under the rubric of creating an area of 'freedom, security and justice'. See Title IV Articles 61-69 EC, though the process of a Community immigration and asylum policy has only begun. Another progressive feature of this new development is the fact that the ECJ has the power to review legislative acts adopted under Articles 61-69 EC. Moreover, that jurisdiction may well be exercised in a way that would subject these acts to the non-discrimination standard embodied in Article 13 EC though that has not been established and is not self-evident given the enabling, rather than free standing nature of that article. In addition to this there are all of the usual hurdles attached to individuals bringing cases for review under the Article 234 EC (ex 177 EC) procedure.

[176] An alternative conceptualisation of this linkage can be conceived of as such: developments at intergovernmental or domestic level relating to immigration or nationality and citizenship law cannot be considered independently of Community law provisions related to the internal market. That is, the development of the Single Market has occurred alongside policy moves which could result in the 'virtual closure of the EC to non-EC labour migrants and the creation of what has been labeled a 'fortress'. This image of a 'fortress' derives from the relaxation of internal border controls within the Community (in order to realize the principle of free movement) on the one hand, with the consequence being (for all member-states alike) the prevention of entry to non-EC national, in particular those from the so-called Third World, on the other hand.' N Piper, *Racism, Nationalism and Citizenship: Ethnic Minorities in Britain and Germany* (1998) 21.

[177] Article 62 is one exception.

[178] There have, however, been a number of inter-governmental initiatives to 'approximate' the rules relating to TCN; in 1993 and 1994 the Home Affairs Ministers adopted unpublished, non-binding rules on family reunifications *inter alia*, and in November 1995, the Ministers agreed a Resolution on the integration of TCN permanently resident in Member State, based loosely on existing Community laws on the rights of national migrant workers .

[179] 'The joining of two momentous effects: the progressive elimination of internal or national boundaries within the European Community and the increasingly draconic enunciation of an external boundary within which the Community is set against certain excluded 'others'. P Fitzpatrick 'New Europe, Old Story: Racism, Law and the European Community' in P Ireland & P Laleng (eds) *The Critical Lawyers' Handbook 2* (1997) 86.

[180] S Allen above n24, 8.

[181] A Sivanandan 'Editorial' (1991) 32 (3) *Race & Class* v.

[182] JO Pieterse 'Fictions of Europe', (1991) 32 (3) *Race & Class* 5.

ways, prerequisite to free movement : internal free movement has thus been achieved by creation of a 'Fortress Europe', justified by the 'problem' of migration flows. 'It is not surprising, given this rationale, that the details of the EC's emerging immigration and asylum policy have shown its potential to exacerbate (indirect) discrimination.'[183] Without provision against race discrimination, Article 62 EC[184] has the potential to create this effect.[185] Furthermore, Article 62(2) EC still provides for 'lists of TCN whose nationals must be in possession of visas when crossing the external borders', and it remains subject to Article 14 EC concerning the internal market, which may dilute the effect of the provision.

The racist dimension to the EU's nascent restrictive immigration policy must be considered because of the absence of a coherent and comprehensive TCN policy, and the ways in which this is connected to the development of EU law *for EU nationals* including Euro-citizenship.[186] The new immigration policy's absence of provision to counteract its potentially indirect racially discriminatory nature are among its most serious flaws. 'The cultural constitution of Europe is primarily effected in opposition to the racially conceived 'non-European' [...] 'this in turn accompanies that parallel development between integration within the Community and the increasing rigidification of what are called its external boundaries.'[187]

'As national barriers within Europe have come down, so the walls separating the EC from the rest of the world have become higher and sharper.'[188] The gradual convergence of

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[183] Emphasis added. TK Hervey, above n3, 334.

[184] The question of whether any future measures outlawing race discrimination under Article 13 EC might cover TCN will be dealt with in Chapters V and VI *infra*.

[185] Article 62 EC provides: 'The Council, acting in accordance with the procedure referred to in Article 67, shall, within a period of five years after the entry into force of the Treaty of Amsterdam, adopt: (1) measures with a view to ensuring, in compliance with Article 14, the absence of any controls on persons, be they citizens of the Union, or nationals of third countries, when crossing internal borders; (2) measures on the crossing g of the external borders of the Members States which shall establish (a) standards and procedures to be followed by the Member States in carrying out checks on persons at such borders; (b) rules on visas for intended stays of no more than three months, including: (i) when crossing the external borders and those whose nationals are exempt from the requirement; (ii) the procedures and conditions for issuing visas by Member States; (iii) a uniform format for visas; (iv) rules on a uniform visa; (3) measures setting out the conditions under which nationals of third countries have the freedom to ravel within the territory of the Member States during a period of no more than three months.'

[186] For a critique of the restrictive conceptions of European citizenship and immigration, J Habermas 'Citizenship and National Identity: Some Reflections on the Future of Europe' 12(1) *Praxis International* (1992).

[187] P Fitzpatrick above n179, 88.

[188] C Shore, 'Ethnicity, Xenophobia and the Boundaries of Europe' (1997) 4 *International Journal on Minority and Group Rights* 247, 249. He goes on to state that 'this new 'boundary' in the shape of a four-fold classification of citizenship status in Europe: 'white citizens, black citizens, legally resident non-citizens ("denizens") and illegals - including refugees', 250.

European Member States immigration trends is not fortuitous:[189] 'there is considerable evidence of a racist consensus on immigration politics in the European Community which has resulted in the virtual closing off of all non-EC migration since the mid 1970's.'[190] While there remains considerable debate on the subject of Euro-citizenship, and what constitutes 'European', 'there seems, in some quarters at least, to be a rapidly developing consensus about who is to be excluded from any access to any definition which might emerge.'[191]

'Fortress Europe' also negatively impacts the contexts of minorities who are already resident in the Community since the restrictive rules on immigration control are directly linked to the evolution of rights and benefits for EU citizens.[192] 'Freedom for (white) EC nationals will be won at the expense of Third World nationals who will face threats to their right of entry, free movement with the community, access to jobs, benefits and general security of life.'[193] The racism animating 'Fortress Europe' appears linked to the issue of TCN rights and, by definition, to the rights of racial and ethnic minorities. 'In these accounts of Fortress Europe, race is the ultimate criterion of exclusion, and the included, the true Europeans, are in turn constituted in racial terms.'[194] The issue of rights emanating from the completion of the Single European Market is clearly not confined to free movement, but includes a wider and growing set of substantive set of civil, political and social rights afforded EU citizens: whether these will be as accessible to minorities as to majorities is a moot question given the evidence of widespread, and growing racism in Western Europe.'[195]

TCN rights and treatment clearly remain inextricably interrelated with the development of EU immigration policy. Immigration is connected to the conditions of entry into a community, and therefore implicates issues related to social and political belonging, the constitution of a people and the definition of a society. Conditions of entry *to* a community are deeply connected with the conditions that prevail *in* those societies and communities. Many

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[189] *Contra.*, EU Commission *Proposal for a Council Decision establishing a Community action programme to promote the integration of refugees* COM (1998) 731 final (98/0356 (CNS)) of 16.12.1998, which states that 'it is based on the need to act at European level as a consequence of the growing public awareness that xenophobia, lack of integration, and social exclusion are fundamental challenges to democratic societies.' (p3).

[190] S Allen & M Macey, above n24, 8.

[191] S Allen & M Macey, above n24, 8 quoting P Boateng 'Forward to Joint Council for the Welfare of Immigrants' (JCWI) *Unequal Migrants: The European Community's unequal treatment of migrants and refugees*, ESRC Policy Paper 13 (1989).

[192] Chapter V below.

[193] P Boateng 'Forward to Joint Council for the Welfare of Immigrants' (JCWI) *Unequal Migrants: The European Community's unequal treatment of migrants and refugees* ESRC Policy Paper 13 (1989).

[194] P Fitzpatrick above n179, 86.

[195] S Allen & M Macey above n24, 11.

criticize the EU for being neither guided by liberalism nor social democracy, but rather a communitarian conception of the right of communities to restrict membership to 'one's own.'[196] The fact that TCN may receive some rights at Member State level and be denied rights at EU level, supports the idea that the EU fosters only a minimalistic model of membership, weaker than that prevailing under domestic law. 'Relative to intra-EU immigrants, or the kinds of rights they enjoy within their state of residence, the content of their [TCN] membership has been diminished.' [...]. 'The image of extra-EU immigrants thus created is that of outsiders, who can be excluded at will from the rights pertaining to insiders, ie EU-nationals.'[197]

Thus, link between and a generally restrictive tendency in immigration rules for access to the EU, and insufficient rights and unequal legal treatment of TCN *within* the Union must not be overlooked.[198] 'The very shaping of an external immigration policy - deciding who may come in and who will be left at the gate - *involves a discourse which can easily pollute internal attitudes towards aliens within the polity.*'[199]

9. PROPOSALS FOR REFORM: THE FORMAL APPROACHES OF EU INSTITUTIONS TO TCN

While the Member States traditionally retained competence over this policy area[200] the increased communitarisation[201] and 'still disputed'[202] transposition of this area in the Amsterdam Treaty [203] is indicative of a shift in the balance of competence. Proposals related to competence

[196] U Levelt 'The European Union as a Political Community Through the Lens of Immigration Policy' in M Martiniello (ed) *Migration, Citizenship and Ethno-national identities in the European Union* (1995) 199.
[197] U Levelt above n196, 210.
[198]Article 62 acknowledges this with respect to internal border checks.
[199] JHH Weiler above n14, 67.
[200] This was confirmed in the Single European Act's Declaration on the maintenance of competence over immigration from outside the EU and the treatment of TCN; and the TEU Declaration on Nationality of a Member State of the Final Act in the Maastricht Treaty which provides that 'the question of whether an individual possesses the nationality of a Member State is left solely to the national law of the Member State concerned'; Treaty on European Union (1993) Article K. 1(3). R Plender 'Competence, European Community Law and nationals of non-Member States' (1990) 30 *ICLQ* 599; D O'Keefe 'The emergence of a European immigration policy' (1995) 20 *ELRev* 20; Commission of the EC COM (94) 23; COM(79) 113; COM (85) 48; SEC (89) 924; SEC (90) 1813, 28; SEC (91) 1855.
[201] Title IV, Articles 61-69 EC.
[202] B Vila Costa above n97, 437
[203] One 'exception' to this position was the Protocol concerning Social Policy which, since Amsterdam, has been adopted into various parts of the Treaty along with the Agreement on Social Policy which covers conditions of employment for TCN legally residing in the EU, and confirms Community competence over them; 117-120 EC. In respect of immigration policy and its objects, there is a significant overlap in this policy area between the tasks and objectives of intergovernmental groups and the EU institutions with regard to immigrants' social and civic rights, and the promotion of social policy and educational plans. The EU's competence in matters related to social policy has significant implications for immigrants where its measures cover all workers, thus including TCN.

are frequently linked to proposals for the improvement of TCN rights.

Numerous proposals exist calling for action to 'put the Union's resident third country nationals on an equal footing as regards economic rights with the citizens of the Union and would go a long way to making the Union a more just and equitable place to live.'[204]

Curtin and Geurts propose an 'amendment of Article 100C EC by adding a new paragraph explicitly providing competence for the Council to determine the conditions under which free movement within the Union shall be exercised by legally resident third country nationals.'[205] A third proposal, of the Meijers Committee, was to amend Article 8A (now 17) EC to embrace within citizenship of the Union legally resident TCN without requiring them to possess nationality of an individual Member State.[206]

The European Parliament has long favoured an increase in the rights of non-EU nationals within the Union.[207] It has called for the Commission and the Council to draw up a common policy based on reciprocity for non-EU workers and their families permanently residence in the EU,[208] emphasising that the absence of a common immigration policy to TCN might lead to pressure on the European labour market.[209] In later resolutions,[210] the Parliament highlighted the need for TCN to avail of the same social welfare rights as EU migrant workers, emphasising the right to family reunification, the need to facilitate naturalisation after a reasonable residence period, and the right to vote in local elections after five years of residence.[211]

The Commission has developed a distinctive approach to the rights of TCN, and has long favoured an expansion of is competence over TCN and an amelioration of their rights.[212]

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[204] Justice Submission,*1996 Intergovernmental Conference; Third Country Nationals in the European Union* Doc CM95-061/8, p5.

[205] D Curtin & M Geurts, above n8 169. This proposal was also made by the Meijers Commission, Report of the Standing Committee of Experts on International Immigration, Refugee and Criminal Law, *Proposal for the Amendment of the Treaty of European Union at the IGC in 1996*, March 1995.

[206] Meijers Committee Report, p12. The report outlined a number of restrictions on this entitlement: 5 years residency in a Member State of the EU, no acquisition of citizenship by descendants of the TCN born outside of the EU, and in the interests of legal certainty no provision is made for the loss of EU citizenship upon leaving the territory of the EU

[207] It has emphasized the right of workers to be reunited with their families in accordance with the European Convention on the Legal Status of Migrant Workers (under the aegis of the Council of Europe and in force since 1983). See eg resolution of 9 May 1985; (1985) OJ No 141, 462.

[208] Resolution of 15 March 1989; (1989) OJ No C 96, 61.

[209] Communication of 14 June 1990; (1990) OJ No C 175, 180.

[210] Resolution of 18 November 1992; (1992) OJ No C 337.

[211] Above n207.

[212] Decision 85/331, based on Article 118 EC favoured a supranational approach to the rules concerning TCN (1985) OJ L217/25.

This has brought it into conflict with both the Council and Member States.[213] Its 1994 Communication on Immigration[214] and its *White Paper on Social Policy: A Way forward for the Union*[215] proposed several new measures to benefit permanently resident TCN including full rights of free movement,[216] suggesting that Member States extend right of permanent residence to TCN and to their spouses[217] and children, supporting full equal treatment in employment and social benefits.[218] Moreover, the Commission's overall aim was to open the EU employment market to all resident TCN, since the single market 'logically implies the free movement of all legally resident TCN for the purposes of engaging in economic activities.'[219] The *White Paper*, opines that 'an internal market without frontiers in which the free movement of persons is ensured logically implies the free movement of all legally resident TCN for the purpose of engaging in economic activities. This objective should be realised progressively.'[220]

The 1993 *Green Paper on European Social Policy*[221] made several recommendations for the improvement of TCN social rights such as freedom of establishment, social welfare,[222] health care and educational entitlements thereby enhancing their inclusion through equal opportunities

[213] Eg Inclusion of TCN in a system of co-ordination for social security;*An Action Plan for Free Movement of Workers: Communication from the Commission* COM (1997) 586 final. The seminal example of that tension emerged with the Commission 88/384 (1988) OJ L183/35 in which the Commission advocated that no Member State rules be allowed which conflicted with EC social policies in order to safeguard EC social policy. The Member States challenged this before the ECJ and won. Joined cases 281,283, 284, 285, 287/85 *Germany et al v Commission* [1987] ECR 3203.

[214] Communication on Immigration and Asylum Policy COM (1994) 23.

[215] COM (1994) 333.

[216] COM (1997) 561 final.

[217] Of note in this vein is the Commission's proposal to reform Regulation 1612/68, Directive 68/360 and Regulation 1408/71 which included important and progressive proposals regarding the buttressing of the rights of TCN acquired through the nexus of family; it also proposed added protection for TCN in the event of the dissolution of marriage. EU Commission *Proposal for a European Parliament and European Council Regulation amending Council Regulation (EEC) No 1612/68 on freedom of movement for workers within the Community; Proposal for a European Parliament and Council Directive amending Directive 68/360/EEC on the abolition of restrictions on movement and residence within the Community for workers of Member States and their families; Proposal For a European Parliament and Council Decision establishing an Advisory Committee on freedom of movement and social security for Community workers and amending Council Regulations (EEC) No. 1612/68 and (EEC) No 1408/71.* COM (1998) 394 final, 12-13.

[218] It has advocated that TCN obtain coverage for health care when traveling in the EU, a right to go abroad to obtain needed medical treatment in another Member State, a right to enter another EU states without a visa, and priority for job openings in other Member State where no EC national or local TCN was available. Then Social Affairs Commissioner Paidraig Flynn, issued a document proposing free movement for established immigrants, security of status for the dependents of an immigrant who may still not be citizens of their country of residence, and measures to promote social integration. EU Commission *Communication on Immigration and Asylum Policies* COM (94) Final 23.

[219] S Peers, above n42, 11; EU Commission, *White Paper on European Social Policy* COM (1994) 333,28-30.

[220] COM (1994) 333, 29.

[221] EU Commission *European Social Policy, Green Paper* Communication by Mr Flynn 17/11/1993 COM (1993) 551.

[222] Eg extending the EU coordinating rules on social security Regulation 1408/71 to TCN.

The Commission favours the 'full implementation' of Article 14,[223] including lifting family member's visa requirements, a Directive abolishing internal frontier checks on any individuals, and a directive on the travel rights of TCN.[224] While the implementation of Article 14 and action under Article 62 would, in principle, facilitate the intra-Community travel of all non-EU nationals, a TCN Travel Directive would improve their rights substantially.[225]

The Commission also endorses *integration* measures to benefit TCN including the establishment of foreigners' consultation boards and associations. It issued guidelines on migration which argued that integration policy[226] entailed a better access to EU rights for foreign residents.[227]

The Council's efforts have been less ambitious, although its non-binding 1995 Resolution laid down a minimum standard for the treatment of long resident TCN.[228] That Resolution[229] closely mirrors Resolution 1612/68, providing that a TCN resident for 10 years should be granted either a permanent residence or a renewal of her permit for 10 years subject to 'public policy or national security'. It further provided equal treatment in 'working conditions, membership of trade unions, public policy in the sector of housing, social security, emergency health care, and compulsory schooling'.

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[223] Article 14 (ex 7A) EC reads '*1. The Community shall adopt measures with the aim of progressively establishing the internal market over a period expiring on 31 December 1992, in accordance with the provisions of this Article and of Articles 15, 26, 47(2), 49, 80, 93 and 95 and without prejudice to the other provisions of this Treaty. 2. The internal market shall comprise an area without internal frontiers in which the free movement of goods , persons, services and capital is ensured in accordance with the provisions of this Treaty. 3. The Council, acting by qualified majority on a proposal from the Commission shall determine the guidelines and conditions necessary to ensure balanced progress in all the sectors concerned.*'

[224] One such initiative was to sponsor the creation of the European Migrants' Forum, intended to foster a political voice for migrants, and comprising various types of immigrants. The formulation of a common agenda has proved difficult because of the diversity of immigrants' situations, and conflicts between different groups and interests COM (1995) 346, 347, 348.

[225] The TCN travel directive would allow for all non-EU citizens legally resident in a Member State to travel visa-free throughout the EU Member State for three months regardless of whether they are the family members of an EU nationals or whether they would otherwise be obliged to obtain a visa

[226] A most recent and very progressive move on the part of the Commission was the *Proposal for a Council Decision establishing a Community action programme to promote the integration of refugees* COM (1998) 731 final.

[227] The Commission also adopted a Decision which set up a procedure for prior communication and consultation of new policy towards TCN which was later successfully contested by five Member States, and annulled by the ECJ in 1987.

[228] *Agence Europe*, 22 November 1995;*Migration News Sheet* , December 1995.

[229] The Resolution does not apply to EU or EEA nationals; nor does it apply to TCN covered by separate agreements or those admitted for study or research. However, see the earlier Guidelines for a Community Policy on Migration (1985) OJ C186/3 passed pursuant to Article 117 EC to improve the working conditions of all workers.

A strenuous defender of TCN rights has been the ECJ.[230] Despite acknowledging that TCN rights of entry and employment fall within Member State competence,[231] it has developed numerous exceptions under the Treaty, Association Council decisions granting TCN employment and social security rights.[232] Indeed the Court already employs Regulation 1408/71 as a baseline in interpreting the Association and Co-Operation Agreements for TCN. The ECJ has also interpreted Article 59 and 60 of the EC Treaty to mean that EU companies can send their TCN employees to provide services in another EU Member State.[233] Furthermore, the Court's use of its *Cassis de Dijon*[234] reasoning (pursued in *Brasserie du Pêcheur /Factortame III*[235] and *Keck & Mithouard*[236]) to Articles 39 (ex 48) EC and 43 (ex 52) EC, and even Article 17 *et seq.* EC, may result in additional rights for TCN, but would likely remain confined to those who are *family members of EU citizens.*[237]

The Community Charter of the Fundamental Social Rights of Workers[238] enumerates free movement among the fundamental social rights of workers. 'Every worker of the European Community shall have the right of freedom of movement throughout the territory of the Community, subject to restrictions justified on grounds of public order, public safety or public health'. The Charter does not specify EU citizenship as a prerequisite of the fundamental social rights of the Charter.[239] The contradictory situations presented by the 'tolerated presence' of TCN workers in the Community, and the uncertain and discriminatory legal position they

[230] W Alexander 'Free Movement of Non-EC Nationals; A Review of the Case-Law if the Court of Justice' (1992) 3 EJIL 53-64; V Guiraudon above n56.

[231] Joined cases 281, 283-285 and 287/85 *Germany et al v Commission* [1987] ECR 3203.

[232] Case 12/86 *Demirel* [1987] ECR 3719; Case C-18/90 *Kziber*, [1991] ECR I-119; Case C-192/89. *Sevince* [1990] ECR I-3461. Agreements with third countries are acts of the Community which may create directly effective rights for individuals which national courts have to enforce. However, clauses in international agreements equivalent to those in the Treaty of Rome will not automatically be awarded an identical interpretation; the interpretation depends upon the nature and purpose of the agreement: the 'Polydor principle'; Case 181/ 73 *Haegemann* [1974] ECR 449; Cases 104/81 *Kupferberg* [1982] ECR 3641; Case 270/80 *Polydor* [1982] ECR 329; Case 12/86 *Demirel* [1987] ECR 3719.

[233] Case C-43/93 *Vander Elst* [1994] ECR I-3803. Note the proposed posted workers directive COM (1993) 223; however, its Preamble states that it will not affect Member States legislation on TCN or EC agreements with third countries.

[234]Case 120/78 *Rewe-Zentral AG v. Bundesmonopolverwaltung für Branntwein (Cassis de Dijon)* [1979] ECR 649.

[235]Joined cases C-46/93 and 48/93, *Brasserie du Pêcheur v. Germany* and *R. v. Secretary of State for Transport, ex. p. Factortame*, [1996] ECR I-4845.

[236] Joined cases C-267 and 268/91 *Keck and Mithouard* [1993] ECR I-6097.

[237] Cases 120/78 *Rewe* [1979] ECR 649; Case C-19/92 *Kraus* [1993] ECR I-1663; judgment in Case C-415/93 *Union royal belge des Sociétés du Football Association A.S.B.L. et al v Bosman* [1995] ECR I-4921.

[238] Adopted by the Heads of State or Government of the Member States of the European Community meeting in Strasbourg on 9 December 1989 (text originally adopted only by 11 states).

[239] Eg Article 2 of Title I states that 'the right of freedom of movement shall enable *any worker* to engage in any occupation or profession in th Community in accordance with the principles of equal treatment as regards access to employment, working conditions and social protection in the host country.'

endure runs counter to many of the most important principles enshrined in the Charter.

Despite upholding the distinction between TCN and EU nationals, and although non-enforceable, the Charter of Fundamental Rights of the European Union[240] may well become a source of protection for TCN rights. While none of the generally applicable articles has the force for TCN it would have for EU nationals because of lacking the reinforcement of the Citizens' rights, and while none is as apt for free movement as what is catalogued under Citizens' rights, some of the rights of general applicability could be useful to TCN in the Single Market. Article 6 on the right to liberty and security of the person which might pertain to TCN rights to free movement and its accompanying rights, freedoms and benefits, as might Article 14's right to education, and to vocational and continuing training. Article 7 on the right to respect of private and family life might also be capable of protecting rights connected with free movement, especially for those related to movement with one's family akin to the rights in EEC Regulation 1612/68.[241] Article 15 on the freedom to choose an occupation and the right to engage in work could and Article 16 on the right to conduct a business, might also be applicable to the protection of TCN rights of free movement and establishment, and could be positively used to improve their position in the market. Finally, Articles 18 and 19 on the right to asylum and protection from removal or expulsion respectively are of patent relevance to the current contexts of TCN.

'There are millions of migrant workers, refugees and other aliens and ethnic minorities living in Europe as second class human beings. If we believe in the equal rights of human beings, we should not accept that our societies are split into tow categories of people: in the class of citizens enjoying human rights and in the class of aliens dependent on 'human allowances' The credibility of European democracies demands that we seriously start to abolish the legal distinction between nationals and aliens.'[242]

[240] Charte 4422/00 (2000) OJ C 364/01.
[241] Journal Officiel [1968] L 257/2
[242] M Nowak, in *New Expressions of Racism, Growing Areas of Conflict in Europe* SIM, Special No.7, 17-20, 19.

V. THE EU LEGAL CONTEXT: EU NATIONALS AND THE CONSTRUCT OF RACE

1. *DE FACTO* DISCRIMINATION AGAINST EU NATIONALS LINKED TO *DE JURE* DISCRIMINATION AGAINST TCN

The previous discussion focused on the *de facto* race discrimination which results from the *de jure* distinctions within EU law between TCN and EU nationals. This chapter considers race discrimination against EU nationals who are members of racial and ethnic minorities because of their association with TCN and more directly because of racist contexts.

'State racism in the form of immigration control is fundamental to an understanding of the status of black and ethnic minorities, but it is equally important to examine their position and treatment *within* a country and that of their offspring born there.'[1] Thus, the 'central case' of racism against EU nationals who are members of racial and ethnic minorities concerns the associational effect of *de jure* discrimination against TCN, on EU nationals who belong to racial and ethnic minorities. This concerns the ramifications of 'Fortress Europe' on minority EU nationals, and the detriment wrought on those 'inside' through that imposed on those who are outside. 'The 'regimes of exclusion do not simply operate at some putative external border of the EU. The excluded are also within.'[2] It is therefore clear that 'discrimination against third-country nationals is inextricably linked to racism and xenophobia [...] Both should be tackled together.'[3]

As a legal concept, *de facto* discrimination covers discrimination against *all persons belonging to identifiable ethnicities*, including certain groups of EU national. 'Public policies may - more or less consciously - encourage heterophobia or its effect by *de facto* instituting or perpetuating discrimination or disadvantage against minority groups.'[4] Although not rooted in de *jure* legal distinctions, this discrimination can result from the crude associations with *de jure*

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[1] S Allen & M Maccy 'Minorities, Racism and Citizenship: The impact of the single market' (1991) 2(2) *European Journal of Intercultural Studies* 5, 9. Also, J Weiler, 'Thou Shalt not Oppress a Stranger: On the Judicial Protection of the Human Rights of Non-EC Nationals - A Critique' (1992) 3 *EJIL* 65, 67.

[2] P Fitzpatrick 'New Europe, Old Story: Racism, Law and the European Community' in P Ireland & P Laleng (eds) *The Critical Lawyers' Handbook 2* (1997) 87.

[3] S Peers 'Towards Equality: Actual and Potential Rights of Third Country Nationals in the European Union', (1996) 33 *CMLRev* 7,50.

[4] T Hervey 'Putting Europe's House in Order: Racism, Race Discrimination and Xenophobia after the Treaty of Amsterdam' in D O'Keefe & P Twomey, *Legal Issues of the Amsterdam Treaty* (1999) 329.

distinctions, since discrimination suffered by TCN is itself often reducible to race discrimination. The phenomenon of *de facto* discrimination is thus cyclical. EU nationals belonging to racial or ethnic minorities are likely to suffer discrimination *as though they belonged* to the legal category of TCN simply because of sharing the same features as the constructed definition of Other in Europe.

The non-status-based, discrimination-orientated, Standing Commission on Racial Equality in Europe, SCORE has highlighted the threat posed to minority free movement rights by racism and by the 'fixed idea of what European citizenship [is] - white.'[5] Similarly,'the strengthening of internal and external controls will mainly affect "Black UK citizens and non-citizens", since it is largely assumed that "Blacks" cannot be equal EC citizens.'[6] One manifestation of this emerges in the disproportionate effect strengthening internal and external EU controls has on members of racial and ethnic minorities, whose ability to live as freely as their fellow European citizens or (white) residents is diminished.[7]

'Citizenship may open European borders to black people and allow them free movement, but racism cannot tell one black from another, a citizen from an immigrant, an immigrant from a refugee and classes all Third World peoples as immigrants and refugees and all immigrants and refugees as terrorists and drug dealers - is going to make such movement fraught with difficulty.'[8] This has perpetuated a 'general idea that 'Blacks' cannot possibly be legitimate (EU) citizens, fully sharing in the rights and opportunities open to these.'[9]

The development of free movement rights for EU nationals has occurred alongside the incremental development of restrictive immigration policy in the EU through Schengen, TREVI and the Ad Hoc Group on Immigration. These policy developments mirror and reinforce the popular perceptions of many European,[10] perpetuating 'stereotypes of people from Third World countries and their descendants in Europe as 'terrorists', 'drug-runners', 'illegal immigrants' and 'scroungers on the Welfare State'. Whilst many of these images are not new, they are being

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[5] Bernie Grant MP, Draft Minutes of SCORE (UK) national launch conference, 24 November 1990 cited by C Neveu 'Is 'black' an exportable category to mainland Europe? Race and Citizenship in a European context' in J Rex and B Drury *Ethnic Mobilisation in a Multi-cultural Europe* (1994) 102,103.

[6] C Neveu, above n5, 103.

[7] J King, 'Ethnic Mobilisation and Multilateral European Institutions', in AG Hargreaves and J Leaman (eds) *Racism, Ethnicity and Politics in Contemporary Europe* (1995) 183

[8] J Sivanandan,'The New Racism' *New Statesman and Society*, 4/11/1988.

[9] C Neveu, above n5, 104.

[10] J Habermas 'Citizenship and National Identity: Some Reflections on the Future of Europe' (1992) 12 *Praxis International* 1 discussing restrictive European immigration policy 13-18. See also Eurobarometer trends.

reconstituted at a new conjuncture in history.'[11]

The treatment of 'Outsiders' as Other, and the treatment of 'Insider with the characteristics of Other' as Other are inextricably bound. Exclusion in racially disparate terms affects the terms of association of those *within the polity* who share the racial characteristics of those outside it.[12] 'Visible minorities find themselves at the base of the hierarchies of both citizenship and colour in the countries of the European Union. Discrimination is a common phenomenon; it differs only in degree.'[13]

De facto discrimination has several dimensions. This discussion examines the way in which discrimination impedes the exercise of EU law rights by EU nationals belonging to racial and ethnic minorities, and how EU law impacts the lives of racial minorities through its omissions. Thus, a purely *de facto* case for intervention against race discrimination is considered here, independent of, but related to the case of TCN. This racism is distinct from, but supported by, the discrimination to which TCN are subjected as a result of Fortress Europe. This discussion will highlight how EU law contains a racially discriminatory construct and therefore how, *internal to EU law*, important reasons exist to act against race discrimination in order to vindicate the *rights of EU citizens*. These are obligations incumbent on the EU by the principles and rationale of its own law.

Contrary to a general expectation of economic benefit to all, European integration and the Single Market have, for members of racial and ethnic minorities, brought a reality 'of inequality in comparison to the European white community,'[14] 'Ethnic minority groups within the EU are justifiably anxious about the ways in which the continuing legal and political processes of European integration may affect them. Those anxieties were first formulated by politically conscious groups, but have now become part of the common currency of discourse within groups of ethnic minority origin.'[15]

2. CATEGORIES OF MINORITY EU NATIONALS

While EU law has had a *de facto* discriminatory effect on minorities at large, important

[11] A Brah 'Black Women and 1992' in J Bhabha & S Shutter *Women's Movement : Women under Immigration, Nationality and Refugee Law* (1994) 23.

[12] This may be formulated as the inter-relationship of rules related to *access* to a community (e.g. immigration) and those pertaining to treatment *within it* (de facto discrimination)

[13] I Forbes 'Institutionalising Anti-Discrimination in Europe' in AG Hargreaves and J Leaman (eds) *Racism, Ethnicity and Politics in Contemporary Europe* (1995) 204.

[14] A Singh Jouhl '1992 and the mobilisation of black people' in J Rex and B Drury *Ethnic Mobilisation in a Multi-cultural Europe* (1994) 78.

[15] J King above n7, 179.

distinctions exist between categories of minority EU national. The various constructs of racial outsider sustained by EU law categories[16] can be identified along a spectrum of the decreasing order of their 'Europeanness'. This hierarchy has created a 'new racism' which is 'less visible, more virulent, open to fascism and, above all, *European.*'[17]

The 'central case', like most racial constructs, is not a homogeneous category, but comprised of a number of ethnic groups. They share the attributes of being EU nationals and members of racial and ethnic minorities, rendering them insiders and outsiders at one and the same time.[18]

The oldest historical category of excluded people in the European polity is that of *indigenous* minorities such as the Roma, Gypsy, Sinti or Traveling communities.[19] In 1992 these communities numbered 12.5 million in total, with between 2 and 3 million residing in the EU.[20] The discrimination they suffer is particularly invidious because of being less clearly identifiable as race discrimination, and being relegated to social or cultural exclusion. Its invisibility is heightened by being manifest primarily at a domestic level by Member States unto their own citizens. This discrimination may even be replicated in a factual and cultural (rather than legal) way at a European level,[21] and the European institutions[22] appear to have recognised this problem

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[16] As with the discussion of 'categories of migrant' in chapter III above, this discussion employs the nomenclature of 'categories' as a shorthand in order to distinguish between different types of minorities or different minority contexts and experiences. The use of the term category in no way assumes that these groups have a discreet, essential or constant identity, nor does it assume that the groups it refers to have wholly separated or insular experiences or contexts: the notion of fluidity and overlap is fully acknowledged.

[17] A Sivanandan above n8.

[18] Mc Ewan describes this as the 'ethnic homogeneity of European states', breaking the categories down to settled communities, refugees, colonial immigration and guest workers. I McEwan, *Tackling Racism in Europe: An examination of Anti-discrimination Law in practice* (1995) 4-6.

[19] For an example of discussion on the domestic legal situation of Travelers, Dublin Travelers Education and Development Group, Irish Council for Civil Liberties, and the Irish Traveler Movement (ITM), *Anti-Racist Law and the Travelers*, ITM, Dublin 1993; M Tannam *Racism in Ireland, Sources of Information* Harmony (Ireland) 1991. Pavee Point Travelers Centre *Roma , Gypsies and Travelers of Europe: An Examination of Discrimination and Racism* (1996)

[20] *1992 Eurostat*; 1 January 1992.

[21] The institutions of the EU, the institutions of the Council of Europe including the Standing Conference of Local and Regional Authorities of Europe, the Committee of Experts; and the Conference on Security and Cooperation in Europe have all passed measures or disseminated documents on this subject, as has the United Nations and the UN High Commission for Refugees *Collection Interface On Gypsies: Texts Issues by International Institutions* compiled by M Danbakli (1994)

[22] This is especially true of the European Parliament. Since 1984 the European Parliament has passed over 50 measures (resolutions, written questions & answers, motions for resolutions and reports) on the subject of the Gypsy / Sinti and Roma communities: covering issues as diverse as free movement rights to political representation to poverty.

in the measures passed regarding the plight of Gypsies, and their children.[23]

A second significant category of minority EU nationals comprises immigrants from non-European countries, though it could include those from Eastern European countries. These people have immigrated and become naturalised, thus falling within the 'central case'. As a result of the largely restrictive nature of rules concerning naturalisation in most of the European states, this category is a relatively small one.

A third category to consider, closely associated with the former, is that of racial or ethnic minority EU nationals born to non-European naturalised immigrant parents or those born to non-European parents in a state which grants citizenship on the basis of birth or territoriality, such as Ireland. They are born EU nationals but bear the characteristics of minorities and outsiders.

A final category is composed of persons from Commonwealth countries or those who become citizens of a Member State through a jurisdictional link retained by a Member State with that foreign, often ex-colonial country.

3. *DE FACTO* RACE DISCRIMINATION IN EU LAW

De facto race discrimination has numerous dimensions and multiple sources. This discussion looks to the sources of that discrimination in EU law and to the ways in which social contexts sustain and exacerbate it.

(1) Omission

Until the Race Directive was enacted in June of 2000[24] *de facto* race discrimination had

[23] Council Resolution No 89/c [1989] OJ C 153/3 on school provision for gypsy and Traveler's children; Commission Synthesis Report on school provision for Gypsy and Traveler children by J-P Liegeois, document 1987; On the same subject the Commission disseminated a Orientation document V/500/88 (1988) and a Summary record VC2 on meeting held 29/5/1991 on the situation of gypsies and Travelers in the EU (1/7/1991).

[24] Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin [2000] OJ L180/22 19.7.2000; preceded by the Commission Proposal COM (1999) 566 final and European Parliament, *Report on the proposal for a Council directive implementing the principle of equal treatment between persons irrespective of racial or ethnic origin* COM (1999) 566, Parliament Session Document, Final [2000] A5-0136/2000; Rapporteur KM Buitenweg. Hereinafter 'the Race Directive'. It is worth noting that the ICERD and ECRI have long called for signatory states to enact comprehensive legislation in both the criminal and civil field see obligations enumerated in Articles 4, 2(1)(d) and 5 ICERD. T van Boven, 'Discrimination and Human Rights Law: Combating Racism' in S Fredman (ed)*Discrimination and Human Rights: The case of Racism* (2001) 111, 123

its source in the absence of any enforceable substantive measures at EU level,[25] combined with the uneven and inadequate forms of legal protection against race discrimination at Member State level. The protracted EU inaction in this realm has resulted in severe systemic detriment for racial and ethnic minorities resident in the EU, although the nature of the discrimination suffered by TCN and EU nationals is different, as is the discrimination suffered by specific groups within these generic categories.

This omission was negatively reinforced by a documented awareness of the effect of the EU's, rendering relevant soft law measures aggravating rather than alleviating factors. The Commission, for instance, acknowledged 'the exposed and vulnerable position of black and ethnic minorities which has arisen from the Community's failure to afford mobility, social benefits and protection from discrimination.'[26]

(2) The Law of Free Movement

(i) Developing rights of free movement

The omission to act against race discrimination was rooted on a conception of the foundational aims and policy prioritisation of EU law:[27] 'the elimination of race discrimination was simply not considered necessary to the project of creating a common market in labour and indeed raised awkward questions in relation to discrimination against non-EU nationals.'[28]

Rather the EU's goals remained overwhelmingly indexed to the completion of the Internal market and to the free movement of persons[29] and non-discrimination on the basis of nationality.[30] As was seen in the previous chapter, free movement rights for *EU nationals* under Article 39 EC *et seq.* have been vigourously developed through an increasingly potent body of

[25] Tamara Hervey notes ' Conspicuous in its absence from the activities so far of the EU institutions in respect to racism, race discrimination and xenophobia is any systematic assessment of the extent to which the Community's and Union's other politics may impact on those excluded because of race, or may implicitly encourage racism and xenophobia.' TK Hervey, above n4, 345. She favours the use of Article 13 EC as a basis for wide-ranging assessment of all 'the EU's policies, existing, and post Amsterdam, to ensure that the EU's own house is in order, and that action is taken to guard against the potentially racially discriminatory effects of the European integration process'. above n3.

[26] S Allen & M Macey above n1, 10.

[27] The omission in EU law proper is also coupled with a second source of *de facto* discrimination which stems from the amplification of MS discrimination at EU level. This assumes that EU law is now endowed with the power not only to replicate norms of domestic law it inherits, but also of amplifying these because of the independent normative force it enjoys in its own right.

[28] S Fredman 'Discrimination law in the EU: Labour market regulation or fundamental rights' in H Collins, P Davies and R Rideout (eds) *Legal Regulation of the Employment Relation* (2000) The Hague, Kluwer Law International 183.

[29] Articles 39 EC et seq. on free movement rights.

[30] Article 12 EC, ex 6.

secondary legislation which secures the full panoply of EU law rights for EU nationals. The development of these rights in contradistinction to the state of TCN rights is reinforced yet more by the new Charter of Fundamental Rights of the EU which makes specific, additional provision for the rights of EU citizens over and above those recognised for everyone.[31]

The previous chapter also illustrated how the creation of a European space for Europeans has been significantly purchased at the expense of TCN free movement rights, with a substantial price being paid by members of racial and ethnic minorities.[32] That price is in part composed of the knock-on effects of greater surveillance at the outer borders against incoming migrants and TCN, especially from the East and South, and in part, in the heightened vigilance exercised against minorities within the territory due to the stereotyped regrouping of all minorities, regardless of status, and the surges of racism which emerge in tandem with restrictive immigration measures.

The free movement rights of EU nationals are supported by the proscription against nationality discrimination in Article 12 EC,[33] which is part of the *modus operandi* of the Single Market. Article 12 does not, however, outlaw the detrimental treatment of legally resident TCN on any analogous basis.[34] Without protecting against race discrimination in contexts where TCN nationality is overwhelmingly aligned to membership to racial and ethnic minority, Article 12 can only effectively protect the free movement rights of *non-minority* EU nationals. It is arguable that such a prohibition on discrimination serves only to displace, not destroy discrimination.[35]

A number of factors contribute to the *de facto* discrimination experienced by racial and ethnic minorities in the exercise of their free movement rights.

First, minorities have suffered as a result of the long absence of a comprehensive set of legal protections at the European level, and the divergent and often ineffective nature of legal protection at Member State level. Even where Member States provided legal protection, it could not account for the problems peculiar to EU rights and interstate mobility.

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[31] Charte 4422/00 [2000] OJ C/364/01; Chapter V on Citizens' Rights. E.g. Article 45 on rights of free movement and residence.

[32] The Commission has acknowledged that the exclusion from free movement could be a major contributor to structural discrimination against ethnic minorities. EU Commission *Social Europe: The Social Dimension of the Internal Market: Interdepartmental working party.* Special Edition COM (1988) 8/89.

[33] Article 12 EC (formerly 6 EC; originally 7 EEC) provides that, 'Within the scope of application of this Treaty, and without prejudice to any special provisions contained therein, any discrimination on the grounds of nationality shall be prohibited'.

[34] S Fredman above n28; B Hepple 'Equality and Discrimination' in P Davies et al (eds) *European Community Labour Law: Principles and Perspectives* (1996) 238.

[35] P Weil, 'Immigration Policy in the EU' in D Cesarini and M Fulbrook, *Citizenship, Nationality and Migration in Europe* (1996) 74.

The sheer variation in the form and substance of anti-discrimination laws across Europe creates substantial confusion as to the nature of the legal protection available, and the degree to which such laws will be enforced.[36] While 'public law prohibitions of racial discrimination exist in most Member States and cover contractual discrimination by the state and its agents'[37] substantial variations exist between the substantive anti-discrimination provisions of Member State laws. The UK, for instance, boasts a comprehensive system of legislative protection against racial and ethnic discrimination.[38] It has the longest standing system of enforcement, petition, information gathering and dissemination in place since 1966.[39] Belgium, on the other hand, has very limited sectoral protection, no constitutional provision against race discrimination, and has only recently established a Royal Commission for the monitoring of racism and xenophobia.[40]

These diversity-related problems provide one of the strongest justifications for a Race Directive. By its nature, however, a Directive leaves substantial discretion to Member States with respect to implementation, which while it advances multi-culturalism and diversity, it may also result in the persistence of some of the foregoing problems.

A second issue is the effect of the tightening of the outer European borders within Europe. The completion of the Internal Market, given the racist contexts that prevail in Europe, has been detrimental for the EU rights of *all* members of racial and ethnic minorities as they attempt to cross borders, take up residence and work or provide services in other Member States. There are very real disincentives to exercising free movement rights from a Member State with a high standard of protection in legislation and enforcement, to one where protection is low,

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[36] EU Commission, *Legal Instruments to Combat Racism and Xenophobia: Comparative Assessment of the Legal Instruments Implemented in the Various Member States to Combat all Forms of Race Discrimination, Racism and Xenophobia and Incitement to Hatred and Racial Violence* (1993) OOPEC, Luxembourg; I Forbes & M Meade, 'Measure for Measure: A Comparative Analysis of Measures to Combat Race Discrimination in the Member States of the European Union (1992) *Employment Department Research Series* No 1, 74; 'Comparative Racial Discrimination Law' (1993) 14 *Comparative Labour Law Journal* 403.

[37] D Schiek 'Contract Law, Discrimination and European Integration' in T Wilhelmsson & S Hurri (eds) *Welfare State Expectations, Privatisation and Private Law* (1998) 405-410. 'In addition, many Member States have deemed some forms of contractual discrimination a criminal offense.' This is the case in the three Nordic Member States (Denmark, Finland, Sweden), in Belgium, France, Greece, the Netherlands and Portugal. EU Commission *Legal Instruments to Combat Racism and Xenophobia* (1992) Luxembourg, Office of the Official Publications of the EC.

[38] Other examples of comprehensive Member State equality laws are Sweden's Jämständighetslagen and Ireland's Equal Status Act, 2000 (No.8 of 2000).

[39] These are some of the functions of the Commission for Racial Equality.

[40] This conceptualisation of divergent levels of protection in EU law has been liberally employed and vigourously developed in the context of free movement of goods and the question of quantative restrictions or MEQRs ('Measures with equivalent effects to quantative restrictions').

inexistent or ineffectual.[41] Racism in the contexts of travel, migration, and establishment has a chilling effect on minority mobility, and combined with the lack of knowledge about free movement rights, and the nature of protection against discrimination in the Member States, the going assumption among minorities is likely to be that free movement is restricted or impossible.

A third issue relates to the 'perceptions and prejudices rooted in national histories and / or conceptions of belonging.'[42] Substantive legal problems are heavily compounded by the context of racism at the level of social interaction, immigration checks, public services, popular culture and the general environment in which free movement rights are exercised.[43] It is undeniable that the long absence of legal protection, coupled with a context of mounting racist hostility and violence in all Member States, has rendered free movement *neither feasible nor desirable for* racial and ethnic minorities. Even now with rights and protections such as those contained in the Race Directive, the problem of general *unwillingness* to exercise EU law rights may remain.[44] The Directive is therefore a crucial development, but one which constitutes only the very first step in the redress of the EU culture of discrimination and the psychology of fear that accompanies it.

(ii) Equal market rights in an unequal social context

The long history of prioritising the market over human rights in EU law has obscured the plight of marginalised groups in the EU.[45] The limits of market equality[46] and the vision of

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[41] This is similar to the AG Jacobs' argument in Case C 168/91 *Christos Konstantinidis v Stadt Altensteig Standesamt und Landratsamt Calw, Ordnungasamt* [1993] ECR I-1191. (Opinion of the Advocate General Jacobs of 9 December 1992) I-1198-1214.

[42] C Neveu above n5, 104.

[43] See M Baimbridge, B Burkitt & M Macey 'The Maastricht Treaty: exacerbating racism in Europe?' (1994) 17(1) *Racial and Ethnic Studies* 420, 426 '...instead of immigration or citizenship status being regulated only at frontiers, practices may develop that entail checks operating any and everywhere. As a consequence of (white) Europeans' apparent inability to realize that the EU consists of black as well as white members, black people will be disproportionately targeted for such checks.'

[44] This is addressed from the perspective of EU nationals exercising their free movement rights in Case C 168/91 *Christos Konstantinidis v Stadt Altensteig Standesamt und Landratsamt Calw, Ordnungasamt* [1993] ECR I-1191. (Opinion of the Advocate General Jacobs of 9 December 1992) I-1198-1214. This cannot compare to the disincentives for TCN who are discouraged on every conceivable level to attempt free movement between Member States at all since they face the same racist contexts, but must also obtain visas where they are not he relatives of EU nationals.

[45] T Hervey, 'Migrant workers and their families in the European Union: the pervasive market ideology of Community law', in J Shaw and G More (eds), *New Legal Dynamics of European Union* (1995) 91.

[46] E Szyszczak 'Racism: The Limits of Market Equality' in B Hepple and E Szyszczak (eds) *Discrimination: The Limits of Law* (1992) 125.

workers[47] as factors of production in the Single Market[48] must be assessed in terms of *de facto* discrimination. The market logic of free movement must be assessed for it disproportionate effects on racial minorities who are exploited as an indispensable, cheap and immobile part of the labour force,[49] and whose position remains economically and legally insecure.[50]

This situation allows minorities to provide economic benefit to states without those states incurring certain social costs or political dislocation. Some charge that this unfettered racism has permitted market forces to exercise informal control,[51] and that the 'problem for an open Europe [...] is how to close it - against immigrants and refugees from the Third World, but not so that their labour is entirely lost. For it is they who do the low-skill, menial, dangerous and dirty jobs in silicon-age capitalism...'[52]

The formal and 'neutral' concept of 'migrant worker' in EU law is *in fact* exclusive since it relies on social contexts which are drastically unequal.[53] The disproportionate social and educational inequality of racial and ethnic minorities is thus a form of *de facto* race discrimination[54] since the neutrality of the terms of incorporation of rights under EU law is 'more apparent than real.'[55] The EU law conception of market equality harms minorities in part because it replicates the contextual inequalities that prevail at Member States level. The systemic barriers faced by racial and ethnic minorities in regard to free movement rights stem primarily from the disadvantage that dominates their social, cultural, political and educational contexts within the Member States. 'They spring from *de facto* situations due to qualifications, the vulnerability of industries in which immigrants have traditionally predominated, inadequate schooling or poor knowledge of the language, and the limited employment and career perspectives open to immigrants within firms, and discrimination (generally disguised) at the

[47] On the difference between 'worker' and 'citizen' as evidenced in the Charter of Fundamental Rights of Workers, P Bercusson *European Labour Law* (1996) 599-608.

[48] P Fitzpatrick 'Racism and the Innocence of Law' (1987) 14 *JLS* 119.

[49] E.g. 'Gastarbeiter' in Germany.

[50] J Rex 'Race and ethnicity in Europe' in Bailey (ed) *Social Europe* (1992) 117.

[51] A Sivanandan above n8.

[52] A Sivanandan above n8. J Wrench 'Preventing Racism in the Workplace in the European Union' (1997) 3(1) *Merger* , Viewpoint; T Modood and R Berthoudh et al *Ethnic Minorities in Britain : diversity and disadvantage* (1997) Policy Study Institute; R Berthoud, *Young Caribbean men and the labour market: A comparison with other ethnic groups* J Rowntree Foundation (YPS); European Foundation for the Improvement of Living and Working Conditions *Case Study on the Prevention of Race Discrimination and Xenophobia and the Promotion of Equal Treatment in the Workplace France* (1997) WP/97/38/EN, 3-4; *Case Studies of Good Practice for the prevention of race discrimination and xenophobia and the promotion of equal treatment in the workplace Germany* (1997) WP/97/39/EN, 1-3.

[53] From the gender perspective J Morokvasic 'Fortress Europe and Migrant Women' (1991) 39 *Fem. Rev.* 69.

[54] P Fitzpatrick 'Racism and the Innocence of the Law' (1987) 14 *Journal of Law & Society* 119.

[55] E Meehan *Citizenship and the European Community* (1993) 105.

recruitment stage.'[56]

This disadvantage is also connected to minorities' non-acceptance in host states, to government policies intent on treating their presence as short term[57] or to public funding emphasising assimilation.[58] Although the onus for integrating has been firmly laid with the newly arrived immigrants, language and training programmes have remained beyond the reach of immigrant communities or have failed to acknowledge their specific needs altogether. Even pro-migrant policies are plagued problems such as the lack of access to services, the lack of flexibility in bureaucratically organised institutions, and the fact that the state is generally perceived as 'threatening' through its conflicting images as provider / controller. The targetted funding of private, social or grass-roots activities would likely be more effective than direct public assistance, since self-help organisations have been central to successful integration in many of the Member States.[59]

Other factors noted by ECRI as obstacles faced by members of racial and ethnic minorities include discrimination in employment, hosing and provision of services, and in the operation of public institutions including the judicial system and banks, racism from law enforcement officers and immigration personnel, the prevalence of incitement to racial or ethnic hatred, prejudice against Muslim communities ('Islamophobia') the resurgence of racism in the rise of extreme right political parties.[60]

Language presents another special problem in the EU context, with minority languages undervalued in favour of the EU's recognised official languages, and the teaching of the latter is not always available. Accreditation of non-European qualifications is also fraught, and some even suggest that EU qualifications are of little use if unaccompanied by EU citizenship. This plainly requires co-ordination in the recognition of non-EU qualifications so that potential of migrants with training, skills or education can be accessed and developed.

The fixed, negative perception of the immigrant labour status combined with the lack of targetted training at an early stage, has set a cycle of low training and discrimination for many immigrant groups. While some immigrant groups, such as Indians in the UK, have

[56] EU Commission *Vocational Training and Higher Education in the EC in the 1990's*, Background Report ISEC/B2/92; 3/2/1992, Brussels, EU Commission.
[57] E.g. the paradigmatic examples in the EU today emerge from Germany with its Gastarbeiter policies, and Austrian policies towards immigrants
[58] F Milburn 'Adult Education and Training Issues for Ethnic Minorities and Migrants in Europe' in AG Hargreaves and J Leaman (eds) *Racism, Ethnicity and Politics in Contemporary Europe* (1995) 209, 216.
[59] F Milburn above n58, 215-216.
[60] Council of Europe, Report of ECRI (2999) 20.

distinguished themselves in attaining high levels of education and concomitant success in employment contexts, many immigrant groups are, even now, perceived as capable of only certain types of low-grade labour, with the poorest conditions and wages and accompanied by little if any mobility.

These multitudinous obstacles endemic to Member State translate to significant impediments at the EU level. 'Low-skilled, economically vulnerable migrants are hardly in a position to take up training and employment offers elsewhere.'[61] Some contend that the EU neglect of problems of race discrimination with respect to training and skills necessary for mobility results from a simple lack of political commitment.[62] What is not in question is that the racialised inequality of Member State social contexts has been compounded by lacunae in EU law [63] and that that racialised inequality is a reality for EU nationals as much as for TCN.

(3) The Single Market, EMU and the criteria for convergence

Beyond the law of free movement, policies connected with the Single Market and the criteria for convergence stipulated in the terms of Economic and Monetary Union in Maastricht must be examined for the ways in which they may reinforce race discrimination.[64]

'The processes of creation of the single market have brought countervailing negative social effects.'[65] These result in an increase in competitive pressures, the restructuring of industries and services, and the fact that EMU requires Member States to place strict control on deficits which will likely reduce public spending.[66] EMU 'establishes deflation as a continent-wide project. This will result in diminished growth and high unemployment, as well as significant cuts in welfare provision.'[67] 'Moreover, there is no provision in the convergence criteria concerning levels of employment, EMU is likely to increase pressures towards unemployment.'[68]

These 'neutral' measures aimed at economic integration mask the unequal distribution of

[61] F Milburn above n58, 219.

[62] One defence of the EU's failure to redress these obstacles is that the Union has no general competence in respect of training, and that this area remains within the purvey of the Member States.

[63] One may question whether the Race Directive will in fact remedy this, C Barnard and B Hepple 'Substantive Equality' (2000) 59(3) *Cambridge Law Journal* 562. The authors are skeptical.

[64] The legal backdrop to EMU in the 1991 Maastricht Treaty is the 1986 SEA which defined the internal market as 'an area without frontiers in which the free movement of goods, persons, services and capital is ensured.'

[65] TK Hervey 'Race discrimination and Xenophobia after the Treaty of Amsterdam' 332.

[66] Chris Shore makes this point persuasively C Shore, 'Ethnicity, Xenophobia and the Boundaries of Europe' (1997) 4 *International Journal on Minority and Group Rights* 247, 259-260.

[67] M Baimbridge, B Burkitt & M Macey above n42, 420. On welfare cuts in individual member states 430-431.

[68] TK Hervey above n4,333

unemployment and poverty which, because of the racially stratified nature of the social contexts, are borne disproportionately by racial and ethnic minorities. That social exclusion[69] is 'a process by which access to income and other social benefits or services, such as health protection, housing and education is restricted, and a pattern of disadvantage, manifesting itself in several related ways, is perpetuated.'[70]

The reinforcement of this exclusion through European market integration may in turn produce social dislocation as those marginal groups experience heightened levels of alienation in European society. Moreover, already marginalised groups, in which racial and ethnic minorities are over-represented, are those most likely to be dependent upon welfare benefits and have insecure employment and to suffer as a result of EMU.[71] *De facto*, socially engendered, race discrimination is therefore not only supported by, but replicated in, Economic and Monetary Union. Furthermore, the adverse effects of deflation in wider social and political terms are such that 'the establishment of a process leading to economic and monetary union laid down by the Maastricht Treaty [....] may exacerbate the racism that already exists within the EC.'[72] This is because voter dissatisfaction, high unemployment and low economic growth have, in the past, frequently been accompanied by both the increase in support for extreme right, racist and anti-immigrant platforms[73] and a rise in racist violence and sentiment. 'The economic climate has a significant influence on social relationships, in particular racialised ones'.[74] It is therefore necessary to highlight the connections 'between the state of the economy and the spread of racist ideologies and behaviours.'[75] Unchecked EU policies will necessarily effect new forms of *de facto* discrimination against the racial and ethnic minorities resident in Europe.

4. EU RESPONSIBILITY IN THE REALM OF THE CENTRAL CASE

The gravity of the foregoing contextual impediments and the replication or amplification of this *de facto* discrimination in EU law establish a strong case for EU action. That

[69] R Spicker 'Exclusion' (1997) 33 *JCMS* 133.
[70] TK Hervey above n4, 332.
[71] ECRE 'The Social and Economic Exclusion of the Roma' (2001) *Annual Progress Report* 003; European Forum for Migration Studies, *Migration Report* (1997) University of Bamburg. Campaign for an Independent Britain 'EMU Effects on Ethnic Minorities' <www.bullen.demon.co.uk.cibbb2htm>.
[72] M Baimbridge, B Burkitt & M Macey above n42, 421.
[73] M Baimbridge, B Burkitt & M Macey above n42, 432.
[74] M Baimbridge, B Burkitt & M Macey above n42, 434
[75] M Baimbridge, B Burkitt & M Macey above n42, 435.

responsibility exists despite the EU lacking, even now, a 'comprehensive mandate for both EU *and non-EU citizens* in all areas that are important for improvement of the legal status of migrants and minorities: regulation of access and residence, employment and social security; providing for measures in the filed of housing, education, social and cultural life, enabling the social integration on the host country with respect for the right to be different.'[76] It also persists despite the existence of the Race Directive because of substantive limitations extant in it, and because the enactment of such a measure does not divest the EU of its remaining responsibilities with regard to *de facto* discrimination engendered by its own laws. Nor does the complicating factor of competence over TCN does not either relieve the EU of its responsibility to redress the disadvantage faced by citizens who belong to racial and ethnic minorities. Because the exercise of EU law rights is implicated, and because EU law plays a part in the cyclical perpetuation of the discrimination suffered in regard to them, the EU has a responsibility to act.

However, a number of EU measures already recognize the obstacles and discrimination faced by minorities in the exercise of their EU law rights.[77] These provide examples of the sort of action needed specifically targeting race discrimination. The European Social Fund, one of the principal components of the EU Structural Funds, has financed programmes in industrial regions to assist the long term unemployed, and funds migrant training projects aimed at the integration of disadvantaged groups within the Member States.[78] The Commission recently released a Communication on Building an Inclusive Europe which contemplates action on numerous aspects of social exclusion and vulnerability, poverty and welfare dependency, recognising the specific ways in which these affect racial and ethnic minorities.[79]

Title XI of the Treaty of Amsterdam mandates greater co-operation in the field of training and education. Article 149 EC (ex 126) states that 'Community shall contribute to the development of quality education by encouraging cooperation between the Member States and, if

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[76] D De Jong and M Zwamborn *Equal Treatment and discrimination in Europe* Final Report on the feasibility study on co-operation of organisations in Europe concerned with improving the position of migrants and ethnic minorities. Commissioned by International Alert and the Netherlands Institute of Human Rights in preparation of the 1991 Conference on Action on Racism in Europe (1991).

[77] EU Commission *Vocational Training and Higher Education in the EC in the 1990's* Background Report, ISEC/B2/92; 3/2/1992. Note also Reports of the European Centre for the Development of Vocational Training (Established under Regulation EEC No 337/75).

[78] E.g. *URBAN, INTEGRA strand of the EMPLOYMENT initiative, EQUAL*, and *NOW*. Also relevant are the youth and education programmes discussed in Chapter III, as well as *Youth for Europe* and *European Voluntary Service* with which synergies would be sought with the *Social Fund* Programmes. The Commission has also stated that complimentarity will be sought with the *Leader* initiative offering support to local initiative programmes in rural areas of the Member States.

[79] COM (2000) 79 final, 6. See also Concerted Strategy for Social Protection COM (1999) 347 final.

necessary, by supporting and supplementing their action while fully respecting the responsibility of the Member States for the content of teaching and the organisation of education systems and their cultural and linguistic diversity'. Article 149 EC also calls for the fostering of cooperation with third countries and the competent international organisations in the field of education, in particular the Council of Europe.[80] Of interest also are the references to mobility in these provisions which tacitly acknowledge the centrality the social context of education and training to free movement. Article 150 EC (ex 129) makes provision for training, calling for EU action to 'facilitate access to vocational training an encourage mobility of instructs and trainees and particularly young people.'.

Despite its limitations, the strongest substantive EU action against the *de facto* race discrimination impeding EU nationals of minority origin in their exercise of EU law rights is still the Race Directive.[81] Article 3 establishes the applicability of the Directive in areas relevant to the foregoing discussion: (a) conditions for access to employment, self employment and occupation, (b) access to all levels and types of vocational guidance, vocational training, and advanced vocational training and retraining, work experience, (c) employment and working conditions, (e) social protection including social security and health care, (f) social advantages, (g) education, and (h) access to and supply of goods and services which are available to the public including housing.

5. CONCLUSION

Formal, 'neutral' provisions of EU law foster *de facto* race discrimination beyond the *de jure* discrimination suffered by TCN, such that there is an incipient construct of 'European' evolving *within* EU law. Regrettably, 'the unifying idea of 'European' translates into an exclusive idea of 'white European.'[82] This discussion highlights that the commonality appealed to to unite 'Europeans' in EU law as one which emphasises the 'otherness' of non-Europeans,[83] belittling their status within the European polity, regardless their official legal status.[84]

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[80] Indeed the training, education and mobility of migrants has remained an important issue on the Council of Europe agenda. E.g. Resolution No 1 on Migrant's Education, Western European Education (1985); Resolution No 2 on Migrant Education (1974). A more recent protect was started in 1994 to run for two years entitled, 'Democracy, human rights and minorities: education and cultural aspects'

[81] Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial and ethnic origin. The Directive will be considered in detail in Chapter VI.

[82] T Hervey, above n45 at 98.

[83] This point is made by A Brah above n11.

[84] For a critique of this duality of standards, J Weiler 'Thou Shalt not Oppress a Stranger: On the Judicial Protection of the Human Rights of Non-EU Nationals - A Critique' (1992) 3 *EJIL* 65.

What can the uniting legal myth of European citizenship amount if it remains wedded to nation-state nationality?[85] What does it contribute given the 'ideology of exclusion' which accompanies citizenship founded on traditional conceptions of nationality? In what ways is a new 'common, market racism',[86] or 'Euro-centricity'[87] emerging? What is its value if the 'human alienating effect of *Us* and *Them*'[88] is simply transferred from its application between Europeans to one between Europeans and non-Europeans?

The EU law context is exclusionary and supportive of a racial, or even *racist* construct in its *effects and operation*, despite the apparent neutrality of the terms and distinctions deployed. The EU therefore has a responsibility to 'put its own house in order', not least to examine its own policies for race discrimination.'[89] While the new Race Directive significantly alters the EU legal landscape, the *context* in which it operates has only deteriorated. How much can the Directive alone achieve when it emerges from a legal context of total omission on the part of the EU, and enters into a social context dominated by racism and exclusion. It may be some significant time before the Race Directive can begin to redress the negative racial construct which still thrives in numerous EU contexts, and erase the history of discrimination from the hearts and minds of racial and ethnic minorities in Europe.

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[85] J Weiler 'To be a European Citizen: Eros and Civilization' *The Constitution of Europe: Essays on European Integration* (1999) 324-357.

[86] A Sivanandan above n8.

[87] F Webber 'From ethnocentrism to Euro-racism' (1991) 32 (3) *Race and Class* 11-17,16.

[88] J Weiler 'Problems of Legitimacy in Post 1992 Europe' (1991) 46 *Aussenwissenschaft* 411; 436, quoted in I Ward *A Critical Introduction to European Law* (1996) 150.

[89] TK Hervey above n4 337.

VI. ACTION AGAINST RACE DISCRIMINATION IN EU LAW : FORM AND SUBSTANCE

1. INTRODUCTION

The form and substance of an anti-discrimination model in any legal system is founded on complex, often non-explicit, values. These values curb the legal context and are transposed into the substance and form of legal rules. This chapter considers the anti-discrimination model of EU law with respect to race from this perspective. The first discussion is theoretic, highlighting the choices between values in anti-discrimination law, and the ways in which cleavages have formed along two axes or 'poles' and how these apply to substantive tenets. The next discussion considers Article 13 and the Race Directive[1] in the light of these theoretic paradigms. The final part of this chapter considers the form of Article 13 as a legal basis within the structure of EU law as a whole.

This chapter is thus, partly theoretic and partly substantive, and it concerns form and substance: it relates to visions of anti-discrimination law and combating race discrimination, rather than the nature of that discrimination in social, historical and political context (Ch III), or in legal context (Ch IV) or even normative bases for combating race discrimination (Ch VII).

2. CONCEPTS OF EQUALITY: TWO POLES

With race understood as a construct, and the European and EC law contexts viewed as creating their *own construct* of race, the consequences for EU anti-discrimination measures and their theoretic bases should be considered. There exist basic 'directions' or 'poles'[2] which incorporate distinct visions: these may be identified in theoretic discourse, as well as in the anti-

[1] Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin. From the perspective of form it is worth noting that the Proposal Directive emerged in the Commission's tripart anti-discrimination package presented in 25 November 1999 which included a *Proposal for a Council Directive establishing a framework for equal treatment in employment and occupation* (pursuant to Article 250 (2) EC) COM (2000) 652 final; and *Proposal for a Council Directive establishing a Community action programme to combat discrimination (2001-2006)* COM (1999) 657. The Framework Directive on Employment was adopted [2000] OJ L 303/16. P Skidmore, 'EC Framework Directive on Equal Treatment in Employment: Towards a Comprehensive Community Anti-Discrimination Policy? (2001) 30 *ILJ* 126.

[2] The term 'pole', refers to the value-based poles in anti-discrimination law and to alignments under political and ideological umbrellas. While these regroupments are necessarily crude and imprecise, they have a functional purpose here, and in no way attempt a strict compartmentalisation of all views: the complexity of existing and potential approaches is fully recognized. These value-laden poles determine substantive outcomes in anti-discrimination law. One such pole is a formalistic and process-based: 'the liberal pole'. The other is contextualised, value-driven, and expansive: 'the alternative pole'. Notwithstanding these generic descriptions there exist numerous permutations *within and between* these poles.

discrimination measures and rules of domestic legal orders. One pole confines itself to equal treatment, and a thin definition of equality of opportunities, while the other strives for a level playing field, a widened conception of equality of opportunities, and even equality of outcomes.[3] These poles are in no way homogenous and comprise diverse strands, themselves capable of conflicting.[4]

An important premise of this discussion is the centrality of values to defining the reach and aims of the law, and the impossibility of a 'value-neutral' discourse.[5] The complex inter-relationship between law and politics[6] renders neutrality in the law illusory and potentially harmful to effective anti-discrimination measures.

(1) Discrimination and Equality

(i) Liberal Equality

One set of approaches, loosely regrouped under the 'liberal pole' is most closely identified with the liberal 'anti-discrimination principle' and adopts a formal conception of equality. This paradigm is limited to a version of equal *treatment*, and is therefore *process*-based rather than *results*-based or 'effects-centered'.[7] Its analytic focus remains grounded on the more deontological question of a means/ends rationality, under which 'suspect classifications' and the 'ill-fit of means and aims' are the triggers for scrutiny.[8] The proxy for

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[3] L Lustgarten notes the 1976 Race Relations Act provision on 'indirect discrimination' S 1(1) (b) as going beyond the equality of opportunity model (while not adopting the 'fair share' idea in terms of equality of outcome; L Lustgarten, 'The New Meaning of Discrimination' (1978) *Public Law* 178;181.

[4] A possible fourfold categorisation is: equal treatment, the level playing field, equal outcomes and equal opportunities. R Mac Ewan *Tackling Racism in Europe* (1993) 23-25.

[5] For related arguments MR Cohen 'Property and Sovereignty' (1927) 13 *Cornell LQ* 8; TH Green *Lectures on the Principles of Political Obligation* (1895); RL Hale 'Coercion and Distribution in a Supposedly Non-Coercive State' (1923) 38 Political Science Q 470; RL Hale *Freedom Through Law: Public Control of Private Governing Power* (1952); LL Jaffe 'Law Making by Private Groups' (1937) 51 *Harvard L Rev* 212. C Sunstein *The Partial Constitution* (1993); C Sunstein '*Lochner*'s Legacy' (1987) 87 *Columbia L Rev* 873; RM Unger *Law in Modern Society* (1976).

[6] This insight is often attributed to Realists, and later to the Critical Legal Studies Movement: M Cohen, 'Transcendental nonsense and the Functional Approach' (1935) 35 *Columbia L Rev* 809; WW Fisher, MJ Horwitz & TA Reed *American Legal Realism* (1993); P Gabel & D Kennedy 'Roll Over Beethoven' (1984) 36 *Stanford L Rev* 1; D Kairys (ed), *The Politics of Law* (2nd edn 1990); D Kennedy 'Critical Theory, Structuralism and Contemporary Legal Scholarship' (1985-6) 21 *New England L Rev* 209; D Kennedy *A Critique of Adjudication (Fin du Siecle)* (1997); M Perry, *The Constitution in the Courts: Law or Politics?* (1994); RM Unger, *The Critical Legal Studies Movement* (1983); C West ' The Role of Law in Progressive Politics' in D Kairys (ed) *The Politics of Law* (1990) 468.

[7] This terminology is employed by Dine & Watt to distinguish the two basic directions or 'choices' which exist in anti-discrimination law J Dine & B Watt (eds)*Discrimination Law: Concepts, Limitations and Justifications* (1996) 5.

[8] The terms 'process-orientated' as distinct from 'result-orientated' are employed by O Fiss 'The Fate of an Idea Whose Time Has Come' 41 *U Chicago L Rev* 742 (1974) 764.

discrimination is not disadvantage as such, but the nature of the decision-making process relating to suspect classifications such as race. Its fundamental concern is thus disparate treatment rather than disparate impact since it scrutinises the *nature of classifications* rather than their *impact*; and emphasises *formal treatment*, rather than *substantive outcomes*. Given this and the emphasis placed on (individual) rights,[9] proportionality plays a key role, particularly for the traditional liberal anti-discrimination principle.

Proportionality is however, neither a unitary,[10] nor substantive, free-standing concept. It is better conceived of as a modality of analysis for competing rights, or as a relational balance between elements. While it may focus our attention on rights (or even values) in a way other principles of judicial review[11] cannot, it may also place excessive emphasis on rights, and it cannot, itself, proffer values. It is also malleable in the outcomes it can justify, which is evident in the varying levels of scrutiny it may require from 'strict scrutiny' to 'rational basis', depending on the degree of 'fit' required of a measure vis-à-vis its aims.[12] It emphasises the *manner* in which limitations on rights are imposed and justified, and *presumes the legitimacy* of restriction, thereby obscuring the importance of scrutinizing government action, and diverting attention to the means employed rather than the idea of restriction itself or the values at issue.

Proportionality is relevant only where discrimination is to be justified. Discrimination is often legitimated under its aegis owing to the formal nature of the equality it fosters, and the fact that its deployment offers no answers to the conflicts of value actually in play in anti-discrimination law. Finally, proportionality is ridden with tension in most contexts owing to the fact that it attempts to reconcile the conflicting claims of rights or interests.[13]

The inherent tension within the concept of proportionality can lead to is a false polarisation of interests or *rights* in the anti-discrimination context, positing them in a formalistic, oppositional way. The challenge is, therefore, to conceive of discrimination in a less atomistic and less polarized way: discrimination, like race, or racism, is diffuse, connected to

[9] J Gardner 'Liberals and Unlawful Discrimination' (1989) 9 *Oxford Journal of Legal Studies* 1.

[10] J Ziller 'Le Principe de proportionnalité, *L'Actualité Juridique Droit Administratif*, 20 Juin 1996 special; 185. At least three recognised *forms* of proportionality exist, ranging from 'strong' forms, implying very rigorous substantive review of restrictions on rights, to 'weaker' models demanding simply a basic relational nexus to be established between elements with a substantial discretion left to the decision-making body. P Craig *Administrative Law* (3rd edn 1994) 411-432.

[11] J Jowell & A Lester 'Beyond *Wednesbury*: Substantive Principles of Administrative Law' (1987) *Public Law* 368.

[12] The aims or objectives are apposite to the standard of review applied, but it is the nature of the classification which is determinative. Strict scrutiny, for example, is warranted where the classification is based on race or sex, because they are considered 'suspect classifications'.

[13] S Leader 'Proportionality and the Justification of Discrimination' in *Discrimination Law: Concepts, Limitations and Justifications* J Dine & B Watt (eds) (1996) 110.

both ends of any proportionality equation.

The liberal pole embraces a 'thin' definition of equality of opportunity, aimed at 'consistency'[14] and equal treatment in order to retain a conception of 'fair shakers'.[15] This guarantees procedural justice only, irrespective of outcomes or even of contexts. Equality translates as a universalistic conception of equal protection or formal equality,[16] under which *every person* is protected from discriminations made on the basis of a suspect classification such as race: Whites as much as Blacks, Asians as much as Gypsies. No attempt is made to distinguish between the various contextual, historical or cultural meanings of discrimination made against particular *groups*, since the model of equality remains a symmetrical one. Formal equality and 'colour-blindness'[17] are defended as reinforcing the values of individual merit[18], achievement, limited conceptions of autonomy and 'negative' interpretations of freedom,[19] none of which are acknowledged to be circular and tautological.

(ii) Alternative poles: non-liberal approaches to equality

Alternative interpretations of equality and discrimination require the frames of reference to be expanded both chronologically and substantively. There exist numerous variants of substantive equality within the alternative pole[20]. These include the equality of results, focused on the impact on, or outcome for, an individual or group, and equal outcome is the aim; further, this approach may include strong variants of the equality of opportunity. Within this pole, the

[14] C Barnard & B Hepple 'Substantive Equality' (2000) 59(3) *Cambridge Law Journal* 562.

[15] This is a term coined by Morris Abram in his defence of a limited, individualised conception of anti-discrimination law; MB Abram 'Affirmative Action: Fair Shakers and Social Engineers' 99 *Harvard LRev* 1312 (1986) in C McCrudden (ed) *Antidiscrimination Law* (1991) 499.

[16] The universalising tendency within traditional liberal rights discourse is attacked by Critical Legal Studies Scholars on precisely this basis. Universalised rights tend to conceal the indeterminacy and incoherence of fundamental rights in context, masking that they are granted by the powerful to the powerless, ensuring that these power relationships are preserved. AD Freeman 'Racism, Rights and the Quest for Equality of Opportunity: A Critical Legal Essay' 23 *Harvard CR-CL LRev* 295 (1988).

[17] First used by the dissenting Justice Harlan in the infamous *Plessy v Ferguson* 163 US 537 (1896), the case which has come to stand for the doctrine of 'separate but equal', later overturned in respect of public school education, on the basis of the 14th Amendment in *Brown v Board of Education of Topeka, Kansas* 347 US 483 (1954) and, on the basis of the 5th Amendment (for DC schools) in *Bolling v Sharpe* 347 U.S. 497 (1956).

[18] For a liberal defence of the anti-discrimination principle founded on (restrictive interpretations of) merit, achievement and autonomy, RH Fallon 'To Each according to His Ability, From none according to His Race: The Concept of Merit in the Law of Anti-Discrimination' 60 *Boston U LRev* 815 (1980).

[19] I Berlin *Four Essays on Liberty* (1968). Berlin articulated the classic liberal distinction between negative and positive liberty: the former being simply the absence of constraints, where the latter notion, embodying the ideal of the truly free person, requiring the imposition of restraints on others, its realisation being what justifies coercion. Berlin rejected the latter ideal as an impossibility.

[20] There are a number of important variants between theories within the alternative pole. S Fredman 'A Critical Review of the Concept of Equality in UK Antidiscrimination Law' *Independent Review of the Enforcement of UK Antidiscrimination Legislation* Working Paper No.3. (1999).

group is emphasised to varying degrees and the overarching theme is teleological rather than procedural.

Perhaps the most controversial tenet of the alternative perspective is equality of results because it tends to contradict the very principle of equality it purports to advance, since preferential treatment of a black person discriminates against white people on the basis of race.[21] Second, monitoring results does not, in itself, demand that the systemic source of problems be addressed, or that the duty to adapt existing structures for diversity be implemented. Finally, the concern with disadvantage alone potentially brings the inquiry out of the realm of anti-discrimination law and into that of welfare, poverty or social security law.[22]

The disadvantage suffered by individuals or groups is identified through the adoption of a broader account of the forces which have created and sustained racial inequality. Discrimination and inequality are more than violations of process, symmetrical equality or proportionality: indeed a formalistic approach is rejected outright. This discussion considers a number of facets of 'substantive reach' since the expansive, alternative perspective presents an oppositional vision of almost every tenet of the restrictive liberal pole and develops its *modus operandi* from there. This oppositional view now constitutes the bedrock of progressive anti-discrimination theory based on a 'bottom up'[23] perspective and emphasising the contextual experiences of those anti-discrimination law was designed to protect.

The structures and practices embedded in legal and social contexts are predisposed to discriminate in effect, and behind guises of neutrality and objectivity lie rules founded on a discriminatory *status quo*. Contexts are unequal, as is the definition of the ideals such as 'merit' and 'achievement' because of the minimal 'input' and participation of minority groups in defining such values or ideals.

Under the alternative pole, the indices of discrimination are substantially broadened, and may include institutional or societal discrimination,[24] such as the continued absence of racial minorities from important areas public life and employment. The remit of anti-discrimination is expanded to include eradicating the *factual reality of inequality*. It is more results-based,[25] and its relevant 'triggers' include substantive disadvantage, stigma, social or historical subjugation

[21] S Fredman 'Reversing Discrimination' (1997) 113 *LQR* 575

[22] S Fredman 'Combating Racism with Human Rights: The Right to Equality' in S Fredman (ed) *Discrimination and Human Rights: The Case of Racism* (2001) 9, 23.

[23] MJ Matsuda 'Looking to the Bottom: Critical Legal Studies and Reparations' 22 *Harvard CR-CL L Rev* 323 (1987).

[24] C McCrudden 'Institutional Discrimination' (1982) *OJLS* 303.

[25] L Lustgarten above n3, 181.

and political marginalisation, regrouped as 'disparate impact'.[26]

Dispensing with a requirement of direct, intended or prejudicially motivated action to establish discrimination, allows one to challenge 'facially benign' or 'putatively neutral' practices or rules for their discriminatory *impact*. From this broadened perspective, discrimination can be direct or indirect, and disparate impact suffices to establish at least a *prima facie* case of discrimination. Discrimination is not confined to the 'animus of evil wrongdoers', but is something 'far more deep-seated and impersonal: characteristic terms in the vocabulary of enforcement are patterns, practices, structures and effects.'[27] Institutional discrimination refers to the disproportionate exclusionary impact of various formal and informal labour market institutions, e.g. apprenticeships requiring long periods of training; the imposition of minimum age limits; nepotism; aptitude tests which reward particular kinds of education and qualifications; and systems of seniority requiring a length of continuous service with the same employer (sometimes in the same job, plant or company).[28]

There exist important variants regarding the subjects of disparate impact impact: some focus on individuals, while others consider impact on groups. Thus, while central to the group-orientated approach, disparate impact is not coterminous with it. Disparate impact can, in certain cases act as a supplement to the model of individual justice, as evidence of an intention to discriminate on the basis of race, partly because of the problems which inhere in establishing 'discriminatory intent',[29] though it remains an essentially individualistic normative paradigm adopting a collective perspective.

Within the alternative pole is the model of group justice, the normative underpinning of

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[26] The advent of this concept came in *Griggs v Duke Power CO* 401 US 424 (1971). The judgment of Chief Justice Burger which confirmed that Title VII of the Civil Rights Act 1964 "proscribed not only overt discrimination but also practices that are fair in form but discriminatory in operation. The touchstone is necessity. If an employment practice which operates to exclude Negroes cannot be shown to be related to job performance the practice is prohibited". *Griggs* related specifically to the discriminatory effects of employment tests and educational qualifications for requirement and promotion, but the ratio has been applied in other cases where requirements have been found to have disparate impact on minorities. *Steelworkers v Weber* 443 US 202 (1979); *Fullilove v Klutznick* 448 US 448 (1979) (concurring opinion of Justice Marshall). *Griggs* was explicitly referred to in the legislative history of the UK Race Relations Act 1976; Official Report, Standing Committee B, 22nd April 1975 and, with respect to the meaning of justifiability of a job requirement or condition, cited with approval by Phillips J in *Steel v Post Office*, [1978] ICR 181 (EAT).

[27] L Lustgarten above n3; G Bindman 'Indirect Discrimination and the Race Relations Act' *NLJ* 26 April 1979.

[28] C McCrudden's article above n24, 313-317.

[29] Intent is an elusive concept, and this is especially true of 'institutional' or 'corporate' intent. Furthermore, purpose or aim is central to intent. The greater the number of permissible purposes, the more difficult it is to identify discriminatory intent. LG Simon 'Racially Prejudiced Government Actions: A Motivation Theory of the Constitutional Ban Against Racial Discrimination' (1987) 15 *San Diego Law Review* 15, 1041; D Strauss 'Discriminatory Intent and the Taming of Brown' (1989) 56 *University of Chicago Law Review* 935.

which is openly consequentialist and explicitly collective.[30] It views social structure, popular culture, the labour market and even the political system as imbued with discriminatory practices which are not impugned under the individual justice model or weaker versions of disparate impact theory. This model looks retrospectively to historic subjugation to inform its conception of discrimination, as well prophylactically to measures for its redress such as affirmative action. This controversial approach is beset with problems of a political and practical nature. Definition of the protected group is fraught with problems, and the evidentiary difficulties implicated in in assessing disparate impact considerable.[31] 'It has proved far from straightforward to agree a methodology for establishing such disparate impact. [...] Once the formula has been settled in any particular case, further controversy arises as to whether the difference is sufficient to warrant a finding of direct discrimination. Is statistical significance enough or should the difference be considerable in some intuitive sense?'[32] It is also worth noting that a finding of indirect discrimination does not of itself trigger a duty to accommodate diversity, remedy systemic discrimination or ensure that applicants are equipped for a job or benefit

This pole favours wider material coverage, acknowledging the inter-related nature of species of rights, registering more *types of discrimination* and the intersectionality of different types of discrimination, such as religion and ethnicity, nationality and race, or gender and race.[33] Direct and indirect discrimination are understood as different in form rather than kind, since they ultimately result from the same root prejudice. Harm is contextualised and historically predetermined, and not founded on ill-fit. The relevant time scale is vastly expanded with the history of discrimination against a particular group considered germane to current discriminatory patterns. Historical accounts of racial disadvantage can be controversial, as can interpretations of their contemporary consequences, or the correct legal response and the modern allocation of burdens.[34]

Past discrimination results in under-representation of racial minorities in employment, and in their lack of qualifications, personal contacts, and adaptability to the conventions, structures, and customs of numerous professions.

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[30] On collective rights, M Malik 'Communal Goods as Human Rights' in C Gearty & A Tomkins (eds) *Understanding Human Rights* (1996) 138.

[31] The Race Directive employs a proportional rather than an empirical one.

[32] S Fredman above n21, 25

[33] S Fredman & E Szyszczak 'The Interaction of Race and Gender' in B Hepple and E Szyszczak (eds) *Discrimination and the Limits of Law* (1992) 214.

[34] RH Fallon & PC Weiler '*Firefighters v Stotts*: Conflicting Models of Racial Justice' 1984 *Sup. Ct. Rev.* 1.

Thus, the formal notion of 'equality of opportunity'[35] is inadequate because it fails to fully capture discrimination, touching only formal obstacles and not systemic or contextual ones. It registers formal as well as informal inequalities, through focusing on the contextual and substantive reality of participation, employment, education or political voice. It scrutinizes the unequal *operation* of informal institutions such as the market[36] and the structural and systemic barriers which support them. These are features left unchecked under the traditional anti-discrimination principle which assumes the even-handedness of institutional structures, cultural norms or social practices.

The alternative pole embraces a conception of equality not confined to process and equal treatment, but one tied to substantively equal outcomes as a gauge of whether rules, practices or structures *in fact* respect equality[37]. Disadvantage and stigma become the proxies for inequality targetted by anti-discrimination law, rather than ill-fit or breach of means-ends rationality. In this way it targets inequality emanating from rules and structures which are not facially discriminatory, but which discriminate in effect. This more capacious conception of equality is also animated by a redistributive impulse which calls for current redress of inequalities for past harm.[38] this is evidenced in the realm of remedies such as affirmative action, which again may benefit individuals or groups. This is perhaps the most contentious of all the tenets of the alternative pole and there are significant problems attendant to it. Among these is the potential unfairness of burdening people not directly responsible for current or past discrimination,[39] the potential for it to be socially divisive, [40] or economically inefficient,[41] and the potential for stigmatization of minorities' regardless of their ability or achievements.[42]

The baselines employed to determine what is like or unalike for the purposes of the equality principle are determinative: those of the liberal perspective are presented as immutable,

[35]This distinction is illustrated in *Ward's Cove Packing Co. v Antonio*, 109 S.Ct. 706 (1989) where the defendant was itself also guilty of past discrimination against the plaintiffs.

[36] F Hirsch *Social Limits to Growth* (1976); J Maass 'Benefit-Cost Analysis: Its Relevance to Public Investment Decisions', 80 QJ *Econ* 208 (1966).

[37] For a critique of formal equality in the context of gender discrimination, ME Becker 'Prince Charming: Abstract Equality' in C McCrudden (ed) *Anti-discrimination Law* (1991) 449; S Fredman 'European Community Discrimination Law: A Critique' [1992] *ILJ* 119.

[38] This issue of redistribution will be returned to below in discussions of affirmative action.

[39] Eg burdening first generation Irish or Italian immigrants for the legacy of slavery of African-Americans in the United States.

[40] W Blackstone 'Reverse Discrimination and Compensator Justice *Social Theory and Practice* 3 (1975).

[41] G Loury 'How to Mend Affirmative Action' *The Public Interest* (1997) Spring.

[42] SL Carter *Reflections of an Affirmative Action Baby*, (1991) 69; R Delgado 'The Imperial Scholar: Reflections on a Review of Civil Rights Literature' 132 *U . Pa. L. Rev.* 561 S Steele *The Content of Our Character: A New Vision of Race in America* (1991) *Contra.* A Aleinikoff 'A Case for Race-Consciousness' 91 *Colum. L. Rev.* 1060.

abstract and objective, typified by its endorsement of 'colour-blind' or 'gender-neutral' models, divorced from context. Conversely, the alternative pole allows for embracing the contingency and subjectivity of equality baselines defined by context, rejecting the obfuscation of putatively neutral or objective structures and choices, which in turn leaves it open to profound indeterminacy.

The favoured conception of equality is less symmetrical, and acknowledges the diversity and eclectic nature of disadvantage suffered by racial and ethnic minorities in an attempt to register the distinctiveness of their experiences and their history. It goes beyond *status quo* values, and preferences defined according to (white, male) majoritarian standards. Those *status quo* values involve prior choices which are 'neither natural nor inevitable. From this point of view 'difference' - [...] is a function of social choice. As such it represents an artifact rather than an immutable and inherent characteristic.'[43] The alternative conception of equality embraces human difference as a social construct, capable of constituting a value in and of itself.

The alternative pole accommodates more *types or forms* of equality since it goes beyond formal equal treatment. Distinctions in *forms* of equality is central to US equal protection jurisprudence in respect of race, and was pivotal to the legitimation of segregation. While equality in political and civil rights was formally recognised, that did not imply substantive equality in social life. The alternative conception of equality stands marked contrast to traditional conceptions of liberal equality[44] by relying on a more substantive definition, under which distributional equities are emphasised over 'liberty-orientated goals.'[45] Equality concerns 'equal social worth, not merely of equal natural rights'[46] since the context and reality of the exercise of such rights is determinative, and because 'the formal recognition of an equal capacity for rights [is] not enough.'[47] Equality can and should inform one's conception of freedom, and to be authentic or meaningful, that freedom must be 'positively' ensured in the social contexts in which rights are exercised.

Another point of distinction is the interpretation of equality of opportunity to which the

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[43] G Quinn 'Rethinking the Place of Difference in Civil Society - the Role of Anti-Discrimination Law in the Next Century', in R Byrne & W Duncan (eds) *Developments in Discrimination Law in Ireland and Europe* (1997) 65, 71.

[44] For an example of a critique of Rawls' theory of equality, M Sandel *Liberalism and the Limits of Justice* (1982) 66-76.

[45] This tendency within liberal thought is attributed to Rawls and Dworkin by W Kymlicka *Contemporary Political Philosophy* (1990) 93-94.

[46] This phrase is used by Marshall in his endorsement of a widened conception of equality as part of his vision of social citizenship; TH Marshall & T Bottomore *Citizenship and Social Class* (1996) 24.

[47] TH Marshall, above n46,

alternative perspective applies a broader definition of equality of opportunity. 'The beginning is freedom; and the barriers to that freedom are tumbling [...]But freedom is not enough. [...] it is not enough to open the gates of opportunity.'[48] Equality of opportunity is typically associated with formal interpretations of equality[49] and 'the rationing of opportunities for people to *become* unequal.'[50] The alternative perspective adopts a critical approach to individualism, merit, fair competition, achievement and success, since they are unable to accommodate subjective notions like prejudice, stigma, social disadvantage, cultural discrimination[51] and the 'psychology of dominance'. They ignore the socially and historically contingent nature of talent, intelligence, achievement or 'skills' at its core, thereby reinforcing the racialised hierarchy they obfuscate.

The ever-equivocal notion of equality of opportunity should be measured according to representation in the employment market, or educational and political demographics, not formal rules of equal treatment which veil distorted power relations.[52] Without *equal access to* opportunity, what value can equality of opportunity or equal treatment have? "It [equality of opportunity] is a myth that rationalizes hierarchy, justifies disproportionate access to goods and power, and shames those at the bottom into internalizing inadequacy."[53]

Equality of opportunity and equality of outcomes are not however mutually exclusive ideas.[54] Equality of opportunity can be interpreted expansively, and like the concept of discrimination, can refer to contextual, structural and distributional features as much as formal or procedural ones, registering the inequalities which exclude people *from* access to the market as well as participation *within* it. At one end of an equality of opportunity spectrum is the purely formal conception of opportunity: technically open to all, factually closed to many; at another is a definition which allows for, or even demands, a 'head start' for those whose access to education or employment is presumptively narrow.[55]

Thus, 'true equality of opportunity' requires that the conditions for that opportunity and

[48] LB Johnson Commencement address to Howard University, 4.6.1965 'Document 91' in A Blaustein & R Zagrando (eds) *Civil Rights and the American Negro* (1968) cited by A Freeman above n16, 295.
[49] L Lustgarten above n3 181 " direct discrimination is the legal expression of the equal opportunity approach...".
[50] JS Fishkin *Justice, Equal Opportunity, and the Family* (1983) 1.
[51] For examples of a collective approach to anti-discrimination law, N Lacey 'Legislating Against Sex Discrimination: Questions from a Feminist Perspective' 14 *JL.& Soc* 411 (1987).
[52] A Freeman above n16, 380-1.
[53] A Freeman above n16; 362.
[54] For a lucid discussion of the notion of equality of opportunity, and an attack on the distinction between equality of opportunity and equality of results as both unhelpful and misleading DA Strauss 'The Illusory Distinction between Equality of Opportunity and Equality of Results' in N Devins & DM Douglas (eds) *Redefining Equality* (1998) 51.
[55] C Edley *Not All Black and White: Affirmative Action and American values* (1996) 165-6.

competition are fair which, requires that one look *behind* the traditional principle of equality of opportunity, and scrutinise the impediments to *access*. Finally, the alternative perspective incorporates a value-driven approach, which is linked to context and to the self-consciously teleological approach this perspective adopts in general. Thus, while even a process-based approach, centered on proportionality cannot be freed of its value content, the alternative pole wholly embraces political and normative values. Thus, it posits the substantive equality of people, their human dignity, autonomy and inherent worth as its driving forces and aims. This approach forces the values behind any rule or policy to be made explicit and substantiated, and calls for the same approach to values within the rights discourse.[56]

(2) The Market

The market is characteristically central to the liberal pole. It is viewed as a forum based on free exchange which serves the economic aim of allocating people to job in which they will be most productive. It is assumed to be free and accessible to all, rewarding (certain conceptions of) merit, effort, talent and productivity, which are values of instrumental and inherent worth. The anti-discrimination principle in this context prevents the *formal exclusion* of talented people from the market on the basis of their race because of it being a characteristic presumptively unrelated to efficiency. Extirpating race discrimination facilitates the efficient operation of the market.

Under the alternative pole, the market is viewed with greater skepticism and its role conceived of as more limited: it is not some fully functioning forum of free exchange and efficient allocation, but rather something needing regulation since it is not self-correcting and is not itself a repository of value. It may reward effort or talent, but there can be no presumption that it offers equal access to all, or that once access is gained, all participants start with anything resembling equality of opportunity. Further, values or ideals supposedly upheld by the individualistic reliance on the market, such as merit or talent are not taken for granted, since they are intrinsically bound to values and interests which are inevitably subject to change, and are all too often aligned to the *status quo* .

(3) Subjects: individuals or groups

[56] The German Grundgesetz adopts this approach to fundamental rights, beginning with a declaration on human dignity as a value above all others, which substantive rights are designed to protect. Article 1(1)

A seminal tenet of the traditional liberal pole is individualism.[57] This pole emphasises a conception of liberal rights, conceived of in individualistic and atomistic terms, prioritising right over duty, and the private realm over the public domain.[58] It favours the 'Model of Individual Justice'[59] rather than a Group Justice Model, adopting what has been termed the 'perpetrator perspective.'[60] This is significant for the definition of discrimination itself,[61] registering particularised instances of discrimination rather than generalised group disadvantage. Only discrimination arising in individual cases should be tackled, and the only parties to such cases are the actual victims and perpetrators of particularised acts, with the only liability imputable to an individual wrongdoer. This bipolar conception[62] of discrimination focuses exclusively on current discrimination as something anathema to both the market and society, which is isolated to the 'misguided conduct of particular actors',[63] rather than a social phenomenon, predetermined contextually, historically or structurally.

The perpetrator perspective remains closely wedded to a relatively narrow conception of 'violation', grounded in notions such as free will, rationality, rather than the structures or social phenomena of race discrimination, which it is unable to register. The concept of fault[64] is also transposed into the perpetrator perspective relating to, and reinforced by, the ideal of

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[57] Owen Fiss maintains that the foundational concept of means-ends rationality is inherently individualistic and independent of the recognition of social groups, O Fiss 'Groups and the Equal Protection Clause' (1976) 5 *Philosophy and Public Affairs* 107.

[58] Critiquing aspect of the liberal rights discourse, P Gabel 'Book Review of Ronald Dworkin's "Taking Rights Seriously"' 91 *Harvard L Rev* 302 (1977); P Gabel 'The Phenomenology Rights-Consciousness and the Pact of the Withdrawn Selves' 62 *Texas LRev* 1563 (1984); MA Glendon *Rightstalk: The Impoverishment of Political Discourse* (1991); K Klare 'The Public-Private Distinction in Labor Law' 130 *U Pa LRev* 1358 (1982); E Sparer 'Fundamental Human Rights, Legal Entitlements and the Social Struggle: A Friendly Critique of the Critical Legal Studies Movement' 36 *Stanford LRev* 509; RM Unger *Knowledge and Politics* (1975) 63-103.

[59] RH Fallon and PC Weiler above n34.

[60] AD Freeman 'Legitimizing Racial Discrimination Through Antidiscrimination Law: A Critical Review of the Supreme Court Doctrine' 62 *Minnesota LRev* 1049 (1978) in C McCrudden (ed) *Anti-discrimination Law* (1991) 248.

[61] The perpetrator perspective, is usually identified with a very narrow approach; there exist however, a number of less extreme variants, such as where the defendant (perpetrator) has specifically discriminated, but there is a *group of victim claimants* rather than one individual victim; or where the constitution of the victim pool is undefined; or where the relief requested broadly cast or posited in 'group terms'. These variants are cogently discussed by C Edley Jnr. above n 55, 84-106.

[F62] Another aspect of this 'bipolarity' emerges in enforcement through litigation which, under most common law systems, remains individualistic and adversarial in its construct, more amenable to the vindication of individual rights than group interests.

[63] Freeman above n16, 288.

[64] The requirement of causation in this area of law has been pivotal to containing the operation of the anti-discrimination principle. Freeman notes Eisenberg's attempt to build a Comprehensive theory on the notion proximate cause in respect of civil rights adjudication and race discrimination, R Eisenberg 'Disproportionate Impact and Illicit Motive: Theories of Constitutional Adjudication' 52 *NYU LRev* 36 (1977) 42-99.

individualism and a process-based perspective. With the emphasis on fault, the scope of remedies is severely circumscribed, since only those directly responsible for discriminatory acts can be called upon to bear the burdens of redressing them. This forecloses the possibility of relying on historic subjugation or group-based values required for affirmative action.[65]

The alternative pole incorporates collective notions such as the group,[66] which is recognised as more than the sum of its parts[67] and as an independently relevant entity. While objective definitions of the group are problematic, it can be identified internally by a degree of interconnectedness and interdependence, and externally by some form of identity and shared meanings. The rationality or identifiability of racial groups is however, not a simple matter of shared physical characteristics, and is more widely understood in social, historical and cultural terms.[68] The embrace of difference in terms of racial group identity is a recurring theme within the alternative perspective. It is a first step in the process of cultural, political and even professional self-determination and definition of minorities within a majoritarian polity.[69]

The group perspective is therefore one axis upon which to endorse difference in a positive sense, and remains meaningful both to the identification and redress of race discrimination,[70] from distributive justice and affirmative action, to alternative conceptualisations of liberal integrationist politics, to the more ephemeral, but equally important realm of racial kinship, cultural identity and self-respect.[71] The value of recognising the racial group as a meaningful entity is essential for a progressive response to the social construct of race, and its role in combating race discrimination and in fostering diversity.[72]

(4) Perspectives: victim or perpetrator

The the subjects of anti-discrimination law are determined by the 'perspective' adopted.

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[65] Under the liberal pole affirmative action is often called 'reverse discrimination'. B Gross (ed) *Reverse Discrimination* (1977); R O'Neil *Discriminating Against Discrimination* (1975); A Scalia 'Commentary: The Disease as Cure' (1979) *Washington U LQ* 147.

[66] This is the second fundamental feature of a widened conception of discrimination noted by L Lustgarten in respect of the UK RRA 1976 provision on indirect discrimination, S 1(1)(b); L Lustgarten above n3; 182.

[67] RM Unger *Knowledge and Politics* (1984) 81.

[68] PJ Williams '*Metro Broadcasting Inc v FCC*: Regrouping in Singular Terms' in G Peller, KW Crenshaw, N Gotanda, K Thomas (eds) *Critical Race Theory* (1995) 190.

[69] D Wilkins 'Identities and Roles: Race, Recognition and Professional Responsibility' 57 *Maryland Law Review* 101 (1998).

[70] For a polemical defence of race consciousness and group perspectives, G Peller 'Race-Consciousness' in *Critical Race Theory* above n69, 127.

[71] Cornel West *Race Matters* (1994) 93-99.

[72] Discussing race consciousness, group identity and the value of diversity, RD Barnes 'Politics and Passion: Theoretically a Dangerous Liaison' 101 *Yale LJ* 1631 (1992).

The liberal pole adopts a 'perpetrator perspective', and the alternative pole embraces the 'victim perspective',[73] emphasising the commonality of experience between members of racial and ethnic minority groups subjugated as a result of the characteristics they share. 'The effects of racism and race discrimination are only fully understood in frankly ascertaining the fate of victims.'[74]

Once a symmetrical and formal notion of equality is abandoned, so too are the presumptions associated with individualism, universalism, negative freedom and formal equality. Once the paradigm is substantively expanded the position of groups can be accommodated and group disadvantage registers as a breach of equality as much as individual direct discrimination. Discrimination is not viewed as an individualised occurrence, but as a socially constructed process, too pervasive and generalised to be premised on direct, provable harm perpetuated by individuals against individuals.[75] Its true indices are group characteristics and generalised disadvantage not individualised bipolar disputes.[76] The concept of fault holds less prominence since the responsibility for discrimination is too pervasive.

(5) Remedies

Directly linked to the foregoing is the question of remedies. The liberal pole confines remedies to the relationship between the perpetrator and the victim in respect of the actual harm caused. Such remedies might include specific performance, the reinstatement of an individual employee, a fine or penalty being imposed on the individual perpetrator. The harm must be present, not historical or cumulative, and the remedy must mirror this: it is invariably reactive rather than prophylactic.

In terms of media of resolution, since the liberal perspective remains focused on direct discrimination, it follows that it favours the formal judicial process and an adversarial model of dispute resolution, rather than alternative dispute resolution such as conciliation or mediation, which may be more suited to the discrimination context.

[73] AD Freeman 'Legitimizing Racial Discrimination Through Antidiscrimination Law: A Critical Review of Supreme Court Doctrine' 62 *Minnesota Law Rev* 1049.

[74] T Van Boven 'Discrimination and Human Rights Law: Combating Racism' in S Fredman (ed) *Discrimination and Human Rights* (2001) 111,115.

[75] From a practical perspective, the 'perpetrators' are often unidentifiable because of being corporate bodies or holders of office.

[76] Section 1 (1) (b) of the Race Relations Act 1976 relating to 'indirect discrimination' provides a good legislative example of the recognition of the relevance of the group in respect to the legality of a particular job requirement or condition. This provision goes some way towards recognising the inadequacy of a private law model to redress the disadvantage of large pools of people who cannot, as a result of certain immutable characteristics, fulfill particular requirements or conditions.

The alternative pole casts the net of harm, and therefore remedies, far wider. Registering past discrimination is linked to adopting a group-based model of justice, identifying the relevant groups in a historical and contextual way. Harm against subjugated minority groups registers as disparate impact and the duty to redress it lies throughout a community in respect of 'discrete and insular minorities'[77] within it. This opens the possibility for affirmative action measures which seek to redress disadvantage through race-based measures in a variety of fields.[78] The bases for affirmative action include redressing past and historic disadvantage, or the value of the widest participation of all groups in a society, as well as the value of diversity. There is, under such a conceptualisation, little or no reliance placed on the notions of 'desert' or fault, since the legacy of subjugation, poverty and generalised disadvantage for racial minorities supports affirmative action.

The endorsement of a group perspective is a prerequisite for such action. An important aim of anti-discrimination law should be to increase the representation of disenfranchised groups. Perpetuated disadvantages and stigma associated with race discrimination have been inflicted on entire groups, with harm against individuals wrought as a result of membership of such groups. Remedial efforts to redress such disadvantage are properly posited in collective terms. The aims of the group-orientated model lie squarely in a more teleological or consequentialist vein than those of the more restrictive individual justice model. They are based on the value-laden premise that the objectives of anti-discrimination law include increasing the educational, social and employment opportunities of minorities, thereby fostering social participation, mobility, voice and influence. The model pursues the *de facto* inclusion of such groups in a variety of contexts, rather than the facial or apparent rationality of the processes that govern them.

(6) Rights

There are fundamental divergences between the manner in which the liberal and alternative perspectives interpret rights. Liberal rights discourse tends to prioritise the individual, with rights mediating the boundaries between individuals and the state, protecting individuals'

[77] This term was first coined in the famous 'footnote 4' of Justice Harlan's dissent in *US v Carolene Products* 304 US 144 (1938) 158; and later used in *Brown v Board of Education* to describe the sorts of group a widened and less formalistic conception of discrimination should protect, 347 US 483 (1954).

[78] Affirmative action first emerged in US Executive Orders of the 1960's imposing positive duties on government contractors to increase the representation of minorities and women in the workforce. Executive Order 10925 issued by President Kennedy in 1961. The current Order 11246 was issued in 1964 by President Johnson and amended in 1967 to cover sex and race.

exclusionary zones of immunity from social responsibility.[79] It presents the individual as isolated, striving for a liberty that is only an anxious privatism',[80] where rights simply represent the 'passive possibility' for connection.[81]

Rights can also be interpreted as strongly collective. This may imply a less atomistic view of individual rights, or even group or communal rights.[82] Such theories emphasise 'the communal content in as many rights as possible',[83] the exercise of a right enhances rather than diminishes the rights of others[84] since rights foster communal values and goods. Rights should not carry in-built potential for oppression, but should protect groups and individuals from oppression, highlighting the social responsibility incumbent on all. Rights should be used to liberate and reform existing social and political structures,[85] rather than serving to legitimate social hierarchy, or secure acquiescence to a fundamentally unjust social order.[86] Rights should be defined through an inclusive political discourse which recognises the interconnectedness and solidarity of rights, and thereby enables the full flourishing of the individual personality.

A seminal cornerstone of liberal rights discourse is the public-private distinction, in whose name rights police public power. 'The idea of human freedom was, and still is, historically linked to the strict maintenance of the public/private divide. Its primary purpose was the protection and segregation of the persons from political authority and from the group and the facilitation of space for the pursuit of private choices - whether in the economic, social or intimate sphere.'[87] The distinction is, however, notoriously malleable and its definition inevitably reliant on political values and preferences: most state action can be characterised as either an interference with the associational rights of groups, or as a vindication of (individual) rights.[88] Is a completely immune private sphere even possible since almost any action in that

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[79] A Hutchinson & P Monahan 'The "Rights Stuff": Roberto Unger and Beyond', (1984) 62 *Texas Law Review* 1477 , 1520.

[80] P Gabel 'Book Review of Ronald Dworkin's "Taking Rights Seriously"' (1977) 91 *Harvard LRev.* 302, 315.

[81] P Gabel 'The Phenomenology of Rights Consciousness and the Pact of the Withdrawn Selves' (1984) 62 *Texas Law Review* 1577,1565.

[82] On collective rights, M Malik above n30; S Lynd 'Communal Rights' (1984) 62 *Texas Law Review* 1417, 1421.

[83] S Lynd above n82 ,1422.

[84] S Lynd above n82 ,1422.

[85] For a theory of rights in this vein, RM Unger *The Critical Legal Studies Movement* (1984).

[86] A Hutchinson & P Monahan above n79, 1486.

[87] G Quinn above n42, 67.

[88] In the context of corporations, J Dewey 'The Historical Background of Corporate Legal Personality' 35 *Yale LJ* 655 (1926); in the context of family law F. Olsen 'The Myth of State Intervention in the Family' 18 *Michigan J L Rev* 835 (1984); in the context of labour law K. Klare 'The Public- Private Distinction in labor Law' in Symposium on the Public-Private Distinction' 130 *U Pa L Rev* 1289 (1982).

sphere can be conceived of as connected with some aspect of the public sphere or with the lives of other individuals? The legitimacy of a distinction which immunizes deleterious social consequences simply because they occur within the realm of private rights requires scrutiny.[89] Under the alternative approach, little or no reliance is placed on this distinction, since it is held *not* to reflect the true nature and location of social power. That is, private power is often indistinguishable in its effects from public power.[90] Power is pervasive and not respectful of a '*cordon sanitaire*' between putatively public or private realms; this critique applies especially to economic power which in turn, is viewed as affecting political and social power.[91] The harm of such claims for (racial) minorities and those who are socially, politically and economically disenfranchised is clear.

This brief discussion of rights speaks directly to the ways in which we conceptualise discrimination, and the rights and responsibilities associated with non-discrimination. The alternative pole endorses imposing responsibility in both public and private realms, in a way disfavored under the anti-discrimination principle.[92]

'For the historically disempowered, the conferring of rights is symbolic of all the denied aspects of humanity [...]. For blacks, then, the attainment of rights signifies the due, the respectful behaviour, the *collective responsibility* properly owed by a society to one of its

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[89] This is because the distinction is frequently deployed to limit the remit of state power or conversely, to shrink state obligation and duty.

[90] On the public - private distinction AA Berle 'Constitutional Limitations on Corporate Activity - Protection of Personal Rights From Invasion Through Economic Power' 100 *U Pa L Rev.* 933 (1952); MR Cohen 'Property and Sovereignty' 13 *Cornell LQ* 8 (1927); MR Cohen 'The Basis of Contract' 46 *Harvard Law Rev.* 553 (1933); M Friedmann 'Corporate Power, Government by Private Groups and the Law' 57 *Col. Law Rev.* 155 (1957); G Frug 'The City as a Legal Concept' 93 *Harvard Law Rev.* 1057 (1980); TH Green *Lectures on the Principles of Political Obligation* (1895) (1987); RL Hale 'Coercion and Distribution in a Supposedly Non-Coercive State' 38 *Political Science Quarterly* 470 (1923) reprinted in WW Fisher, MJ Horwitz, TA Reed (eds.) *American Legal Realism* (1993) New York, OUP; 101; RL Hale *Freedom Through Law: Public Control of Private Governing Power* (1952); LL Jaffe 'Law-making by Private Groups' 51 *Harvard Law Review* 201 (1937); C Sunstein *The Partial Constitution* (1993); C Sunstein '*Lochner*'s Legacy' 87 *Columbia L Rev* 873 (1987); RM Unger *Law in Modern Society* (1976); Vol 130 U *Pa L Rev* (1982) Symposium on the Public-Private Distinction.

[91] D Freeman & E Mensch ' The Public- Private Distinction in America Law and Life' 36 *Buffalo L Rev* 237 (1987); MR Cohen 'Property and Sovereignty', 13 *Cornell LQ* 8 (1927); RL Hale 'Coercion and Distribution in a Supposedly Non-Coercive State' 38 Pol Sc Q 470 (1923); 'The Basis of Contract' 46 *Harvard L Rev* 553 (1933); RL Hale 'Force and the State: a Comparison of "Political" and "Economic" Compulsion' 35 *Colum L Rev* 149 (1935); LL Jaffe *ibid*; R Pound 'Liberty of Contract' 18 *Yale LJ* 454 (1909). See also M Horwitz, D Kennedy, K Klare et al. in Symposium on the Public-Private Distinction Vol 130 *U Pa L Rev* (1982).

[92] L Lustgarten on S1 (1)(b) of the UK RRA 1976 , above n3; 183. See also UK Race Relations (Amendment) Act 2000 S71 which imposes duty. S71(1) provides: 'Every body or other person specificed in Schedule1A or of a description falling within that Schedule shall, in carrying out its functions, have due regard to the need (a) to eliminate unlawful racial discrimination and (b) to promote equality of opportunity and good relations between persons of different racial groups.'

own.'[93] The aspiration offered racial minorities by liberal rights should therefore not be denied: 'for a people so solemnly ruled 'other' the first sentence of the 14th amendment declaring that "All persons born or naturalized in the United States [...] are citizens of the United States, and of the state in which they reside" is obviously more than a merely formal legalism'.[94]

Traditional liberal rights discourse has had a role in 'combating the experience of being excluded and oppressed'[95] through fostering the protection of civil liberties for racial and ethnic minorities.[96] And while it has protected entitlement in the weak and powerless far beyond what their actual political power could have produced, the genesis of liberal rights discourse in a Lockean notion of pre-political, individualistic natural rights embraced by laissez-faire capitalism remains anathema to collective values, and the equitable distribution of wealth, power and participation.[97] Thus, liberal rights discourse remains necessary but not sufficient to egalitarian and emancipatory endeavours. While the alternative pole presents many solutions to the limitations and lacunae of the liberal pole, it is also clear that it is attended with problems of its own, related directly to its openly political embrace of values, and its ambitious and expansive reach.

The challenge is to go beyond the formalistic confines of the liberal pole without discarding its contributions, and without becoming so immersed in systemic critique that the very endeavour of combating race discrimination through law is threatened. It is essential that one strive to *transform* the status quo ante, not simply destroy it. It is often through transforming the institutions and forms and laws that exist that we can transcend them.

3. THEORY TO SUBSTANCE: EU LAW MEASURES ON RACE DISCRIMINATION

EU law contains distinctive interpretations of the theoretic tenets discussed hitherto, and the following discussion applies a theoretic analysis to EU law measures, with special emphasis on the new Race Directive. This excursus will mirror the foregoing headings for the purposes of clarity, and will explore the advances and limitations of EU measures in this realm,

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[93] PJ Williams 'Alchemical Notes: Reconstructing Ideals from Deconstructed Rights' (1987) 22 *Harvard CR-CL L Rev* 401, 416. (emphasis added).

[94] A Freeman above n 52, 333.

[95] KW Crenshaw 'Race, Reform and Retrenchment: Transformation and Legitimation in Anti-Discrimination Law' (1988) 101 *Harvard L Rev* 1331, 1357.

[96] KW Crenshaw above n95, 393, note 4 citing *Brown v. Board of Education*, 347 US 483 (1954) regarding equal opportunities for non-segregated school education, and *Bakke v Regents of the University of California*, 483 US 265 (1978) which held that university admissions programs may consider race as a relevant factor in selection.

[97] MJ Horwitz 'Rights' 23 *Harvard CR-CL L Rev* (1988) 393.

concluding with a critique of the lacunae in EU discrimination law.

(1) Discrimination and Equality

EU measures recognise race discrimination as a contextually defined and widespread social problem manifest in individual, collective and institutional ways.[98] In numerous substantive areas EU law incorporates direct and indirect discrimination, embodying both liberal and alternative poles, often in a single instrument. This discussion highlights the various strands of liberal and alternative poles as they are manifest in EU anti-discrimination measures with special emphasis on those concerning race and ethnicity.

The logic of recognising these various forms of discrimination concurs with a recognition of the diversity of forms of race discrimination, and with the cultural and historical differences within and between Member States, which would render a unitary, direct discrimination model inappropriate in principle, and ineffective in practice. While the language of EU law favours the 'principle of equal *treatment*', that treatment has been understood in a broad and contextual manner incorporating both poles. 'The wide definition of race discrimination which has become universally accepted, includes any treatment 'based on race, colour, descent or national or ethnic origin with a discriminatory purpose or *effect* [...].'[99]

While historically founded on direct discrimination concepts, EU gender discrimination measures and jurisprudence[100] now contain expansive definitions of discrimination.[101] Article 43 EC,[102] as well as Directives and Regulations on equal pay for equal work[103] and related

[98] Although some critiques exist of even the European Parliament's vision of race discrimination; L Fekete 'Report of the European Committee on racism and xenophobia: a critique' (1991) *Race & Class* 147-149.
[99] D Curtin & M Geurts 'Race Discrimination and the European Union Anno 1996' (1996) 2 *NQHR* 147,151 (emphasis added)
[100] S Fredman *Women and the Law* (1997) Ch 1; R Nielsen and E Szyszczak *The Social Dimension of the European Community* (1997) Ch 4.
[101] This is so despite a number of retreats in the ECJ jurisprudence.
[102] Article 141 EC, ex 119 EC.
[103] Council Directive 75/117/EEC [1975] OJ L 45/19 on equal pay for men and women targetted direct rather than indirect discrimination, although Article 1 states 'the elimination of all discrimination on grounds of sex with regard to *all* aspects and conditions of enumeration'. Article 3 reads: 'Member States shall abolish *all discrimination between men and women* arising from laws, regulations or administrative provisions which is contrary to the principle of equal pay.' This provision speaks to the disparate impact of laws, presumably targeting even facially neutral ones.

substantive areas,[104] all support a widened, contextually-defined conception of discrimination,[105] embracing direct as well as indirect discrimination, registering disparate impact, and accommodating group perspectives (eg part-time work and pregnancy)[106]. The recent Council Directive on the Burden of Proof in sex discrimination cases upholds a similar perspective,[107] identifying indirect discrimination where an apparently neutral provision, criterion or practice disadvantages a substantially higher proportion of the members of one sex unless it is appropriate and necessary, and justifiable by objective factors unrelated to sex.[108] *Bilka-Kaufaus* [109] represents a strong judicial assertion of indirect discrimination under Article 141 EC. The more robust vindication of the principle of equal treatment came with the ECJ's expansive interpretation of the concept of pay rather than a stretch of the concept of equality[110], though the concept of discrimination may have been indirectly strengthened through the ECJ's widening of its material application[111]. Concurrent with this is the substantive and progressive conception of equality evidenced in EU law concerning gender discrimination, which is salient in the Pregnant

[104] Council Directive 76/207/EEC [1976] OJ L 39/40 on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion and working conditions: this Directive targets areas beyond direct discrimination. Article 2 specifically outlaws discrimination on grounds of sex 'either directly or indirectly by reference in particular to marital or family status'. Council Directive 79/7/EEC [1979] OJ L6/24 on the progressive implementation of the principle of equal treatment for men and women in matters of social security; Council Directive 86/378/EEC [1986] OJ L 225/40 on the implementation of the principle of equal treatment for men and women in occupational social security schemes; as amended by Directive 96/97/EC [1997] OJ L 46/20. Articles 4(1) and 6(1) respectively make clear that provisions contrary to the principle of equal treatment shall include those based on sex, *either directly or indirectly in particular by reference to marital or family status*.

[105] S Fredman *Women and the Law* (1997) 287-300.

[106] Council Directive 86/613/EEC [1986] OJ L 359/56 on the application of the principle of equal treatment between men and women engaged in an activity, including agriculture, in a self employed capacity, and on the protection of self-employed women during pregnancy and motherhood. Also, Council Directive 92/85/EEC on the introduction of measures to encourage improvements in safety and health at work of pregnant workers and workers who have recently given birth or are breast feeding (1992) OJ L348 and Council Directive 96/34/EC on the framework agreement on parental leave concluded by UNICE, CEEP and the ETUC [1996] OJ L145 Council Once again, the principle of equal treatment in this measures covers sex discrimination which is either direct or indirect by reference to marital or family status.

[107]Council Directive 97/80/EC OJ which was extended to the United Kingdom and amended by Directive 98/52/EC [1998] OJ 205/66 (based on Article 100 EC.)

[108] Article 2.

[109] Case 170/84 *Bilka-Kaufaus GmbH v Weber von Harz* (1986) ECR 1607.

[110] The concept of equal pay, originally borrowed from the ILO's influential Convention on equal pay has been taken further by the Court's expansion of the concept of 'equal pay for work of equal *value*', such that the rule of parity must be applied as between men and women even where they are not doing the same or similar jobs, but doing work of equal *value*, as interpreted under an analytical job evaluation scheme. Case 61/81 *Commission v UK* [1983] ECR 3431. Pensions paid by an employer to an individual employee have been interpreted as 'pay' Case 262/88 *Barber v Guardian Royal Exchange Assurance Group* [1990] ECR 1-1889.

[111] Case 170/84 *Bilka-Kaufaus* ; Case 12/81 *Garland v British Rail Engineering* [1982] ECR 359; Case C-262/88 *Barber* ; Case C-360/90 *Arbeiterwohlfahrt der Stadt Berlin v Bötel* [1992] ECR I-3589; Case C-457/93 *Kuratorium für Dialyse und Nierentransplantationen v Lewark* [1996] ECR I-243; Case C-167/97 *R v Secretary of State for Employment, ex parte Seymour Smith & Perez.* [1999] I-623.

Workers' Directive,[112] the Directive on parental leave,[113] and in *Dekker*. [114]

Articles 12 and 43 EC, and Regulation 1612/68 EEC, all recognise multiple forms of discrimination and the EU law proscription on nationality discrimination contained in Regulation 1612/68 EEC outlaws 'all covert forms of discrimination which, by the application of other criteria of differentiation, which lead in fact to the same result.'[115]

EU soft law recognises the existence of widespread disparate impact and disparate treatment discrimination. Its recognition of contextual forms of discrimination is particularly relevant because of the disparate impact of racially neutral distinctions of EU law, such as those which negatively affect TCN. EU declarations and resolutions on race acknowledge various forms of discrimination, and demonstrate a commitment to their eradication,[116] calling for 'the strengthening and harmonizing national laws penalizing all forms of discrimination',[117] and noting that 'the prevention of racial discrimination in the workplace [...] requires an in-depth knowledge of the voluntary or involuntary forms which direct and indirect discrimination may take.'[118] The definitions employed are substantively broad, encompassing established forms of

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[112] above n106,

[113] Council Directive on Parental Leave, n106, 10

[114] Case 177/88 *Dekker* ECR 1991 I-3941.

[115] E Szyszczak & J Nielsen (eds) *The Social Dimension of the European Community* (1997) 66-68; Case 152/73 Sotgiu [1974] ECR 153; Case 379/87 Groener [1989] ECR 3967; Case 33/88 *Pilar Allué & Mary Carmel Coonan v Universita degli Studi di Venezia* [1989] ECR 1591. In the last case the Court also referred to its judgment in Case 41/84 *Pinna v Caisse d'allocations familiales de la Savoie* [1986] ECR 1.

[116] Eg *Inter-institutional Declaration against Racism and Xenophobia*; [1996] OJ C 158 implicitly recognises the multiplicity and pervasiveness of forms of race discrimination in its Preamble: 'Whereas respect for human rights and the elimination of forms of racial discrimination are part of the common cultural and legal heritage of Member States...'. *Council Resolution on the Fight Against Racism and Xenophobia in the Field of Employment and Social Affairs* [1995) OJ C 296, calls upon Member States to guarantee' protection for persons against all forms of discrimination on grounds of race...' and to fight 'all forms of labour discrimination against works legally resident in each Member State'. Recital 7(a) and (c) respectively. EU Council, Consultative Commission on Racism and Xenophobia, *Final Report* [1995] 6906/1/95 RAXEN 24 (the 'Kahn Report', after Jean Kahn, Chairman of the Commission) calls for labour market organisations to make collective agreement containing provisions prohibiting *all forms of discrimination* on grounds of race etc. Part 2, proposal (g), p 12. The Consultative Commission was established by the European Council at the Corfu Summit in June 1994.

[117] Kahn Report, above n116. II.Proposals; 40, p17.

[118] *1995 Joint Declaration* ; Social Dialogue Summit in Florence on 21 October 1995 (hereafter, 'Joint Declaration')

discrimination,[119] and more contextual ones[120] such as racial harassment,[121] racist violence,[122] incitement to racial hatred,[123] and victimisation 'of a person for asserting his/her rights under the [anti-discrimination] legislation [...].'[124]

The Joint Declaration provides that 'no person should be disadvantaged by unjustified practices, including covert discrimination, which although applied to everyone involved with the organisation, disproportionately disadvantage people from a particular ethnic group'.[125] It recognises indirect and institutional discrimination in the employment context,[126] and recommends that acts of racial discrimination, pressure or behaviour conducive to racial discrimination, abuse or harassment and victimisation of persons subject to discrimination be regarded as serious infringement of the disciplinary rules.[127] The Commission's Communication on Racism, Xenophobia and Anti-Semitism and the proposal for a Council Decision on designating 1997 the European Year Against Racism[128] outline various forms of indirect discrimination, noting the link between exclusion and race discrimination, and recognising the disproportionate economic and social disadvantage of racial and ethnic minorities as forms of discrimination itself.[129]

The EU Race Directive explicitly covers both direct and indirect discrimination .[130] Article 2 stipulates that 'the principle of equal treatment shall mean that there shall be no direct or indirect discrimination based on racial or ethnic origin.' The article goes on to define each. The Directive's classic definition of direct discrimination confines itself to disparate treatment: 'Direct discrimination shall be taken to occur where one person is treated less favourably than

[119] Kahn Report, above n116; Chapter II A 1, p39 Proposal 1(a) and (b) direct discrimination defined as 'treating a persons less favourably on 'racial grounds' for example on the grounds of colour, race, nationality or ethnic or national origins'. Indirect discrimination being defined as 'practices which are discriminatory in their effect on a particular racial ground and cannot be shown to be justified'.

[120] Eg *Inter-institutional Declaration* above n116; Recital 1,'vigourously condemns *all forms of intolerance, hostility and use of force* against persons or groups of persons on the grounds of racial [...] differences'. Recital 1.

[121] The wider definition of incitement to racial hatred, or incitement to racism and violence was not included in the Council Directive, despite proposals by the European Parliament and discussion by the Consultative Commission.

[122] Eg *Resolution of the European Parliament on the resurgence of racism and xenophobia in Europe and the danger of right wing extremist violence* [1993] OJ C 150.

[123] Kahn Report, above n116. III Reports of the Subcommittees: Part 2.,Comment (b)p11 on Racial harassment.

[124] Kahn Report, above n116. Chapter III A Proposal 1(c).

[125] Joint Declaration, above n 119, p 7.

[126] Joint Declaration, above n 119, p 8-9

[127] Joint Declaration, above n119, p 11.

[128] COM (95) 653/4; [1995] OJ 1273, point 12.

[129] Communication, *above* . section 2.3.1, p8.

[130] E Guild 'The EC Directive on Race Discrimination: Surprises, Possibilities and Limitations' (2000) 29(4) *Industrial Law Journal* 416.

another is, has been or would be treated in a comparable situation on grounds of racial or ethnic origin.'[131] While the liberal perspective is present in the definition of directive discrimination,[132] the alternative perspective underpins the Directive's definition of indirect discrimination: 'Indirect discrimination shall be taken to occur where an apparently neutral provision, criterion or practice would put persons of a racial or ethnic origin at a particular disadvantage compared with other persons',[133] and the Directive's provision for 'genuine and determining occupational requirements' which allow States to permit different of treatment.[134] The Directive employs a 'potential disadvantage test' for its definition of indirect discrimination,[135] dispensing with the need for statistical evidence to prove a case of indirect discrimination.

The provision against racial harassment,[136] and the condemnation of instruction to discriminate against persons on grounds of racial or ethnic origin highlight context in the Directive,[137] as does its rejection of 'theories which attempt to determine the existence of separate human races. The use of the term 'racial origin' in this Directive does not imply an acceptance of such theories.'[138] Although these forms of discrimination elude clear definition and present evidentiary problems, they broaden the reach of anti-discrimination acknowledging how potent these diffuse forms of discrimination really are.

The Directive fails to include certain 'intersectional' forms of discrimination such racial and religious discrimination, or racial and nationality discrimination.[139] The ethnic constitution of a (religious or national) group may render discrimination based on a putatively non-racial or

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[131] Article 2.2.(a).

[132] D Chalmers 'The Mistakes of the Good European' in S Fredman (ed) *Discrimination and Human Rights: The Case of Racism* (2001) 192, 221 and 239 who identifies the liberal vision as institutionalised in the Directive.

[133] Article 2.2.(b). This definition is subject to a caveat of objective justification where the aim is legitimate and the means employed are appropriate and necessary.

[134] Article 4. Given the absence of protection against religious discrimination in this context, this broad provision may become problematic. L Waddington 'Article 13 EC: Setting Priorities in the Proposal for a Horizontal Employment Directive ' (2000) 29(2) *IJ* 176, 180.

[135] Article 2.2 (b) reads: indirect discrimination shall be taken to occur where an apparently neutral provision, criterion or practice would put persons of a racial or ethnic origin at a particular disadvantage compared with other persons, unless that provision, criterion or practice is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary.'

[136] Article 2.3. reads 'Harassment shall be deemed to be discrimination within the meaning of paragraph 1 , when unwanted conduct related to racial or ethnic origin takes place with the purpose or *effect* of violating the dignity of a persons and of creating an intimidating, hostile, degrading, humiliating or offensive environment in any of the areas covered [...] shall be deemed to be discrimination within the meaning of Paragraph 1.' [emphasis added].

[137] Article 2.4. The Parliament had favoured a wider provision including 'Behaviour consisting of incitement, instructions or pressure to discriminate [...] irrespective of whether any specific victim of discrimination is identified.' (Amendment 28).

[138] Preamble, Recital 6.

[139] above p24

non-ethnic index indistinguishable from race discrimination,[140] and religion may serve as a pretext for race discrimination.[141] The intersectionality of race and gender discrimination[142] is however provided for, acknowledging that women potentially suffer aggravated or multiple forms of discrimination due to structural inequalities linked to gender roles. To that end, the Directive provides for gender mainstreaming 'to ensure that due consideration is taken of the gender dimension in its application'.[143]

Related to intersectionality, is the question of whether protection should be confined to nationals or extended to all legal residents. This must be answered by reference to the value commitment behind protections against race discrimination. Where people are protected because of their humanity alone rather than their integrative function the approach will necessarily be broader. The 'race dimension' to nationality discrimination has not been adequately recognised in EU law.[144] Numerous soft law measures have taken note of it, though its treatment in all the institutions' proposals on the Race Directive contained caveats protecting distinctions based on nationality.[145] Thus where race discrimination is nominally founded on nationality, it remains beyond the remit of the Directive. 'Differential treatment and unequal opportunities based on nationality leads in fact to the same effects as discrimination based on the grounds of race, colour etc. [...] victims of racial slurs and violence are usually identified in terms of their nationality rather than racial identity (e.g. Moroccan or Turkish workers).[146]

The Race Directive includes general protection for TCN, but qualifies it strongly, such that it 'does not cover differences of treatment based on nationality and is without prejudice to

[140]Eg the Jewish faith which may regroup people as an ethnological entity; Catholics as Irish in Northern Ireland; Sikhs in India; Bosnia and Kosovo also represent examples of where the demarcation between religion and ethnicity / race might be less meaningful, or where not combating religious discrimination, and only focusing on race or ethnic origin would severely compromise the potency of anti-discrimination norms in those contexts.

[141] The European Parliament proposed including 'Discrimination on the basis of racial or ethnic origin which is presented as a difference in treatment on the grounds of religion, conviction or nationality is covered by the scope of this directive'. Amendment 15.

[142] Preamble Recital 14: ' In implementing the principle of equal treatment irrespective of racial or ethnic origin, the Community should , in accordance with Article 3(2) of the EC Treaty, aim to eliminate inequalities, and to promote equality between men and women, especially since women are often the victims of multiple discrimination.

[143] IV. The Commission's approach to Community action; Para. 5.

[144] Council of Europe, Recommendation on Measures to be taken against incitement to racial, national and religious hatred. Rec 453; Consultative Assembly of the Council of Europe (1966).

[145] The Parliament proposed: 'it is necessary to improve the treatment accorded to third country nationals in order to further the fight against racism and xenophobia, and whereas Member States should include nationality as one of the facts determining racial and ethnic origin'. Amendment 16. 'Nationals of third countries are covered by the Directive insofar as the discrimination they experience falls within the scope of the Directive and is not based solely on their being non-EU nationals.'.

[146] D Curtin & M Geurts above n99.

provisions governing entry and residence of third-country nationals and their access to employment and occupation.'[147] The Directive's reach formally covers TCN without recognising the specific nature of the racist constructs surrounding TCN, and explicitly excluding[148] the distinctions most relevant to the plight of TCN.[149] In this it reinforces the hypocrisy of the old order, by legitimating distinctions based on 'nationality alone' and obfuscating the true nature of the discrimination engendered.

In terms of formal applicability, the Directive 'shall apply to all persons, as regards both the public and private sectors, including public bodies',[150] thereby repudiating reliance on a public - private distinction and ensuring the Directive's applicability in the 'private' domain.[151] The 'material scope' of the Directive, follows the Parliament's recommendations for broad reach,[152] and covers discrimination in conditions for access to employment,[153] to self-employment, and to occupation, citing all relevant intra-employment issues,[154] and it explicitly covers working conditions, including dismissals and pay.[155] Discrimination is outlawed in access to all types and levels of vocational training,[156] as well as membership of, or involvement in organisations of workers or employers, or any organisation whose members carry on a

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[147] Some distinctions based on nationality are necessary for practical reasons, and because of subsidiarity. Such limitations are a very common feature of international anti-discrimination measures. Eg ICERD, for instance, does not apply to 'distinctions, exclusions, restrictions or preferences made by a State Party to this Convention between citizens and non-citizens'. 'Nothing in this Convention may be interpreted as affecting in any way the legal provisions of States Parties concerning nationality, citizenship or naturalization, provided that such provisions do not discriminate against any particular nationality'. Article 1(3)

[148] The Charter of Fundamental Social Rights of Workers (1989) refers simply to 'every worker of the European Community' having the right of free movement throughout the Community, and that right is stated to enable 'any worker' to engage in 'any occupation or profession in the Community in accordance with the principles of equal treatment as regards access to employment, working conditions and social protection in the host country.'

[149] *C.f. contra.* Dummett who favours, *inter alia* governments outlawing unjust discrimination on grounds of race, colour, nationality (including citizenship), national or ethnic origin, or religion so as to protect resident third-country national and an EU Treaty amendment outlawing unjust discrimination on the same grounds.

[150] Article 3.

[151] On coercive *private* power, MV Tushnet '*Shelley v. Kraemer* and Theories of Equality' (1988) 33 *N.Y.L.Sch.L.Rev.* 383; M Friedman 'Corporate Power, Government by Private Groups and the Law' (1957) 57 *Colum. L.Rev.* 155; LL Jaffe 'Law-making by Private Groups' (1937) 51 *Harvard Law Review* 201.

[152] Parliament Resolution 29 January 1998 (1998] OJ C 56.

[153] The Parliament proposed covering 'unpaid and voluntary work, official duties'.(Amendment 30).

[154]Article 3.1.(a) The provision covers selection criteria, and recruitment conditions, whatever the branch of activity and at all levels of the professional hierarchy, including promotion.

[155] Article 3(c) . The Parliament amendment proposed adding safety and health, pension schemes, information and consultation to the enumerated list of employment and working conditions. (Amendment 32).

[156] Article 3.1.(b) specifies guidance, training, advanced vocational training and, including practical work experience. To this the Parliament proposed adding traineeships and practical work experience.(Amendment 31).

particular profession,[157] including the benefits provided by such professional organisations.[158] It embraces 'social protection,[159] including social security and health care',[160] and the potentially vast expanse of 'social advantages'[161] and 'access to, and supply of, goods and services which are available to the public, including housing'.[162] This is materially reinforced by a prohibition on 'any provisions contrary to the principle of equal treatment which are included in individual or collective contracts' and covers other related rules, associations and organisations.[163] This broad coverage[164] reveals a rich and contextualised conception of discrimination at the heart of the Directive, supporting a strong, substantive understanding of equality. This approach comports more with the tenets of the alternative pole.

Equality in EU law can be viewed as equal opportunities theory[165] infused with substantive equality and guided by solidarity, rather than merely formal or procedural equality.[166] 'While discrimination based on prejudice [against women] is a central problem which the law must tackle, equal opportunities law should reach well beyond that and should tackle structural and institutional forms of discrimination not necessary based on prejudice.'[167] A broad

[157] The Parliament proposed adding 'and voting or standing as a candidate in elections to bodies within or between such organisations'. (Amendment 35). Its justification for this proposal was that the elections to posts within industrial relations bodies are an important part of economic democracy and should thus be free from discrimination on grounds of racial or ethnic origin.

[158] Article 3.1.(d). Article 14(b) also requires Member States to declare null and void, or amend any provisions contrary to the principle of equal treatment which are included in individual or collective contracts or agreements, rules governing the independent professions and workers' or employers' organisations *inter alia*.

[159] The Council appears to have taken on some of the Parliament proposals in respect of social protection (eg specifically health care), but did not include the pensions. (Amendment 34).

[160] Article 3 1. (e) This implies that the social protection at issue here is not confined to the types enumerated and that these might simply be examples.

[161] Article 3 1. (f).

[162] Article 3.1.(h). The Parliament proposed devoting a separate article to housing on the basis that the text proposed, and ultimately adopted, was not sufficiently explicit. (Amendment 36).

[163] Article 14(b).

[164] The Parliament proposed 3.1.(h) on housing (Amendment 36); 3.1(i) 'the exercise of its functions by any public body, including police, immigration, criminal and civil justice authorities' (Amendment 37); 3.1 (j) 'participation in cultural, political, economic and social life and in clubs and associations' (Amendment 38). These amendments would have made for stronger Directive since they target contexts in which some of the most egregious forms of race discrimination occur; *Moose Lodge v Irvis*, 407 US 92 S Ct (1965). That obligation might have been formulated as the state failing to uphold the principle of equal treatment in relation to participation in social life and in clubs and associations.

[165] Council Resolution on the Fight Against Racism and Xenophobia in the Field of Employment and Social Affairs[1995) OJ C 296 the objective of which is 'equal opportunities for the groups most vulnerable to discrimination [..]' Recital 7(d)

[166] It states in relevant part that 'in order to ensure equal treatment, it is important to combat every form of discrimination, including discrimination on grounds of sex, colour, race, opinions and beliefs, and whereas, in a spirit of solidarity, it is important to combat social exclusion' *Community Charter of Fundamental Social Rights of Workers*; Strasbourg, 9 December 1989.

[167] C McCrudden above n24 308..

interpretation of equality is likewise implicit in the 1995 Joint Declaration,[168] the Community Charter of Fundamental Rights of Workers EU law and the Commission's Action Plan Against Racism[169] established equality of opportunity as a central goal.[170] Similarly, the Final[171] and the Interim Reports of the Consultative Commission on Racism and Xenophobia emphasise fostering good relations with minorities[172] to ensure the elimination of discrimination and to promote equality of opportunity for all'[173]. The Charter of Fundamental Rights of the EU[174] holds 'Everyone is equal before the law'[175] and elaborates on this substantively, 'Any discrimination based on any ground such as sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age or sexual orientation shall be prohibited.'[176] The normative import of the Charter in terms of equality is perhaps attenuated by the distinctions it embodies in providing for substantial additional citizens rights, which are not recognized in 'everyone'.[177]

(2) The Market

The market has a strong foundation in the Directive despite the prominence of human rights rhetoric. 'Discrimination based on racial or ethnic origin may undermine the achievement of the objectives of the EC Treaty, in particular the attainment of a high level of employment and of social protection, the raising of the standard of living and quality of life, economic and social cohesion and solidarity.'[178] The Explanatory Memorandum refers to the role played by social protection in ensuring social cohesion, maintaining political stability and economic progress across the Union.[179] Market rationales underpin the Impact Assessment Form, which concerns

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[168] This links equal treatment and a strong conception of equality of opportunity, and between equality of opportunity and *access to education and accommodation;* Preamble, p 2.
[169] COM (1998) 183 final.
[170] 2.3.1. Employment Strategy, p11; see also 2.3.7. Public Procurement, p15.
[171] Kahn Report above n116.
[172] Included in the Draft Interim Report and omitted from the one disseminated.
[173] EU Council, Consultative Commission on Racism and Xenophobia; *Interim Report from the Consultative Commission on Racism and Xenophobia to Permanent Representative Committee/ General Affairs Council*; [1994] 11138/94 RAXEN 23 p11.
[174] Proclaimed 7 December 2000; Charte 4422/00' [2000] OJ C364/01.
[175] Article 20.
[176] Article 21.
[177]Charter Chapter V.
[178] Preamble; Recital (7) on Treaty objectives; (9): noting access to and supply of goods and services
[179] Explanatory Memorandum; Part IV; Para. 2.

the practical ramifications and economic effects of the Directive.[180] In particular, it notes that the Directive would secure participation ensuring people the opportunity to fulfill 'their *potential in economic terms*'.[181] Another economic benefit relates to that accruing on employers or the market generally: the Directive will help ensure that enterprises have at their disposal the best qualified employees, from the widest possible pool of workers, thereby 'contributing to the competitiveness and the strength of the firm and of the economy more widely.'[182]

The 1999 Employment Guidelines[183] stress the need to foster conditions for a socially inclusive *labour market.* [184] The wide substantive application of the principle of equal treatment is justified because areas indirectly linked to employment may 'contribute significantly to social and economic integration',[185] or the way in which 'discrimination in access to goods and services also limit social and economic integration, especially in access to finance, but also more widely.'[186]

The influence of the market is evident in the Charter of Fundamental Rights through the additional rights protected in EU citizens, many of which implicate classic EU market rights[187] . Moreover, while the concept of EU citizenship remains defined, even in part by the market, an instrument that perpetuates distinctions based upon it upholds certain market values. While EU anti-discrimination law has evolved from complete reliance on market rationales for intervention,[188] these are still of central importance and must be scrutinized for the ways in which they interact, with or put strain upon, the newly recognised human rights bases [189]

(3) Objects: Groups or Individuals

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[180] Impact of the Proposal on Companies and In Particular on Small and Medium Sized Enterprises (SMEs); Document Ref. No. 99010.
[181] Impact Assessment Form, 'Impact on Enterprises' 4. Para.1.
[182] *ibid.*
[183] Agreed in Vienna 11/12/1998 by the European Council.
[184] Council Resolution on the 1999 Employment Guidelines <http://europa.eu.int/comm/employment_social/empl&esf/empl99/guide_en.htm>Preamble; Section I (8) on Promoting a labour market open to all, and Section I (9) which states that 'each Member State will give special attention to the needs of the disabled, ethnic minorities and other groups and individuals who may be disadvantaged, and develop appropriate forms of preventative and active policies to promote their integration into the labour market.'
[185] Explanatory Memorandum; Part IV; Para. 3.
[186]Explanatory Memorandum; Part IV; Para 4.
[187] For instance Article 45 on the right of free movement and of residence.
[188] This is given in-depth treatment in Chapter VII.
[189] Chapter VII *infra.* which is devoted to the question of normative bases.

Indirect discrimination depends, to some extent, on a collective dimension,[190] such that, at least in some general sense, EU law embraces group notions which, by their nature, expand and contextualise an anti-discrimination endeavour. The group dimension pervades much EU soft law on race. The 1986 Inter-institutional Declaration against Racism and Xenophobia 'vigourously condemns all forms of intolerance, hostility and use of force against *persons or groups of persons* on the grounds of racial [...] differences'[191] as does the 1990 Council Declaration.[192]

Several aspects of the Directive incorporate group perspectives[193]. It registers discrimination against a person or *group of persons,*[194] and its definition of indirect discrimination is based on a collective conception of discrimination. Article 2.2.(b) identifies indirect discrimination where 'an apparently neutral provision, criterion or practice would put *persons* of a racial or ethnic origin at a particular disadvantage compared with other persons [...]'. While not explicitly group-centered this definition is favourable to the alternative pole, through not requiring statistical evidence, thereby placing a lesser burden of proof on the complainant.[195] Some have critiqued the provision as severely compromising the group component of indirect discrimination, construing the use of 'persons' as representative of an individualistic and formal equality orientation.[196]

The Directive's provision on affirmative action necessarily incorporates the group,[197] and its *locus standi* provisions have a clear collective foundation, providing for forms of

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[190] That is not to say that indirect discrimination models are indistinguishable, but rather that they share many important features, and that components of the former are necessary though not sufficient components of the latter.

[191] [1986] OJ No.C 158 Recital 1.

[192] Council Resolution [1990] OJ No C 157.

[193] The Parliament's proposed amended title further emphasised this dimension: 'Proposal for a Council Directive implementing the principle of equal treatment irrespective of racial or ethnic origin, of both natural or legal persons, and non- formalized groups of persons'. Amendment 1; Title of Directive, p 6.

[194] See Parliament Report with proposed amendments: Title of Directive (Amendment 1); Article 2(2)(a) on direct discrimination (Amendment 26); Article 8 on burden of proof (Amendment 43); Article 9 on victimisation (Amendment 45).

[195] L Waddington above n134, 220.

[196] C Barnard and B Hepple 'Substantive Equality' (2000) 59(3) *Cambridge Law Journal* 562, 568. The authors assert that the final provision 'loses the crucial objective of equality of results in favour of the notion of formal equality between individuals.' While a more explicit grounding of the group perspective would have been preferable, the term used is still a plural one (the singular 'person' was dropped), and indirect discrimination, by definition connotes some group perspective.

[197] Article 5, 'Positive Action'.

representative actions and class actions,[198] as well as the participation of interested groups as interveners or as *amici curiae*.[199] This also supports a participatory conception of the role of groups in the judicial enforcement of values.[200]

(4) Victim vs Perpetrator

EU law on race discrimination has some affinity with the victim perspective: 'Racism does not have a 'ghost like' appearance; its an every day reality for many people in European society, victims as well as perpetrators'.[201] The 1995 Joint Declaration states that 'people should be aware of the procedures for combating racial discrimination and no person should be victimised for complaining about racial discrimination'.[202] The Interim Report of the Consultative Commission makes similar provision: 'the establishment of national joint committees bringing together public administrations and services with the social bodies to exchange information, and to coordinate the actions of all parties involved.'[203]

Numerous features of the Race Directive are favourable to victims: first, the provision on 'victimisation'[204] creates an obligation for states to introduce into their national legal systems measures necessary for the protection of victims[205]. Second, the burden of proof under the Directive is discharged once a *prima facie* factual case is established,[206] which favours the victim / plaintiff, as does the provision requiring protection against retaliation.[207] Finally, the provision

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[198] The Parliament's proposed amendment would have strengthened this provision , it also noted that the right of collective action was in conformity with Article 11(2) of the Directive 97/7/EC on consumer protection. (Amendment 18; see also Amendment 41 on locus standi and defence of rights) Parliament, *Report on the proposal for a Council directive implementing the principle of equal treatment between persons irrespective of racial or ethnic origin COM (1999) 566*, [2000] Parliament Session Document Final A5-0136/2000 Rapporteur KM Buitenweg.

[199] From the terms of Article 7.2.

[200] On the importance of class actions to enforcing equal treatment in the US, MV Tushnet *Making Civil Rights Law* (1994).

[201] SS Lutchman 'Combating Racism: A View from the European Commission' in R Byrne & W Duncan (eds) *Developments in Discrimination Law in Ireland and Europe* (1997) 33,34.

[202] *1995 Joint Declaration* above n119.

[203] Interim Report, above n 173, II.C.39; p 17.

[204] Article 9 which provides that 'Member States shall introduce into their national legal systems such measures as are necessary to protect individuals from any adverse treatment or adverse consequence as a reaction to a complaint or to proceedings aimed at enforcing compliance with the principle of equal treatment.'

[205] The Parliament favoured including natural and legal persons, as well as non-formalised groups of persons in the definition of 'victim'.

[206] Article 8. *Contra Watson v Forth Worth Bank and Trust Co.*, (1988) 108 S Ct 277, which left the burden of proof with the Plaintiff at all times in cases of disparate impact. Congress reversed this in S.105 of the Civil Rights Act 1991, and mandated a return to the standard in *Griggs* (1971) 401 US 424.

[207] Supplemented by Article 9. This is a minimum standard only, and there is no preclusion of more favourable rules of evidence Article 8(2).

on conciliation[208] concurs with an alternative, non-adversarial perspective which may be less intimidating for victims.

(5) Remedies

Affirmative action is central to EU gender discrimination law,[209] and the Amsterdam Treaty's new Articles 2 & 3 EC 'aim to eliminate inequalities and promote equality between men and women', complimenting Article 141(4) EC which allows for 'specific advantages[...]to prevent or compensate for disadvantages in professional careers.'.

EU soft law on race discrimination supports affirmative action as central to an effective anti-discrimination strategy. 'People from racial, ethnic or national minorities who have suffered from racial discrimination or disadvantage should be given training or encouragement, where possible, to compete for jobs or promotion on equal terms'.[210] The Kahn Report asserts that 'in order to promote equal opportunities it must be realised that children and students from ethnic minorities may have special needs. Particular difficulties faced in the educational system by children and students from ethnic minorities should be addressed to help them cope better[..] *inter alia*, additional language training.'[211] The Report also calls for the support of 'employment measures which are to the benefit of indigenous and non-indigenous deprived groups'[212] citing the examples of codes of conduct and legislative measures such as contract compliance.

The Race Directive is explicit, albeit only permissively, in its provision for 'positive action': 'With a view to ensuring full equality in practice, the principle of equal treatment shall not prevent any Member State from maintaining or adopting specific measures to prevent or

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[208] Article 7(1).

[209] Case C-450/93 *Kalanke v Freie Hansestadt Hamburg* [1995] ECR I-3051 was the first major interpretation of affirmative action, it proved controversial because the Court condemned the strict quota system provided for by the Bremen law. The Court rallied back with a stronger endorsement of affirmative action in Case C-409/95 *Marschall v Land Nordrhein-Westfalen* [1997] ECR I-6363. Strong endorsement of affirmative action emerged in Case C-158/97 *Badeck v Hessischer Ministerprasident Landesanwalt beim Staatsgerichtshof des Landes Hessen* [2000] ECR I-1875 where the Court held that Directive 76/207/EEC's Article 2(1) and (4) did not preclude states from reserving at least half of the places for training in public administration to women, subject to certain safeguards. This saw the Court adopt a clearly result-orientated approach to further the equal representation and participation of women in the workplace. However, in Case C-407/98 *Abrahamsson v Fogelqvist* [2000] ECR I-5539 the Court held that a national rule giving automatic priority to a women who held sufficient qualifications which were slightly inferior to a male applicants was incompatible with Article 2(4) of the Directive and Article 141 (4) EC.

[210] II. Recital 4; p 7.

[211] Kahn Report III. 1. Proposal (k) p 9; see also the provision on the media above n116, **1**.III. B. IV.10. p 30.

[212] Kahn Report above n116, **2**. B. p 42

compensate for disadvantages linked to racial and ethnic origin.'[213] Clearly, 'not preventing' affirmative action, is something quite different from requiring it, and only the latter would ensure the truest realisation of group norms and a collective and comprehensive conception of equality.

(6) Rights

In EU law, the rights discourse straddles a number of contentious issues. The rights originally enshrined in the Treaty are market-based, rooted in free movement. It is from these highly instrumental rights and freedoms, that a more humanistic rights discourse has burgeoned. Since *Stauder* in 1969[214] the EU has pledged to protect human rights extant in the general principles of EU law:[215] this has flourished into a wider set of commitments and principles which now arguably constitute a set of EU norms. The Single European Act,[216] the Treaty on European Union[217] and the Amsterdam Treaty[218] all attest to this, through their increasingly explicit undertakings to respect fundamental human rights. Moreover, EU Cooperation Agreements all now contain human rights provisions, incorporating these commitments as conditions precedent to cooperation. Finally, the long-awaited EU Charter[219] is an impressive catalogue of the rights upon which the Union is founded, and the values to which it aspires.

The EU rights discourse has other functions[220] which raise questions about whether it is

[213] Article 5.

[214] Case 29/69 *Stauder v City of Ülm* [1969] ECR 419.

[215]Case 11/70 [1970] ECR 1125 *Internationale Handelsgesellschaft* anchored this jurisprudence in the philosophical, political and legal substratum common to the Member States.

[216] The SEA Preamble refers to respect for the fundamental rights recognized in the constitutions and laws of the Member States, in the Convention and in the European Social Charter. SEA [1997] OJ L 169; Treaty Series 31/1988 Cmnd 372.

[217] Article F(2) TEU states that the Union 'shall respect fundamental rights, as guaranteed by the European Convention ... and as they result from the constitutional traditions common to the Member States, as general principles of Community law'; the fifth part of Article J.1(2) of that Treaty refers to respect for human rights and fundamental freedoms; Article K.2(1) of the Treaty contains an express reference to compliance with the Convention in cooperation in the fields of justice and home affairs.

[218] Article 2 (ex Article B) TEU: 'The Union shall set itself the following objectives: to strengthen the protection of the rights and interests of the nationals of its Member States through the introduction of a citizenship of the Union...'; Article 6 (ex Article F) TEU:' 1. The Union is founded on the principles of liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law, principles which are common to the Member States.'

[219] British Institute of Human Rights, *EU Charter of Human Rights - Written Evidence on Behalf of the BIHR before the House of Lords European Committee (Sub-Committee Law and Institutions)*(2000).

[220] One such function is mediating the balance of power and competences between the EU and Member States; J Weiler 'The Transformation of Europe' (1991) 100 *Yale Law Journal* 2403, 2417-19. It also arguably fulfills a legitimating function for market integration, protecting economic interests and rights; J Coppel & M O'Neill 'The European Court of Justice: Taking Rights Seriously?' (1992) 14 *Legal Studies* 227; DR Phelan 'The Right to Life of the Unborn v. Promotion of Trade in Services: The European Court of Justice and the Normative Shaping of the European Union' (1992) 55 *Modern Law Review* 670.

capable of being freed from its single market rationale[221] and 'the pervasive market ideology of Community law'.[222] Even where EU law has been forging its human rights jurisprudence in the most robust and innovative way, as in the comparativist era of *Stauder* and *Nold 2*, it still 'reinforced a crucial concession to the basic economic imperatives of the EU legal order, by conceding that a compromise had to be made between the 'substance' of fundamental rights and 'certain limits justified by the overall objectives pursued by the Community.'[223] The concern is that a rights discourse, or anti-discrimination law based on it, can offer only contingent and limited protection to minorities because of being predicated towards the market.

However, the Directive neither explicitly perpetuates nor repudiates the classic EU law rights discourse / instrumentality dilemma. In terms of the public - private distinction , the Directive clearly rejects of any such stark divide[224]. Since *van Gend en Loos*[225] EU law has accommodated a form of *Drittwirkung* of Treaty provisions as constitutional norms.[226] The Treaty's citizenship provision now reads: 'Citizens of the Union shall enjoy the rights conferred by this Treaty and shall be subject to the *duties* imposed thereby.'[227]

Acknowledgment of the interconnected nature of rights is another welcome feature of the Directive, as is its rejection of bright-line distinctions between species of rights, which have usually served to limit the protection.[228] Recognising the interconnectedness of different 'forms' or 'types' of rights amounts to a widened vision of interests comprising an anti-

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[221] I Ward *The Margins of European Law* (1996) 142-157.

[222] TK Harvey 'Migrant workers and their families in the European Union: the pervasive market ideology of Community Law' in G More & J Shaw (eds) *New Legal Dynamics of European Union* (1995) 91-110.

[223] Case 4/73 *Nold no.2* [1974] ECR 491

[224] *Contra* US position on state action.

[225] Case 26/62 v*an Gend en Loos v Nederlandse Administratie der Belastingen* [1963] ECR 1; 12. The seminal quotation related to Community law 'the subjects of which comprise not only Member States but also their nationals [...] *Community law therefore not only imposes obligations on individuals but is also intended to confer upon them rights* which become part of their legal heritage'. (emphasis added).

[226] *Drittwirkung* connotes the applicability of constitutional norms or rights *inter partes*, between private individuals and entities.

[227] Article 17(2) (ex 8) EC.

[228] Thus, in US historical context of disenfranchised racial minorities, the bestowal of political 'inclusion' was effectively voided by social exclusion and economic deprivation. A circumscribed definition of civil and political rights could never ultimately assure any real equality before the law precisely because, to be effective, the social and economic dimensions of such rights required protection (epitomized in the *Slaughter-House Cases* (1872) 83 US 36). President FD Roosevelt's famous 'Four Freedoms' speech clearly endorses defending economic and social rights as part of a complete and authentic freedom. LB Sohn, 'Protection of the Rights of Individuals' (1982) 32 *Am U L J* 1,33. M Tushnet 'The Politics of Equality in Constitutional Law' (1987) 74 *J of American History* 884: 'Equality in civil and political rights did not mean, as a legal matter, that blacks could insist on equal treatment in the ordinary course of social life.'

discrimination strategy,[229] broadening the substantive scope for the anti-discrimination norm.[230] Different generations of rights are not viewed as 'alternatives' but as mutually defining ,[231] since 'the two sets of rights can neither logically nor practically be separated in entirely watertight compartments.'[232] First generation rights are meaningless in the absence of basic welfare or subsistence rights being safeguarded which confirms the constitutive connection between rights and needs.[233] Despite some limitations, the Directive possesses real anchorage in fundamental rights discourse, and shows a true commitment to equal treatment and non-discrimination as universal rights.

4. MODELS FOR RACE DISCRIMINATION LAW: THE FORM OF ARTICLE 13.

A model for action against race discrimination comprises substantive and formal aspects: the foregoing analysis has roughly corresponded to the former, and the following will consider the form of the EU model embodied in Article 13 and the Race Directive by reference to existing models of anti-discrimination law: the free-standing model, the contingency model and the enabling model. These models refer to the formal transposition of theoretic and substantive precepts. They embody different legal means to implementing antidiscrimination rules and imposing legal obligations in international legal contexts and systems: in this they are analogous to constitutional models and choices.

The free-standing model is autonomous and capable of generating obligations. It is the strongest embodiment of a non-discrimination norm, and it can apply to other rights of the measure in which it is included, as well as to the actions (and inactions) of its signatories (Member States, and in some cases, private individuals). The contingency or auxiliary model confines the anti-discrimination provision to rights explicitly contained in the instrument: it is

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[229] Eg the vigourous dissent of Harlan J in the *Civil Rights Cases* (1883) 109 US 3.

[230] The factual and normative interconnectedness of different 'species' rights pervades international human rights conceptions of equality and freedom, with the evolution of 'first generation rights', referring to classic civil and political rights, and 'second generation rights' protecting more social, economic and cultural rights. A more recent development is 'third generation' rights relating to collective goods such as solidarity, peace, self-determination or the right to a clean environment. This conception of interdependence is given specific endorsement in the preamble of the International Convention of Economic, Social and Cultural Rights (1966). "In accordance with the Universal Declaration of Human Rights, the ideal of free human beings enjoying freedom from fear and want can only be achieved if conditions are created whereby everyone may enjoy his economic, social and cultural rights as well as his civil and political rights..." 99 UNTS 3 (1966); UK Treaty Series 006/1977 Cmnd 6702.

[231] P Alston 'A Third Generation of Solidarity Rights: Progressive Development or Obfuscation of International Human Rights Law?' 29 *Neth. Intl L Rev* 367 (1982).

[232] HJ Steiner & P Alston *International Human Rights in Context: Law, Politics, Morals* (1996) 263.

[233] A Sen 'Freedoms and Needs' *The New Republic* (1994) 31 (Jan 10 & 17); 32.

therefore not a general or free-standing provision capable of generating its own independent obligations. Finally, an enabling model simply enumerates grounds of discrimination with the objective of endowing designated bodies with the power to act. It is a legal basis for *future action* only and lacks the potency and symbolism of a free-standing principle. The new Article 13 EC by the Amsterdam Treaty embodies the enabling model:

> 'Without prejudice to the other provisions of this Treaty and within the limits of power conferred by it upon the Community, the Council, acting unanimously on a proposal from the Commission and after consulting the European Parliament, may take any appropriate action to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation'.

This is a permissive provision only,[234] and although it clearly establishes the competence of the Council, it remains reliant on the political will which has proved weak hitherto.[235] Unlike the main provisions of the two existing discrimination clauses concerning nationality and

[234] One clear, negative consequence of the permissive nature of Article 13 is the emerging hierarchy among the different heads of discrimination in terms of the 'legislative priority' each is afforded. L Flynn 'The Implications of Article 13 EC - After Amsterdam will some Forms of Discrimination be More Equal Than Others?' (1999) 36 CMLRev 1127-52; L Waddington above n134; L Waddington and M Bell 'More Equal Than Others: Distinguishing European Union Equality Directives' (2001) 38 Common Market Law Review 587 (2001). Moreover, after the long prioritisation of gender and nationality discrimination, the enactment of the Race Directive 'became no more than a process of rationalization of an ongoing process.' D Chalmers, above n133, 204.

[235] J King 'Ethnic Mobilisation and Multilateral European Institutions', in AG Hargreaves and J Leaman (eds) *Racism, Ethnicity and Politics in Contemporary Europe* (1995) 180. Some contend that, 'in official or unofficial conclaves, the Member States seem inevitably to regard ethnic minority communities as presenting either at best a problem to be solved or, at worst, a threat to be countered.'

gender,[236] and unlike the Universal Declaration of Human Rights,[237] Article 13 establishes no free-standing principle,[238] it confers *no* individual rights, and does not possess the requisite attributes for direct effect[239] leaving it unenforceable by citizens, still less residents [240] Thus, only in some very qualified way, could one see Article 13 emerging as a concrete manifestation of the more general prohibition on discrimination' which also assumes the existence of a free standing, and perhaps enforceable equality norm.[241]

The ICCPR exemplifies the free-standing model, recognising the equal and inalienable

[236]Case 26/62 *Van Gend en Loos* [1963] ECR 1; Case 43/75 *Defrenne v SABENA* [1976] ECR 455: that the provision imposes clear, precise and unconditional obligations on the Member States, requiring no further measure on the part either of the Community institutions or the Member States.

[237] *Contra.* Universal Declaration of Human Rights (adopted and proclaimed by General Assembly Resolution 217 A (III) of 10 December 1948), Article 7: 'All are equal before the law and are entitled without any discrimination to equal protection of the law. All are entitled to equal protection against any discrimination in violation of this Declaration and against any incitement to such discrimination'. The International Covenant on Civil and Political Rights (General Assembly Resolution 2200 A (XXI) (1966) UN Doc. A/6316 999 UNTS 171; UK Treaty Series 006/1977 Cmnd 6702; Article 26 provides: 'All persons are equal before the law and are entities without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.'; Article 27 protects minority rights: 'In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right in community with the other members of their group, to enjoy their own culture, to progress and practice their own religion or to use their own language,'. Even the ILO Convention contains a free-standing general principle: Discrimination (Employment and Occupation) ILO Convention (No. 111) (1958) Cmnd 593. which imposes similar positive obligations on its signatory states to take the necessary measures to secure the rights and guarantees it contains. The Convention contains a general non-discrimination provision in Article 1(1)(a) which defines discrimination as:'any distinction, exclusion or preference made on the basis of race, colour, sex, religion, political opinion, national extraction or social origin, which has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation'. (Of the EU Member States, Ireland, Luxembourg and the UK have not yet ratified this Convention.)

[238] This is so notwithstanding the Directive's recognition of 'the right to equality before the law and protection against discrimination' as a 'universal right' (recital 3).

[239] Under the standard prescribed by *Van Gend en Loos v der Belastingen*, above Article 13 EC fails to satisfy the requirements stipulated in order to have direct effect.

[240] Elements of an indirect application or *Drittwirkung* in Article 2 (1) (d) requiring that the state prohibit racial discrimination *by any persons, group or organisation. Drittwirkung* is a term borrowed from German constitutional law which translates literally as 'third party effect', such that constitutional human rights norms apply in the private sphere either vicariously through the operation of private law rules, or more directly. BS Markesinis *The German Law of Torts* (1994) 352-398; KM Lewan 'The Significance of Constitutional Rights for Private Law: Theory and Practice in West Germany' 17 *ICLQ* 571 (1968). On *Drittwirkung* of ECHR 'international constitutional norms' A Clapham *Human Rights in the Private Sphere* (1993) esp 89-133; A Clapham 'The Drittwirkung of the Convention' in MacDonald, Matscher & Petzold (eds)*The European System for the Protection of Human Rights* (1993) 163; *X & Y v The Netherlands*, Judgment of 25 March 1985, Series A Vol. 91.

[241] D Chalmers above n132, 202.

rights as proclaimed in the UN Charter[242], and establishing a general prohibition and positive obligations[243] in Article 26.[244] Similarly, the ICERD's free-standing model goes beyond traditional paradigms,[245] and includes positive obligations.[246]

Article 13's foundational weakness is that it fails to establish non-discrimination on the basis of racial or ethnic origin as a general principle[247] of EU law.[248] 'This expanded list of prohibited grounds might suggest that the grounds mentioned are examples of a broader and general non-discrimination principle, nothing in this provision can be read as indicating a direct or horizontal effect, or as amounting to a change in the basic conception.'[249] They are clearly not. The existing model was a deliberate choice since stronger proposals were rejected in the 1996 IGC. The Commission had sought to add race to Article 141 EC or to Article 12 EC.[250] The Official Reflection Group had gone further, proposing an amendment to the Treaty comprising a 'general clause prohibiting discrimination, in addition to the existing non-

[242] ICCPR and ICESCR(1966) 999 UNTS 171 and 999 UNTS 3 respectively; UK Treaty Series No 006/ 1977; Cmnd 6702. It is also interesting to note that the economic and social counterpart of the ICCPR, the International Covenant on Economic, Social and Cultural Rights contains no such non-discrimination rule beyond reaffirming the recognition of the 'equal and inalienable rights of all' in its Preamble. It is indeed surprising that such an omission exist in respect of a realm that witnesses such great discrimination, and one so essential to a complete definition of equality. UN Charter, Preamble at <www.un.org/aboutun/charter>.

[243] Cf *SWN Broeks v the Netherlands* UN Human Rights Committee 9 April 1987 (29th Session) Communication No 172/1984.

[244] The ICCPR also mirrors the non-discrimination provision of the Universal Declaration on Human Rights (1945) UNGA Res 217(A)(III) UN Doc A/180 (1948) BFSP 151,604.

[245] ICERD, 660 UNTS 195 (1966) Treaty Series No. 077/1969; Cmnd. 4108. Article 2 (a) requires that each state party engage in no act or practice of racial discrimination against persons, groups of persons or institutions and ensure that all public authorities and public institutions, national and local, shall act in conformity with this obligation. Article 2(1)(b) requires each state party to undertake not to sponsor, defend or support racial discrimination by persons or organizations. Some assert that ICERD obligations cannot be discharged by a simple constitutional condemnation of racial discrimination; I Forbes & G Meade 'Comparative Racial Discrimination Law: Measure to Combat Racial Discrimination in Employment in the Member States of the European Community' (1993)14 *Comp Labour L J* 403, 406

[246] 2(1)(d) which states that : "Each state party shall take effective measures to review governmental, national and local policies, and to amend, rescind or nullify any laws and regulations which have the effect of creating or perpetuating racial discrimination wherever it exists".

[247] Article 13 arguably aggravates rather than alleviates concerns about whether equality has the status of a general principle covering race and ethnic origin. A Somek 'A Constitution for Antidiscrimination: Exploring the Vanguard Moment of Community Law' (1999) 5(3) *ELJ* 243-271.

[248] However, a general principle can be identified in the new Article 29 TEU which establishes that the EU should provide citizens with a high level of safety within an area of freedom, security and justice by [*inter alia*] preventing and combating racism and xenophobia; furthermore, general anti-discrimination provisions are now included in agreements concluded with Third Countries

[249] A Somek, above n247, 244-245.

[250] A related suggestion was to enact a new Article 6a : 'Within the scope of this Treaty, and without prejudice to any special provisions contained therein, discrimination on the grounds of race, colour, religion, or national social or ethnic origin shall be prohibited. The Council, acting in accordance with the procedure referred to in the current Article 189 b or 189 c may adopt rules designed to prohibit such discrimination'. That amendment would have established the principle of non-discrimination as a directly effective, general principle of EU law.

discrimination clauses concerning nationality and gender.[251] The Kahn Commission suggested a number of variants: the amendment of Article 3 of the EC Treaty, to include the prohibition of race discrimination as a core Treaty objective.[252] This would have read: '(u.) the prohibition of discrimination on the grounds of race, colour, birth, religion, [possibly language] or national, social, or ethnic origin.'[253]

Article 13 only *enables* the Council to act *unanimously* with regard to the Member States, *rather than obligating* the EU or the Member States to refrain from discrimination and enact anti-discrimination measures, or even covering all EU law provisions in a general and contingent way. Article 13 is not, of itself, a source of *obligations*. *Enabling* effective action is distinct from *requiring* it. General principles are important in terms of effectiveness, but they also provide a normative base for action underpinning all rules like *jus cogens*,[254] and generate a 'patrimoine juridique' which has been central to the evolution of EU law.

Moreover, Article 13 operates 'without prejudice to the other provisions of this Treaty',[255] potentially limiting the ambit of race measures. Given the absence of combating race discrimination among the Treaty objectives of Article 3 EC, this caveat could be used in interpreting the Treaty schematically, tempering the effect of anti-race discrimination measures or Article 13 itself.

Article 13 does not require EU law itself to be scrutinised for discriminatory effects. This would require a free-standing principle of general applicability, or a general standard to which all laws and rules were subjected ensuring the non-discriminatory application of EU law and all Member State laws connected to it.[256] The latter model is illustrated in Protocol 12[257] to

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[251] Progress Report from the Chairman of the Reflection Group on the 1996 IGC, Madrid (1 September 1995).

[252] This resembled the proposals of *The Starting Line* and *Justice;* Proposals of the Standing Committee of Experts on International Immigration, Refugee and Criminal Law (the Meijers Committee); Law Society and the General Council of the Bar of England and Wales, *Race Relations in the European Union*, Proposal Doc.18 January 1995/JG/an.

[253] W Duncan 'Racism, Discrimination and Amendment of the European Community Treaty and the Treaty on European Union' in R Byrne & W Duncan (eds) *Developments in Discrimination Law in Ireland and Europe* (1997) 43, 49.

[254] DJ Harris, *Cases and Materials on International Law* (1991) ch 2.

[255] 'The competence of the Community is restricted to the powers conferred on the Community by the Treaty'. A Somek above n247, 269.

[256] Noted by the Commission, envisaged by the White Paper on Social Policy and noted in the Final Report of the Reflection Group on the 1996 IGC. *EC Commission, Communication on Racism, Xenophobia and Anti-Semitism and on the Proposal for a Council Decision designating 1997 as the European Year Against Racism* COM (95) 653/4 [1996] OJ 1273 - point 12.

[257] Reported 2001 ECtHR cases on Article 14 made note of the Protocol, but, because of the long delay between applications and the rendering of decisions, did not consider the post-Protocol Article 14. Eg *Beard v UK*, Application No. 24882/94 Judgment of 18.1.2001; *Cyprus v Turkey*, Application No 25781/94 Judgment of 10 May 2001.

the ECHR which effected fundamental changes to Article 14. Article 1 reads: 'The enjoyment of *any right set forth by law* shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status'. This significantly expands the formal reach of Article 14 beyond the ECHR to 'any right set forth by law'[258], without enshrining a general principle of equality.[259] The ECHR[260] had, prior to Protocol 12,[261] typified the contingency model:[262] Article 14[263] operated as an auxiliary model which provided for a negative proscription against discrimination confined to Convention rights. 'This provision [was] designed to protect rather than create rights.'[264]

The Race Directive cannot directly cover EU action, nor nearly all EU rights. 'The purpose of this Directive is to lay down a framework for combating discrimination on the grounds of racial or ethnic origin, with a view to *putting into effect in the Member States*, the principle of equal treatment.'[265] The Directive is addressed to Member States alone, which comports with the traditional understanding of the nature of Directives.[266]

In its 1995 Communication, the Commission expressed its intention to ensure the non-discriminatory application of EU legislation, by proposing, "where appropriate", broad, non-discrimination clauses, both in new EU instruments, and in revisions of existing EU legislation.

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[258]Recommendation 1116 (1989) on reinforcing the non-discrimination clause in Article 14. This has been the thc principlc focus of ECRI's work.

[259]The Council of Europe's Parliamentary Assembly expressed disappointment at the Committee of Ministers' version of the Protocol, and the fact that it did not take on the Assembly's recommendation to pass a more general equality provision.

[260] Signed in Rome, 4 November, 1950; entered into force 3 September 1953 in accordance with Article 66 therein Treaty Series No. 071/1953 Cmnd 8969. The ECHR is also relevant to EU law because of the special relationship between the two orders. Case 4/73 *Nold v Commission* [1974] ECR 491 confirmed that international treaties comprised the guidelines for identifying fundamental human rights, and Case 36/75 *Rutilli* [1975] ECR 129 followed, referring explicitly to the ECHR. Also of note was the controversial Case C 2-94 On Accession of the Community to the ECHR, Opinion of 28 March 1996 [1996] 2 CMLR 265. This discussion does not, however, deal with the potential for relying on Article 14 of Convention to frame a claim of discrimination within EU law, S Ellis 'Race Discrimination and the Community law' (1993) *Migrantenrecht* 3.

[261] Council of Europe, Parliamentary Assembly *Report of the Committee on Legal Affairs and Human Rights*, 'Draft Protocol No.12 to the European Convention on Human Rights'. Doc 8614, 14 January 2000. (Rapporteur E Jurgens].

[262] ILO Convention No. 111, which imposes positive obligations on signatory states to secure the rights and guarantees it contains.

[263] Article 14 read: 'The enjoyment of the rights and freedoms set forth in this convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.'

[264] E Guild 'EC Law and the Means to Combat Racism and Xenophobia' in A Dashwood & S O'Leary (eds) *The Principle of Equal Treatment in EC Law* (1997) Oxford, OUP 189, 194.

[265] Directive, Chapter 1, Article 1.

[266] Article 19 states: 'This Directive is addressed to the Member States'.

Success has been limited. Commission proposals[267] for non-discrimination clauses in Council Directives on parental leave[268], and on part-time work[269] were dropped in the Directives' substantive provisions, although references remained in the Preamble's recitals. This signals at least recognition by certain EU institutions[270] that there is a need for EU law to be held in compliance with a non-discrimination norm. The inclusion of such a clause in EU legislation would, however, be no substitute for the enactment of a general principle of law as a fundamental right in the Treaty.

Some have asserted that in 'staff[271] and antitrust cases illustrated that the Court has developed and applies the superior rule of law principle to those fields which clearly lie within the scope of Community law'.[272] The Court's interpretation governs what this might mean, and that may not always include race discrimination and general equal treatment.[273] This approach is inadequate because protection remains contingent on the judicial review of the European Court of Justice, and it is not an mandatory, directly enforceable substantive provision with which all EU institutions and measures must comply.[274]

Similar problems attend the new EU Charter on Fundamental Rights. While it indicates that a general principle may develop as a superior rule of law which may be relied on in the interpretation of other rules, such a prospect remains the purvey of the Court of Justice. Thus, despite its symbolic import, it remains soft law which the Union may deploy selectively and which legally binds neither Member States nor the Union itself.

Despite the foregoing limitations, there are other ways in which the Directive is

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[267] The Commission has pledged to continue proposing such provisions 'where appropriate'.

[268] COM (1996) 26 final. Directive 96/34/EC obliges Member States to ensure that parental leave is granted without discrimination on these grounds.

[269] COM (1997) 392 final.

[270] While the need for the inclusion of such provisions, there is not (yet) widespread support for it. The Parliament's proposal for the inclusion of a non-discriminatory provision in the Directive on Package Travel which was rejected. PE DOC A 368/88, 13.

[271] Case C-37/89 *Weiser v Caisse nationale des barreaux français* [1990] ECR 2395.

[272] E Guild, 'Combating Racism and Xenophobia', above n264, 200.

[273] Case 100/88 *Oyowe and Traore v Commission* [1989] ECR 4285 illustrated a total unwillingness on the Court's part to even consider the discrimination claim raised by the plaintiffs where race may have been a factor. This staff case was resolved on the grounds of freedom of expression.

[274] Interestingly, the Commission vowed to propose non-discrimination clauses in EU instruments, though the decision would remain the Commission's! EU Commission *Communication on Racism, Xenophobia and Anti-Semitisim* [1995] COM (95) 653 final at 18. Guild notes that 'inserting non-discrimination provisions in Directive and regulation on a case-by-case basis would be in accordance with the spirit of the Court's jurisprudence regarding the Community's obligation to ensure respect for human rights when Community measures are applied by the Member States. This cannot be said to be a full exercise of the obligations to protect residents of the Union from the discriminatory application of Community law.' E Guild above n 264, 202.

peculiarly appropriate measure. From a formal perspective, it allows Member States the choice of form and method, thereby accommodating the principles of pluralism[275] subsidiarity[276] and proportionality.[277] Member States can 'take account of their own particular circumstances based on their history and traditions'[278] in implementing the Directive. A directive can be 'varied and adaptable. [...] based on broad, general principles whose changing application to particular circumstances, for both citizens and aliens, can be readily worked out.'[279] Consistent with this, the Directive sets only a 'common definition for unlawful discrimination' and '*only broad objectives* to ensure that discrimination is prohibited and that the victims of discrimination enjoy a *basic minimum entitlement* to redress.'[280] It establishes a minimum standard,[281] allowing for more favourable provisions',[282] and it in no way attempts a uniform EU-wide standard.[283] The implementation of the Directive should not serve to justify any reduction of the level of protection which prevails Member States.[284]

The Directive may present some interesting quandaries in terms of enforcement: the ECJ has steadfastly refused to allow an unimplemented Directive have 'horizontal' direct effect, between individuals.[285] Given the importance of the Directive's application in the private realm, and some Member States' record with implementation, the choice of Directive over Regulation,

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[275] D Chalmers above n133, 233 identifies pluralism in the Race Directive's provisions on racial harassment, affirmative action, differences of treatment based on occupational requirements, and Article 6 establishing the Directive as a minimum standards only.

[276] H Petzold 'The Convention and the Principle of Subsidiarity'; M-A Eissen 'The Principle of Proportionality in the Case-Law of the European Court of Human Rights' both in StJ Macdonald, F Matscher & H Petzold (eds) *The European System for the Protection of Human Rights* (1993) 41 & 125 respectively.

[277] The Protocol to the Amsterdam Treaty on the application of these principles states that EU action is justified when "action at Community level would produce clear benefits by reason of its scale or effects compared with action at the level of the Member States". Treaty of Amsterdam Treaties Series No 052/1999 Cmnd 4434.

[278] Explanatory Memorandum; Part IV, Final Recital.

[279] Runneymede Trust 'Combating Racism in Europe. A Summary of Alternative Approaches to the Problem of Protection Against Racism and Xenophobia in Member States of the European Communities' (Prepared by the Runneymede Trust for the Commission of the European Communities) October 1987. Section III.II.a.

[280] Runneymede Trust above n 279.

[281] Explanatory Memorandum; Part I; Para. 2.

[282] The issue of higher or lower standards is a complex one, J Weiler, 'Fundamental Rights and Fundamental Boundaries',*The Constitution of Europe* (1999) 102.

[283] Article 6.

[284] Race Directive, Recital 25.

[285] Case 41/74 *Van Duyn v Home Office* established 'vertical' direct effect of Directives [1974] ECR 1337.

may present some interesting challenges and bring *Francovich*[286] the fore in the race discrimination context.[287] Once implemented, the Directive will provide a number of non-conventional enforcement mechanisms such as conciliation,[288] information dissemination,[289] and the promotion of 'social dialogue' between the two sides of industry[290] and with interested non-governmental organisations.[291] It calls for community based initiatives,[292] the dissemination of information, the exchange of experiences and goods practices, information and training[293] and the establishment of a body to provide independent assistance to victims of discrimination, to conduct surveys and publish independent reports and recommendations.[294]

5. ARTICLE 13 AND THE RACE DIRECTIVE, FORM AND SUBSTANCE

Given the enabling model of Article 13 and its Directive, what can be said of the form and substance of the current operative EU law model? This chapter has considered substantive tenets of anti-discrimination theory (part 2), and looked at these tenets as they emerge in EU law(part 3). This substantive analysis showed the EU model to be generally progressive: Article 13 incorporates a broad range of heads of discrimination, and the Directive is far-reaching. The next discussion looked to the form of Article 13 and the Directive, and found that aspect to be attended by some significant *formal* limitations and lacunae (part 4).

The Race Directive is an auspicious development for EU law, and an ambitious use of its

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[286] Joined cases C 6/9/90 *Francovich & Bonifaci v Italiana Republic* [1991] I ECR 5357. (Of relevance in the aftermath of *Francovich* are case c-91/92 *Faccini Dori v Recreb. Srl* [1994] I ECR 3325; Case 46/93 and 48/93 *Brasserie du Pêcheur* [1996] CMLR 889. 'The failure to protect an individual from racial discrimination in the exercise of Community rights may give rise to state liability along the lines established in *Francovich* where the discrimination results directly from the Member State's action or indirectly from its failure to act in the regulation of transactions between private parties.' E Guild, 'EC Law and the Means to Combat Racism and Xenophobia' in A Dashwood and S O'Leary (eds) *The Principle of Equal Treatment in EC Law* (1997) 213.

[287] This in itself, should present some interesting questions regarding the important horizontal applicability of the Directive as between private individuals.

[288] Article 7(1).

[289] Article 10.

[290] Article 11.

[291] Article 12

[292] M Read and A Simpson, *Against a Rising Tide: Racism, Europe and 1992* (1991) emphasise the need for action at a grass roots and local level, targeting the inclusion and participation of black community and anti-racist groups, community support networks, and greater assistance for education, training, anti-poverty and information programmes.

[293] Eg education, training and youth programmes which indirectly contribute to combating race discrimination, *Socrates* (of which the *Comenius* chapter was especially relevant), *Leonardo da Vinci*, *Youth for Europe III*. Also, Council Regulation 337/75 concerning the establishment of a centre for the development of vocational training [1975] OJ L39/1; amended by Council Regulation 1131/94/EC [1994] OJ L127

[294] Article 13. Eg the UK's CRE www.gov.uk>. The Commission and the Parliament made broader provision for the independent body's competence

enabling parent provision.[295] Substantively, it places EU law in advance of many legal models with its progressive formal and enforcement aspects and its expansive material reach. However, within the formal scheme of EU law, the Directive is wholly inadequate. It cannot account for the structural and schematic needs of an entire legal system by covering only part (the Member State laws).[296] The Treaty should contain a general principle, requiring, rather than simply enabling the EU to act, and binding the EU itself to a general principle of equality.[297] This is essential from both practical and normative perspectives.

There is much evidence of a *substantively* progressive model in EU law, significantly aligned with the alternative model, but the current *form* is entirely lacking. It is both lop-sided and troubling self-referential. It commits the enactment of anti-discrimination norms to the EU's discretion, and renders the EU's subjection to anti-discrimination norms a matter of EU choice. Equality deserves to be enshrined in a comprehensive, general provision, possessing mandatory applicability with respect to Member States, individuals and the European Union itself.

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[295] Directive, Preamble recital 2 invokes principles of liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law, principles which are common to all Member States. It also proclaims the right of equality before the law and to protection for all persons against discrimination constitutes a universal right recognised by the Universal Declaration of Human Rights, the UN Convention on the Elimination of all forms of Discrimination against Women, the ICERD the UN's Convention on Civil and Political Rights and on Economic, Social and Cultural rights, of which all Member States are signatories'; Directive Preamble recital 3. However, the Directive overlooks the fact that in the instruments invoked, the principle of equality or equal treatment is set forth as a general principle, enforceable as such and free-standing within the measure, which renders it capable of being expanded and substantiated in contexts.

[296] And if unimplemented, only the public aspect of that part.

[297] D Curtin & M Geurts above n99, 168-169. The authors note these as the proposals of the Starting Line and the Meijers Committee.

CHAPTER VII

NORMATIVE JUSTIFICATIONS FOR ACTION AGAINST DISCRIMINATION ON THE BASIS OF RACE OR ETHNICITY

1. INTRODUCTION

Considering race discrimination in context in Europe and EU law leads to consideration of the normative justifications for EU action against race discrimination which are explored in theoretic, political and ideological terms in this chapter. This discussion aims to extrapolate normative reasons for action against race discrimination in the EU law context, but in doing so, aims to go beyond existing normative frameworks, since 'our legal imagination is [...] often hostage to and crabbed with, "what is".'[1]

The aims and justifications for action against race discrimination raise complex questions involving difficult choices. The choices may present themselves as between utilitarian or individualistic precepts, or between liberal and communitarian tenets. Should anti-discrimination laws be posited in terms of rights, and if so, should these vest in groups or to individuals? Further, should these be understood as human rights, social rights or labour rights? Should anti-discrimination law cover governmental and public action only, or should it also apply in the private realm and bind individuals? Should such norms protect against directly discriminatory acts only, or should they also punish omissions to act which result in discrimination? And if so, how far should such positive duties extend?

The answers to these questions lie in choices referable to normative values and political principles. This chapter considers just one dimension involving two distinct orientations in EU law which, while both concerned with the extirpation of discrimination, are animated by different aims and 'the relative influence of each of these streams differs according to historical and constitutional contexts.'[2] One is based on fundamental human rights, the other founded on market rationales.

A fundamental premise of this discussion assumes the philosophical and legal legitimacy of intervention against discrimination,[3] rejecting any view that 'residual private

[1] G Quinn 'Rethinking the Place of Difference in Civil Society - the Role of Anti-Discrimination Law in the Next Century' in R Byrne & W Duncan (eds) *Developments in Discrimination Law in Ireland and Europe* (1997) 65, 66.

[2] S Fredman 'Discrimination law in the EU: Labour market regulation or fundamental rights' in H Collins, P Davies and R Rideout (eds) *Legal Regulation of the Employment Relation* (2000) 183.

[3] S Deakin & F Wilkinson 'Rights vs Efficiency? The Economic Case for Transnational Labour Standards' (1994) 23(4) *ILJ* 289, 310.

discrimination, as the expression of a legitimately unrestricted freedom [of contract], is often rational and efficient,"[4] and discounting any presumptive reliance on the market's self-correcting potential. 'Free markets do not produce the good that we call 'social policy'. Social policies only come into existence through the intervention of the state.'[5]

In a more general sense, some regulation of the labour market appears inevitable for that market to function, and even the purportedly deregulatory policies of Thatcherism required regulation of the labour market. This premise is apposite in the EU context given the market creation rather than correction it involves *ab initio*. EU law, by its nature, rejects the notion of a spontaneous economic order. The labour market is not naturally competitive:[6] it does not move towards a non-discriminatory equilibrium, and anti-discrimination laws advance the attainment of this equilibrium more quickly than market forces alone would.[7] Moreover, antidiscrimination law neither distorts competition nor creates negative consequences for victims of discrimination.[8] These assumptions are rooted partly in a conception of discrimination as systemic rather than simply emanating from individualistic racial animus. They are also founded on a political belief in the value of regulating against discrimination with positive law over a 'laissez faire', market-governed approach.

2. ANTI-DISCRIMINATION MEASURES AGAINST RACISM AND THE REGULATION OF THE SINGLE MARKET

(1) Regulation of the labour market and the attainment of economic objectives

'No market that is rational, much less fair, can afford to arbitrarily screen out human

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[4] SA Besson 'Discrimination and Freedom of Contract: Philosophical and Economic Foundations of the Law against Racial Discrimination in Employment' (1999) 3 *International Journal of Discrimination and the Law* 269; 270.

[5] D Kleinman & D Piachaud 'European Social Policy: Conceptions and Choices' (1993) 3(1) *Journal of European Social Policy* 1,3.

[6] These two conventional efficiency theory assumptions are often attributed to G Becker *The Economics of Discrimination* (1971). Becker's theory of discrimination proposes a way of 'analyzing discrimination in the market place because of race, religion, sex, colour, social class, personality or other non-pecuniary considerations. Individuals are assumed to act as if they have tastes for discrimination, and these tastes are the most important immediate cause of actual discrimination'. at 153. Also, L Turgeon *State and Discrimination - The Other Side of the Cold War* (1989); M Lundahl & E Wadensjö *Unequal Treatment: A Study in the neo-classical theory of discrimination* (1984).

[7] For a positive view of anti-discrimination laws in this vein, JJ Donohue 'Is Title VII Efficient?' (1986) 134 *University of Pennsylvania Law Review* 1411.

[8] Against this R Epstein *Forbidden Grounds, The Case Against Employment Discrimination Laws* (1992). In this work he defends the repeal of Title VII of the 1964 Civil Rights Act in the US; also 'The Subtle Vices of the Employment Discrimination Laws' (1996) 29 *John Marshall Law Review* 575.

talent on the basis of stereotypes or otherwise.'[9] There exist a number of ways in which anti-discrimination law and social policy[10] may be guided by single market goals.[11] One of the strongest economic cases for labour standards views them as a response to market failures of a kind endemic to labour markets and to the process of integration. If the labour market is deregulated, nothing guarantees that the price mechanism will allocate resources to their most efficient use.[12] Three related arguments will be examined here: a functional approach, a market-creation approach and an approach based on the potential congruence of regulation based on market and socially based ends.

(i) Functional approach

'Social policy is [...] the handmaiden, not an equal partner, of economic integration. Its role [...] is secondary [...] to ease the transition into the internal market by reassuring workers that there will be a social dimension and to assist the casualties of the process of economic restructuring which is at the heart of the whole integration project.'[13] Social policy may supplement efficiency by supporting workers with social services and commodities. The unleashing of competitive forces in EU integration generate 'net economic gains which may be restricted by both key negative externalities and non-tariff barriers preventing trade or workforce mobility.'[14] Social policy is limited to providing support against the negative impact of integration in employment and distributional processes.

A second sense in which market efficiency can guide social policy relates to the effect of social policy on economic productivity generally. Efficient economies require a trained, healthy

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[9] G Quinn above n1, 68.

[10] This discussion refers primarily to social policy, but could apply also to anti-discrimination laws.

[11] For a recent, comprehensive overviews of EU social policy PC A Neal *European Labour Law and Social Policy* (1999); L Hantrais *Social Policy in the European Union* (1995); TK Hervey *European Social Law and Policy* (1998); W 'Neo-voluntarism: A New European Social Policy Regime' (1995) 1(1) *European Law Journal* 31-59; S Sciarra 'From Strasbourg to Amsterdam: Prospects for the Convergence of European Social Rights Policy' (1998) 98/9 EUI *Working Papers*; E Szyszczak 'Future Directions in European Union Social Policy Law (1995) 24(1) *Industrial Law Journal* 19.

[12] Even in apparently unregulated labour markets, structural imperfections such as uncertainty, limited information, and such costs are likely to have the effect that labour of comparable productivity is available to employers at different wage rates. The availability of undervalued labour is a cause of productive inefficiency in its own right, compensating less efficient firms for their managerial and organizational inadequacies, enabling obsolete plants and equipment to remain in use, and encouraging low-wage compensation among employers which makes workers increasingly dependent on social security. (see eg deregulation policies in the UK during the early 1980's).

[13] M Kleinman & D Piachaud above n5, 10.

[14] R Goma 'The Social Dimension of the EU: a new type of welfare system?' (1996) *Journal of European Public Policy* 3:2; 209. Consider generally, EU Commission *Social Dimensions of the Internal Market* EC COM(1988) 8/89

workforce which assumes adequate education, health care, housing and social security. 'Under provision of social policy [...] lowers the productivity of industrial capital and thereby leads to both output and profits being below what is technically feasible.'[15] This approach limits all intervention to efficiency-improving measures, and social barriers refer primarily to distinct national labour regulations and social security systems.

Since labour market regulation and social policy are integral to economic progress,[16] a socially and legally protected workforce which is highly trained, participative and secure provides a better basis for economic development than a low-wage, low-productivity one.[17] The Impact Assessment Form appended to the Commission's Proposal for the Race Directive[18] relies on this rationale. 'Securing social participation and avoiding social exclusion by ensur[es] that people have the opportunity to *fulfill their potential in economic terms*, thus being able to provide for themselves and their dependent to best effect and to reduce their dependence on the state.'[19]

While these approaches exemplify the *use* of social policy in an instrumental way, subordinate to the market, this approach can nevertheless support action against race discrimination. First, the presumptive exclusion of a significant section of the population from access to, or participation in, the market, because of colour or ethnicity is non-competitive and inefficient given the market's loss of potentially exploitable skill and talent. This exclusion can rarely be justified in economic terms given the absence of a relationship between the grounds for the discrimination and the skills demanded in the market.[20] Second, even assuming labour market access, once in the labour force, minorities' subjection to racial harassment or discrimination will eventually lead to lower productivity and to an overall loss of competitiveness in the market.[21]

[15] M Kleinman & D Piachaud above n5, 4.

[16] A forceful proponent of this 'compatibility thesis' is S Deakin 'Labour Law as Market Regulation: the Economic Foundations of European Social Policy' in P Davies et al (eds) *European Community Labour Law: Principles and Perspectives* (1996) 63; S Deakin & F Wilkinson 'Rights vs Efficiency? The Economic Case for Transnational Labour Standards' (1994) 23 *ILJ* 289, 295.

[17] B Hepple 'Law in Motion' *International Encyclopaedia of Laws* World Law Conference (1997) 874-5

[18] Impact of the Proposal on Companies and In Particular on Small and Medium Sized Enterprises (SME's) Document Ref. No. 99010.

[19] IAF, 4 para.1.

[20] This is analogous to there being an absence of job-relatedness to 'objectively justify' the discrimination. The Race Directive includes exceptions to the non discrimination principle under 'genuine and determining occupational requirements or occupational requirements; Race Directive, Article 4.

[21] Some analogies may be drawn between this approach and the animus-based theory of racial discrimination in US-American race relations championed by Becker above n6. Under that theory, the animus-based discrimination is based on a desire to avoid interaction with blacks, and is by definition, economically detrimental to the actor because he forgoes bargains with the group discriminated against.

(ii) Market creation arguments

Regulation aimed at market creation targets *de jure* obstacles emanating from Member State laws. Article 141 (ex 119) EC[22] had the aim of eliminating and preventing distortion of the Single Market[23] and owes its existence to 'concerns over unfair competition'[24] and the potential that existed for France to lose competitiveness as a result of her laws on equal pay for equal work.[25] It was designed to impose parity of costs on the Member States[26] and prevent destructive competition resulting from different regulatory regimes prevailing between them.[27] These decidedly economic concerns aimed at creating *a level playing field* and a 'common'

[22] Article 141 provides, in relevant part: '1. Each Member State shall ensure that the principle of equal pay for male and female workers for equal work or work of equal value is applied. 2. For the purpose of this Article, 'pay' means the ordinary basic or minimum way or salary and any other consideration, whether in cash or in king, which the worker receives directly or indirectly, in respect of his employment, from his employer, Equal bay without discrimination based on sex means: (a) that pay for the same work at price rates shall be calculated on the basis of the same unit of measurement (b) that pay for work at time rates shall be the same for the same job.'

[23] Article 119 was based, in part, on ILO Convention No 100 on equal remuneration for men and women workers for work of equal value, though it is not a 'perfect translation' of the Convention. The new, post-Amsterdam numbering will be used to refer to this provision hereafter, thus, all mention of Article 141 EC, implicitly refers to ex 119 EC. The only remaining reference to 119 will be in the discussion of its history or in quotations. An additional explanation for its inclusion is the economic one extrapolated here, there exist arguments to the effect that, even indirectly, Article 119's inclusion in the EEC Treaty is founded on women's activism around the time of the war and after it, especially in France; see C Hoskyns 'Encapsulating Feminism' (1996) *ELJ* 1-2; *Integrating Gender* (1996). Gender equality has now been elevated to 'constitutional' status as a fundamental objective or aim of the Community in the new Article 2 EC (as amended by the Treaty of Amsterdam).

[24] S Deakin above n16, 63.

[25] France had one of the smallest pay differentials in Europe at that time.

[26] S Deakin & F Wilkinson above n3, 301.

[27] While the norms of the ILO were primarily aimed at the improvement of living and working conditions, the social provisions of the Treaty of Rome 'respond above all to the fear that unless employment costs are harmonized, economic integration will lead to competition to the detriment of countries whose social legislation is more advanced.' Barnard also points out that the existence of this Convention and the differential ratification of it across the then Member States of the EEC, created an additional incentive to legislate Article 119. By 1957 France, Belgium, Germany and Italy had ratified it, but not Luxembourg or the Netherlands. C Barnard 'Economic Objectives of Article 119' in T Hervey and D O'Keefe (eds) *Sex Equality Law in the EU* (1997) 321.

market across Europe.[28] Article 141 has obviously developed beyond this as a result of ECJ jurisprudence with respect to 'work'[29] or 'pay',[30] as well as the enactment of the Equal Treatment Directives.[31] 'The origins of Article 141 no longer take centre stage and the cases seem to be explicable additionally, though not exclusively, by reference to the social function.'[32] This expansion has been evidenced beyond gender as well.[33]

Social dumping is a by-product of distorted markets 'a process whereby differences in forms and levels of labour law regulation between countries within a single trading block, such as the EC, encourage firms to seek out sources of under-valued labour within less highly

[28] Spaak Report, Rapport des Chefs de Délégations, Comité Intergouvernemental (21 Avril 1958), which drew heavily on the ILO experts' Ohlin Report, International Labour Office, 'Social Aspects of European Co-operation: Report by a Group of Experts' (1956) 74 *International Labour Review* 99. It is worth noting that the Spaak report viewed the complete harmonisation or parity of social standards as neither necessary nor desirable. It makes clear that 'competition does not necessarily require complete harmonization of the different elements in costs: indeed, it is only the basis of certain differences-such as wage differences due to differences in productivity that trade and competition can develop. In addition, wage and interest rates tend to level up in a common market- a process which is hastened by the free circulation of the factors of production. This is a consequence rather than a condition of the common market's operation'; Comité Intergouvernemental Crée par la Conference de Messine, Rapport des Chefs de Délégation aux Ministres des Affairs Etrangeres, Brussels (1956); summarized in English in *Political and Economic Planning* (1956) no 405: 'Spaak Report'; 233, as cited by S Deakin above n16, 69; S Deakin & F Wilkinson above n3, 289; EU Commission, *Explanatory Memorandum on the Proposal for Directives Concerning Certain Employment Relationships* COM (1990) 22 at para. 22.

[29] The ECJ has extended the equality obligation of 119, via indirect discrimination, to part-time workers in the context of the contract of employment (Case 36/80 *Jenkins v Kingsgate* [1981] ECR 911; Case 170/84 *Bilka-Kaufaus Gmbh v Weber von Hartz* [1986] ECR 1607), collective agreements (*Kowalska v Freie und Hansestadt Hamburg* [1990] ECR I-2591; Case C-184/89 *Nimz v Freie und Hansestadt Hamburg* [1991] ECR I-297), and statutes Case 171/88 *Rinner-Kuhn v FWW Spezialgebaudereinigung Gmbh* [1989] ECR 2743; Case-360/90 *Botel v Arbeiterwohlfahrt der Stadt Berlin* [1992] ECR-3589).

[30] The Court has extended 'pay' to include contracted out occupational pensions, Case 170/84 *Bilka-Kaufaus* [1986] ECR 1607; survivor's benefits, Case C-262/88 *Barber v Guardian Royal Exchange Assurance Group* [1990] ECR I-1889; Case C-109/91 *Ten Oever v Slichling Bedrijfpensioenfonds voor het Glazenwassers en Schoonmaakbedriff* [1993] ECR I-4879; and bridging pensions Case C-132/92 *Bird's Eye Walls v Roberts* [1993] ECR I-5579.

[31] Council Directive on the approximation of the laws of the Member States relating to the application of the principle of equal pay for men and women 75/117/EEC [1977] OJ L45/19; Council Directive on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions 76/207/EEC [1976] OJ L39/40; Council Directive on the progressive implementation of the principle of equal treatment for men and women in matters of social security 79/7/EEC [1979] OJ L6/24.

[32] C Barnard 'Economic Objectives of Article 119' in T Hervey and D O'Keefe (eds) *Sex Equality Law in the EU* (1997) 321, 328. Also Case C-177/88 *Dekker* [1990] ECR I-3941 where the ECJ went beyond economic rationales and market concerns by recognising the rights of pregnant workers through abandoning the 'sick male comparator' approach traditionally deployed by courts. See also Council Directive 92/85/EEC on the introduction of measures to encourage improvements in the safety and health at work of pregnant workers and workers who have recently given birth or are breast feeding [1992] OJ L348.

[33] In the realm of free movement of workers: Council Directive 89/48/EEC on a general system for the recognition of higher education diplomas and training of at least 3 years duration [1989] OJ L019; amended by Council Directive 92/51/EEC [1992] OJ L 209/25.

regulated systems.[34] It is 'a variety of practices by both Member States and employers [...] designed to give a competitive advantage to companies due to low labour standards,'[35] putting pressure on countries with more advanced systems of protection to reduce costs on firms [...]'[36] and adjust labour laws downwards in order to attract foreign investment. Companies may move in response to Member States efforts to deregulate to attract capital or at retain existing capital. Transnational labour standards therefore play an important preventative role in ensuring, as the White Paper on Social Policy put it, 'that the creation of the Single Market does not result in downward pressure on labour standards.[37]

Economic and Monetary Union presented additional needs for regulation against the potentially negative consequences of integration. Constraints imposed by EMU convergence criteria resulted in Member States losing their ability to regulate interest rates and exchange rates in their quest for improving their international competitiveness, while labour standards and wages would remain within their purvey to regulate or deregulate. EMU would allow Member States exploit their autonomy in respect of social policy to lower national standards (what Barnard terms 'social devaluation'[38]) unless trans-European labour standards existed to discourage them from doing so.

(iii) Convergence arguments

Economic regulation through transnational European labour standards aim to create a basic 'floor of rights' to discourage states from pursuing a mutually destructive strategy of cutting labour protection to attract or retain capital investments. This assumes the compatibility or 'convergence' of economic and social objectives. Its aim is dynamic rather than static, promoting a *process* where rising labour standards and productivity go hand in hand.[39] This

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[34] Or where companies established in states with low wage costs win contracts in companies where the local wage costs are considerably higher, they send their own (lower paid) employees to fulfill these contracts (wage dumping). It may also refer to cases of internal social dumping where employers favour atypical part-time workers over typical full time workers.

[35] B Hepple 'New Approaches to International Labour Regulation' (1997) 26 *ILJ* 353, 355.

[36] S Deakin above n16, 82.

[37] The Commission's Green Paper itself confirms that part of the need for an agreement on 'common minimum labour standards' because of the threat of negative competitiveness among the Member States which would lead to social dumping, to the undermining of the consensus-making process identified in the Maastricht Social Agreement. and to danger for the acceptability of the Union. EU Commission Green Paper on Social Policy, *European Social Policy: Options for the Union* COM (1993) 551 final 46.

[38] C Barnard 'EC 'Social' Policy' in P Craig & G de Búrca (eds) *The Evolution of EC Law* (1999)479, 507.

[39] S Deakin & F Wilkinson above n3, 289, 307-309 defend the thesis that transnational labour standards interact with economic integration in a dynamic process which produces a continuous upwards movement in social and economic outcomes.

argues for is a relatively high degree of congruence between the economic space created by rules of interstate trade, and the social space of labour standards and regulations.

Thus, 'the function of labour standards is not to prevent economic development from taking place, but to foster economic development of a particular kind by increasing the costs of destructive strategies for both companies and states, 'by obstructing downward-directed competition, and supporting dynamic modes of adjustment, the overall performance of the economy can be enhanced and the outcome of adjustment made more acceptable.'[40]

The Commission White Paper endorses a similar view: 'the pursuit of high social standards should not be seen only as a cost but also as a key element in the competitive formula.[...]'.[41] Its very title confirms the perceived connection between competitiveness and social objectives. The Commission's Medium Term Social Action Programme refers to encouraging high labour standards *as part of a competitive Europe.*'[42] From its inception, the EU's general objectives have concurrently included 'a high level of employment and social protection', and 'raising [...] the standard of living and quality of life', as well as 'economic and social cohesion and solidarity among Member States.'[43] Social policy is viewed as reinforcing competitiveness, and competitiveness is viewed as beneficial to social policy.

'There are sound economic reasons for promoting equality of opportunity, so as to enable everyone to participate in - and contribute to - the *economic well-being of our societies.* This is more important given the impact of demographic trends and the consequent need to boost participation rates.[44]' The Commission has articulated specific economic objectives in respect of race discrimination and employment strategy: 'The active promotion of non-discrimination policies is increasingly seen not only as a means to guarantee equality of opportunities, but also as good business practice. Companies which adopt strategies to promote full participation of employees from a range of ethnic and cultural backgrounds have found that they are more productive and more open to different markets. This positive experience was highlighted at the "Gaining from Diversity" conference organised by the European Business

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[40] S Deakin above n16, quoting W Sengenberger 'Labour Standards: An Institutional Framework for Restructuring and Development' in W Sengenberger & D Campbell (eds) *Creating Economic Opportunities: The Role of Labour Standards in Industrial Restructuring* (1994) (International Institute for Labour Studies, Geneva)

[41] EU Commission, *White Paper Growth, Competitiveness, Employment: The Challenges and Ways Forward into the 21st Century* COM (1994) 333 Introduction, recital 5.

[42] *Social Europe* 1/95 (1995) 9, 18 & 19.

[43] Excerpts from Article 2 EC; See also Article 3 EC, parts (j) and (k), related to policy in the social sphere and the strengthening of economic and social cohesion respectively.

[44] EU Commission, *Social Action Programme 1998-2000* based on COM(1998) 259 final. III.3, paragraph 6.

Network for Social Cohesion in Lyon in 1997. The Commission is looking for ways of building on this.'[45]

This view has been echoed by Commission representatives: 'Racism does not only constitute a threat to society, but also to the smooth functioning of the economy. Businesses and other organisations are today operating in an increasingly multicultural environment with customers, suppliers and employees from diverse national ethnic and cultural backgrounds. Success in the market place is more and more dependent on the ability to maximize the potential or these diverse backgrounds. In other words: Diversity Pays!'[46]

The pervasive problem of racism in the EU is an impediment to the efficient operation of the Single Market. EU soft law measures on race discrimination consistently recognise 'the threat posed by racism, xenophobia and anti-Semitisim to [...] the economic and social cohesion of the Community.'[47]

(2) The Economic Function of the Principle of Equality in EU Law

'Building an inclusive society, achieving equality and fighting discrimination are things which we must do - not just because they are right but because they make economic sense. Indeed, some of the main reasons for striving for an equal society are economic.'[48]

This discussion considers the extent to which equality, as a 'fundamental principle'[49] or 'general principle of EC law,[50] and 'one of the core principles underlying all Community policies',[51] has a market-based relevance. ECJ equality jurisprudence illustrates the multiplicity of its potential uses, and the connection many of these bear to the Single Market. Equality, as a

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[45] EU Commission *Communication from the Commission : An Action Plan Against Racism* COM (1998) 183 final.

[46] SS Lutchman 'Combating Discrimination: A View from the European Commission' in R Byrne & W Duncan (eds) *Developments in Discrimination Law in Ireland and Europe* (1997) 33, 38.

[47] Resolution of the Council and the Representatives of the governments of the Member States meeting within the Council of 23 July 1996 concerning the European Year Against Racism (1997) OJ C 237 Article 1 (a).

[48] P Flynn *Closing Address by Commissioner Pádraig Flynn to the European Conference on Anti-Discrimination: the way forward*; Vienna 4 December 1998. (unpublished manuscript).

[49] ECJ in *P v S and Cornwall County Council*, Case C-13/94, [1996] ECR I-2143.

[50] F Jacobs 'An Introduction to the General Principle of Equality in EC Law' in A Dashwood and S O'Leary (eds)*The Principle of Equal Treatment in EC Law* (1997) 1.

[51] EU Commission, *Communication from the Commission on Racism, Xenophobia and Anti-semitisim*, (1995) COM (95) 653, final para, 1.2..C Docksey 'The Principle of Equal Treatment Between Women and Men as a Fundamental Right Under Community Law' (1991) 20 *ILJ* 33 who asserts that equality is one of the 'basic principles which underpin the whole of Community law'.

selectively applied principle of equal treatment,[52] has emerged as a notion with a significant market-unifying role and with distinctly market-orientated origins.[53] Non-discrimination was essential to the creation of a unified market and to the free movement and equal access of products services and persons.[54] 'The principle of equal treatment was therefore assigned both a market-creating and a market-protecting role.'[55]

The ongoing project of creating and sustaining of a common market[56] is underpinned with a general non-discrimination clause proscribing discrimination on the grounds of nationality.[57] The central provisions of the 'four freedoms' are supported, either directly or indirectly, by the principle of equal treatment:[58] free movement of goods,[59] free movement of workers,[60] freedom of establishment,[61] freedom to provide services,[62] and the free movement of capital.[63]

Although the conferral of individual rights on market actors was not explicit in the original EEC Treaty, the fundamental freedoms and the right not to be discriminated against on grounds of nationality nevertheless suggest that individual rights were implicit in this new

[52] G de Búrca 'The Role of Equality in European Community Law', in A Dashwood & S O'Leary (eds) *The Principle of Equal Treatment in EC Law* (1997) 13,15. 'It is clear from examining both the caselaw of the Court of Justice and Community legislation, [...] that the principle of non-discrimination is in fact rather limited and that in a number of fields Community law actually permits or even promotes discrimination and unequal treatment.' An example of the latter is that Articles 12, 48 and 52) all prohibit discrimination on the grounds of nationality but, according to ECJ jurisprudence, there is no prohibition on a state discriminating against its own nationals compared with nationals of another Member State (unless the former have exercised a right of free movement between the Member States) Case 175/78 *R v Saunders* [1979] ECR 1129; Joined cases 35 and 36/82 *Morson & Jhanjan v the Netherlands* [1982] ECR 3723 and case 136/78 *Ministere Public v Auer* [1979] ECR 437; M Pickup 'Reverse Discrimination and Free Movement of Workers' (1986) 23 *CMLRev* 135.

[53] G More 'The Principle of Equal Treatment: From Market Unifier to Fundamental Right?' in P Craig & G de Búrca (eds) *The Evolution of EU Law* (1999) 517.

[54] It has other roles in EU law: regulatory (acting as a check on Community policy), constitutional (used by the ECJ to start to develop a range of citizens' rights accompanying free movement rights and normative (having the potential to develop into a general principle of its own right without a nexus to free movement.

[55] G More above n53, 521.

[56] Article 2 EC (then EEC) 'The Community shall have as its task, by establishing a common market and an economic and monetary union, and by implementing common policies or activities referred to in Articles 3& 4'

[57] Pre-Amsterdam, the only such clause was Article 7 EEC (now 12 EC), which reads: 'Within the scope of application of this Treaty, and without prejudices to any special provisions contained therein, any discrimination on grounds of nationality shall be prohibited'.

[58] In the creation of the Common Agricultural Policy, the Community is bound, by Article 40(3), now 34(2) to respect the principle of non-discrimination between producers and consumers.

[59] Articles 30, 34, 37 and 95 EC, now 28, 29, 31 & 90.

[60] Article 48(2) EEC now 39(2) EC.

[61] Article 52 EEC now 43.

[62] Article 59 EEC now 49.

[63] Article 67 EC.

market order.[64] Equal treatment remains directly linked to the 'market access rights'[65] of individual market actors developed by the ECJ and other EU institutions. The bestowal of (market) rights on individual actors is widely viewed as an important part of the constitutionalising of EU law.[66]

'The principal influence over EU social policy has been, and remains, the economic goal of market integration, which appears to animate social policy and the interpretation of the principle of equality within it.'[67] Even Article 141's equality norm of the fundamental right to equal pay owes its existence to concerns over unfair competition, which partially explains why the Article deals only with employment. Article 12's prohibition on nationality discrimination as between Member States, was similarly based on Single Market concerns, albeit more directly rooted in free movement. Indeed most EC.

According to More, the principle of equal treatment fulfills two types of market-unifying role: first, through the importance of the equal application of EU law throughout and between the Member States and the centrality of equal conditions of competition to EU law; second, in dismantling barriers to free movement within a unified market.[68] Equal treatment has therefore been employed to break down protectionist practices with respect to goods, labour or services, and the principle has been offered a very flexible interpretation by the ECJ, covering directly and indirectly discriminatory trade barriers.[69]

Equality plays an important role in implementing specific EU aims:[70] 'the principle of non-discrimination is a tool which is appropriated to further the aims of the Community and,

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[64] G More above n53, 521.

[65] G More above n53, 529 quoting N Reich 'A European Constitution for Citizens: Reflections on the Rethinking of Union and Community Law' (1997) 3 *ELJ* 131-164; 136.

[66] Examples of seminal works: B Laffan (ed) *Constitution-Building in the European Union* (1996); GF Mancini 'The Making of a Constitution for Europe' (1986) 26 *CMLRev* 595; J Temple Lang 'European Community Constitutional Law: The division of powers between the Community and Member States' (1988) 39 *NILQ* 209; 'Community Constitutional Law: Article 5 EEC' (1990) 27 *CMLRev* 645; 'The Development of European Constitutional Law' (1991) 25 *The International Lawyer* 455; JHH Weiler 'The Transformation of Europe' (1991) 100 *Yale Law Journal* 2403; 'The Reformation of European Constitutionalism' (1997) 35 *JCMS* 97; *The Constitution of Europe* (1999).

[67] N Bernard 'What are the purposes of EC Discrimination Law?' in J Dine & B Watt (eds) *Discrimination Law: Concepts, Limitations and Justifications* (1996) 77.

[68] More notes the principle of non-discrimination in the market explicitly in Articles 12, 39, 90 EC (ex 6, 48, 95); and implicitly in Articles 28, 49, 43 EC (ex 30, 59, 52).

[69] Eg indistinctly applicable barriers to trade. See '*Cassis de Dijon*', Case 120/78 *Rewe-Zentrale AG v Bundesmonopolverwaltung fur Branntwein* [1979] ECR 649.

[70] de Búrca identifies two other roles for the principle of equality: as a *value* which mediates, constrains or redirects other specific Community measures or goals; or as an independent Community *goal* and in this sense, potentially a source of legislation in its own right. These will be returned to in the later discussion of fundamental human rights bases for action.

accordingly, it is shaped by the Community's goals.'[71] Market integration provisions which rely on non-discrimination or the principle of equal treatment pervade the Treaty and exist to 'enhance free trade between Member States, to prevent traders being dissuaded from importing and selling their goods in other Member States and to prevent then from being disadvantaged even when they are prepared to do so.'[72] Thus, the importance of the role of equal treatment in creating a single European space for persons, goods, business and services.[73]

(3)The Single Market and Economic Rationales for Outlawing Race Discrimination

Anti-discrimination laws on race and ethnicity across the Union are highly fragmented, uncoordinated and potentially conflicting.[74] Analogous to the pre-Treaty of Rome landscape with respect to gender discrimination laws, the present condition of Member State laws, lacks cohesion or even a minimum standard of protection.[75] Are there not ways in which these divergent standards of protection might themselves foster a type of social dumping? 'Different penalties imposed in different Member States on employers for racial discrimination can lead to a distortion in trade which is contrary to the founding principles of the Union.[76] Equally, Community-wide measures against discrimination in employment are needed to avoid the situation in which undertakings which adopt a policy of nondiscrimination [...] suffer a competitive disadvantage in relation to those prepared to exploit vulnerable minorities.'[77]

Discrimination impedes free movement[78]: non-discrimination provisions related to free movement have distinct economic origins.[79] The creation of a single market in which workers

[71] G de Búrca above n52, 24.

[72] G de Búrca above n52, 25.

[73] P Watson 'Equality of Treatment A Variable Concept' (1995) 24 (1)*ILJ* 33.

[74] This problem is widely noted. In Article 2 of its Resolution on racism, xenophobia and anti-Semitism, [1995] OJ C126 Article 2. The Parliament 'Draws the attention of the Consultative Committee on Racism and Xenophobia to the fact that racism, xenophobia and anti-Semitism can only be combated effectively if national policies do not conflict with each other or make it possible to exercise or promote racism and xenophobia or anti-Semitism across borders.

[75] It was noted by the Consultative Commission on Racism and Xenophobia, Final Report p 56; Economic and Social Committee, Own Initiative Opinion on the Status of Migrant Workers from Third Countries 91/159/05 [1991] OJ C 159/12.

[76] Law Society and the General Council of the Bar of England and Wales *Race Relations in the European Union*, Proposal Doc. 18 January 1995/JG/an (unpublished).

[77] D Curtin & M Geurts 'Race Discrimination and the European Union Anno 1996' (1996) 14/2 *NQHR* 147,153.

[78] The High Level Panel on Free Movement of Persons notes this as an area where action is needed under 'Abolition of indirect obstacles to free movement.' This heading considers social context / *de facto* obstacles, and obstacles arising as a result of disparities in national legislation. The Commission has also acknowledged this EU Commission, *Social Dimensions of the Internal Market* COM (1988) EC 8/89.

[79] High Level Panel on Free Movement of Persons *Report of High Level Panel on the free movement of persons chaired by Mrs Simone Veil* presented to the Commission 18 March 1997; Introduction 1.1. p8.

have full free movement enables labour to move where it is most useful,[80] causing shifts to more productive jobs until marginal productivity and pay (for the same work) are in alignment within the area of integration.[81] Labour mobility is a prerequisite for this: 'for efficiency gains to be realized in full, there must be perfect factor mobility.'[82] It also requires that workers be informed of the job opportunities in other countries, that no other constraints on migration exist in a narrow sense (work permits, residence permits), or in broader senses (living and housing conditions, language).[83]

The absence of a minimum standard with regard to race discrimination[84] across Member State laws potentially impacts free moment in ways that negatively effect the operation of the Single Market.[85] Visible minorities are more likely to suffer discrimination, and are therefore more likely to be dissuaded from moving where there is a variation in levels of protection against discrimination, particularly, where the move contemplated is from an area of high protection to one of low protection, or no protection.

Konstantinidis[86] illustrated the impact of discrimination on free movement. It concerned German laws related to transliteration of names in a civil register which had a 'chilling effect' on certain nationalities exercising their rights of free movement, thereby indirectly

[80] The theory in this context is 'integration theory', T Straubhaar 'Labour Migration within a Common Market: Some aspects of EC experience' (1988) *Common Market Studies* 46.
[81] 'Integration theory'. P Robson *The economics of international migration*, p65; T Straubhaar 'Labour Migration within a Common Market: Some aspects of EC experience' (1988) *Common Market Studies* 46.
[82] M Kleinman & D Piachaud above n5, 9.
[83] H Werner 'Economic Change, the labour market and migration in the Single European Market' in Social Europe 1/95 39-60 (DG V; Luxembourg, Office of Official Pub. of EC) 39.
[84] The debate regarding the appropriate level of social policy harmonisation is a fraught one which will not be explored in this work: however, it is worth noting that there is disagreement about whether to harmonize at all, and if so, whether the standard should be a uniform one, a minimum standard only, or a unified standard which creates a 'floor of rights'. Many contend that there are important differences between a level playing field and a 'transnational floor of rights in labour standards which would aim to entrench certain irreducible levels of protection'. Deakin is one proponent of the idea of a transnational floor of rights under which the standard is more than minimal: he also maintains that there exist good economic reasons to do so.
[85] For an insightful overview into the law on free movement of persons see R Nielsen & E Szyszczak *The Social Dimension of the EC* (1991) 39-80.
[86] Case C 168/91 *Christos Konstantinidis v Stadt Altensteig Standesamt und Landratsamt Calw, Ordnungasamt* [1993] ECR I-1191. (Opinion of the Advocate General Jacobs of 9 December 1992) I-1198-1214. The case concerned the transliteration of the applicant's Greek name by German authorities in Roman characters in the marriage register in Tübingen. The manner in which the register records the name abided by the specifications of the International Organization for Standardization but was extremely distasteful to the applicant because of its phonetic inaccuracy. The question before the ECJ was whether the Amstgericht Tübingen was correct in upholding the original transliteration of the applicant's name in disregard of his wishes, and in particular, whether there was an encroachment, contrary to Article 5 & 7 of the EC Treaty (now 10 and 14 EC), on the rights of a national of a Member State of the EC who is an employed or self-employed person covered by Article 48, 52 and 59 et seq. (now 39, 43, 49 EC), for him to be obliged to be entered in the registers of civil status of his host country, another Member State, against his express wishes, in transliteration differing from the phonetic transcription, whereby its pronunciation is modified and distorted.

discriminating against them. Advocate General Jacobs' Opinion highlighted how this was 'indirect discrimination contrary to 12 and 43 EC (then 7 and 52).'[87] He viewed the practice of the German authorities as 'capable of resulting in covert discrimination against Greek nationals'. Although the Court did not follow the AG's Opinion, the argument 'remains one of the most interesting aspects of the development of fundamental rights protection in Community law.'[88]

Analogies can be drawn between the discrimination effected by Member State nationality laws and those related to race. Member States laws may discriminate through failing to protect sufficiently against race discrimination, or through the specific adverse effects certain provisions have on the free movement of racial and ethnic minorities from other States. The impact of this on the functioning of the Single Market cannot be ignored,[89] since 'variations between national levels of protection may discourage persons likely to suffer discrimination from moving to those states where protection is small or nonexistent and will hinder making a reality of free movement within the single market.'[90] The *Konstantinidis* rationale lies at the heart of a *market-based* argument for protecting against race discrimination. It underpins Article 12 , Articles 39 et seq. EC[91] and is also evident in the Equal Treatment Directives.[92]

It requires recognition of the reality of race discrimination and racial harassment at every

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[87] Opinion of AG Jacobs, above n96 recital 13.

[88] E Guild 'EC Law and the Means to Combat Racism and Xenophobia' in A Dashwood & S O'Leary (eds) *The Principle of Equal Treatment in EC Law* (1997)

[89] Curtin and Geurts note an interesting 'precedent in the context of the free movement provisions, where the Community has already created an obligation which gives rise to individual rights in respect of one aspect of the fight against racism and xenophobia. Council Directive 89/553/EC of 3 October 1989 on the coordination of certain provisions laid down by law, regulation or administrative action by the Member States concerning the pursuit of television broadcasting activities (1989] OJ L298 p23 is based on Article 57(2) and 66 EC. Article 22 of this Directive entails, *inter alia*, that 'Member States shall ensure that broadcasts do no contain any incitement to hatred on grounds of race, sex, religion or nationality'. Curtin & Geurts refer to E Guild's CCME (Churches Committee for Migrants in Europe) Paper of 16 June 1995, unpublished).

[90] D Curtin & M Geurts above n77, 155.

[91] New Article 12 EC reads (ex 6) : ' Within the scope of application of this Treaty, and without prejudice to any special provisions contained therein, any discrimination on grounds of nationality shall be prohibited. The Council, acting in accordance with the procedure referred to in Article 251, may adopt rules designed to prohibit such discrimination.'

[92] *Council Directive on the implementation of the principle of Equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions* 76/207/EEC [1976] OJ L 39/40 (it notes Article 235 alone); *Council Directive on the progressive implementation of the principle of equal treatment for men and women in matters of social security* 79/7/EEC [1978] OJ L 6/24 (it notes Article 235 alone); *Council Directive of the implementation of the principle of equal treatment for men and women in occupational social security schemes* 86/378 EEC [1986] OJ L 225/40; *Council Directive on the application of the principle of equal treatment between men and women engaged in an activity, including agriculture, in a self-employed capacity, an don the protection of self-employed women during pregnancy and motherhood* 86/613/EEC [1986] OJ L 359/56.

level of public and private life:[93] social interactions, cultural activities, administrative procedures, border controls and policing which discourage EU citizens of racial and ethnic minority origin from exercising their rights to freedom of movement, of establishment and in the provision of services. The free movement rights of many minorities are limited in reality. Such discrimination presents a significant barrier to the operation of the single market insofar as EUN of minority origin are unable (or unwilling) to fulfill their 'integrative function' as *mobile* market actors because of discrimination in the integrated European market, thereby interfering with the 'optimum allocation of resources throughout the Community, the optimum rate of growth, and thus the optimum social system.'[94] Racism prevents minorities from contributing economically (as well as socially and culturally) to the process of European integration, as full market citizens.[95] As such therefore, racism can create the sort of distortions Article 12 EC was designed to eradicate, since discrimination based on race and ethnicity can be viewed as 'transferred' nationality discrimination. The fact that EU law has assisted that transfer lays special responsibility with the EU to address the newly reinforced discriminations.

With no formal legal barriers to EU citizens' migration, movement between the Member States is determined less by formal laws and far more by what have been termed 'push and pull factors [...] and by the persistence of anti-mobility factors such as cultural, language or climatic differences'[96]. Discrimination based on race and ethnicity is one such anti-mobility factor[97] .

The EU recognises the severity of racism as an impediment to free movement within the Single Market. The inter-institutional *Joint Declaration* declares 'whereas the Community institutions attach primary importance to the respect of fundamental rights, [...] and to the

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[93] T Hervey 'Putting Europe's House in Order: Racism, Race Discrimination and Xenophobia after the Treaty of Amsterdam' in D O'Keefe & P Twomey (eds) *Legal Issues of the Amsterdam Treaty* (1999) 329, 332.

[94] C Barnard 'EC 'Social' Policy' in P Craig & G de Búrca (eds) *The Evolution of EC Law* (1999)479.

[95] Analogous arguments exist in favour of action to combat discrimination against persons with a disability. The Declaration to the new Article 95 EC (ex 100a) provides: 'The Conference agrees that, in drawing up measures under a [now Article 95] of the Treaty establishing the European Community, the Institutions of the Community shall take account of the needs of persons with a disability'. Recalling that the central purpose of Article 95 is the establishment and functioning of the Single Market, this Declaration is significant. It concedes is 'a point of principle which is that market rationality is best served by factoring in the needs of people at the outset in drafting measures to harmonize the internal market. Disability is now seen not merely as a soft social policy issue but as an internal market concern.' G Quinn 'The Treaty of Amsterdam Raising the Visibility of Europeans with Disabilities' in P Alston (ed) with M Bustelo & J Heenan *The EU and Human Rights* (1999); 281-326.

[96] H Werner above n83, 46.

[97] It is noteworthy that the High Level Panel on Free Movement notes in its report the importance of assessing free movement in the context of political and cultural pluralism. Introduction, Part 3, p9.

principle of freedom of movement as laid down in the Treaty of Rome.'[98] Similarly, the Parliament asserted 'the free movement of persons within the European Union and European citizenship combined with the promotion of human rights and fundamental freedoms, within and outside the Union, require that the must be no racist, xenophobic or anti-Semitic action within the EU.'[99] The Commission explicitly recognises the hindrances certain social groups face in exercising rights of free movement:[100] 'The Union must act to provide a guarantee for all people against the fear of discrimination if it is to make a reality of free movement within the single market.'[101] Thus, 'racist or discriminatory behaviour towards minorities, especially in employment and housing, inhibits free movement and may distort the labour market or undermine educational or other exchange programmes within the Community.'[102]

As the then Commissioner Flynn noted, anti-discrimination measures against race are necessary in the EU to guarantee 'the basic fundamental right to equality, the full functioning of the single market - notably where free movement of persons and services are concerned - the success of the European employment strategy, and the proper application of common Community policies, including the Structural Funds.'[103] This rationale was followed through in the Commission's proposals for the tripart anti-discrimination package:[104] 'This proposal by discouraging discrimination, will lead to greater economic and social participation and a reduction in social exclusion. This will have *direct benefits for economic growth* reducing public expenditure on social security and assistance, competitiveness of companies by ensuring that they make the best of all the resources available in the labour market.'[105]

The Impact Assessment Form appended to the Proposal offers support for an economic

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[98] Recital 2. Also Joint Declaration of 11 June 1986; [1986] OJ C 158 and the 1988 Commission Proposal for a Council Resolution of 29 June 1988 and Opinion of ECOSOC of 24 April 1996 which note the free movement argument for action against race discrimination.

[99] EP, *Resolution of the European Parliament on racism, xenophobia and anti-Semitism* [1995] OJ C126, p75,. Article 1.

[100] EU Commission *White Paper on Social Policy: a Way Forward for the Union* [1994] COM (1994) 333; IV.A.3, p26. It specifically mentions those without resources, persons with certain disabilities, the unemployed without benefits, those who live on social benefits, and the Traveling and Gypsy communities. Although racial and ethnic minorities are not specifically mentioned here, they are over-represented in the groups that are: the *de facto* discrimination they suffer is indirect discrimination based on race and ethnicity.

[101] EU Commission *White Paper on European Social Policy* COM (1994) 333, 40.

[102] D Curtin & M Geurts above n77, 153.

[103] Flynn address; p8; para 1.

[104] EU Commission Proposal for a Council Directive implementing the principle of equal treatment irrespective of racial or ethnic origin COM (1999) 566 final.

[105] EU Commission, Proposal Directive, implementing the principle of equal treatment between persons irrespective of racial or ethnic origin; Impact Assessment Form COM(1999) 566 final 99/0225 Part 4; paragraph 4.

aim: 'it *ensures that enterprises have at their disposal the best qualified employees, thus contributing to the competitiveness and the strength of the firm and of the economy more widely.*'[106]

The Race Directive[107] relies in part on an economic and market-based justification.[108] 'Discrimination based on racial and ethnic origin may undermine the achievement of the objectives of the EC Treaty, in particular the attainment of a high level of employment and of social protection, the raising of the standard of living and the quality of life, *economic and social cohesion* and solidarity. It may also undermine the objective of developing the EU as an area of freedom, security and justice.'[109] This provision conceives of race discrimination as something impeding the attainment of Treaty objectives, including Single Market ones.

The material scope of the Directive highlights employment issues implicating the market: it explicitly covers access to employment, vocational training, working conditions, workers organisations, and even the access to and supply of goods and services.[110]

3. NORMATIVE BASES FOR ACTION AGAINST RACE DISCRIMINATION IN EU LAW

Racism is an evil which assaults vital aspects of our humanity. It is far more a crime against people than it is a threat to the market. The following discussion recognises this, and acknowledges the strength of human rights rationales over market ones. Anti-discrimination should, first and foremost, be founded on normative motivations and not on economic concerns.

'Can [...] the value of equality and a new generation of anti-discrimination laws be used to create space where none exists? Can the value of equality (and the laws that follow it) be used to change the character of the non-space into which many marginalised groups fall?'[111]

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[106] EU Commission, IAF above n105 Part 4 [emphasis added].

[107] Council Directive 2000/43/EC implementing the principle of equal treatment between persons irrespective of racial or ethnic origin; [2000] OJ L180/22 (preceded by the Commission Proposal COM (1999) 566 final.) This was part of its tripart anti-discrimination package presented in December 1999.

[108] The Commission's Proposal likewise relies on a number of economic strands: 'Social protection systems play a fundamental role in ensuring social cohesion, and in maintaining political stability and economic progress across the Union. Discrimination in access to benefits and other forms of support from the social protection system compounds the marginalisation of individuals from ethnic minority and immigrant backgrounds. [...] Other areas are more indirectly linked to the world of work but nevertheless contribute significantly to social and economic integration. [...] Discrimination in access to goods and services also limits social and economic integration, especially in access to finance, but also more widely' EU Commission Proposal Directive, Explanatory Memorandum COM(1999) 566 final 99/0225, p5 para. 2, 3, 4.

[109] Directive 2000/43/EC; Preamble recital 9. Emphasis added.

[110] Directive 2000/43/EC; Article 3

[111] G Quinn above n1, 69.

The creation of a new space in EU law for those marginalised on the basis of race or ethnicity, requires that we move *beyond assuming that space*, and therefore go *beyond market objectives*, and search for stronger objectives rooted in fundamental human rights and their values.[112] Can the fundamental rights discourse of the EU free itself of its Single Market genesis and limitations, and become one founded on independent, non-instrumental grounds beyond the understanding of 'rights pertaining to the freedom of movement as fundamental rights'?[113] Indeed, it is clear that 'preventing racism to protect free movement entitlements might paradoxically exacerbate racism by granting entitlements on an indirectly racially discriminatory basis, the implications of this have not been carried forward into other parts of the EU's racism discourse.'[114]

The EU must meet the challenges of its soft law and its new Race Directive, and protect people because of their humanity rather than their economic function. 'A Community national who goes to another Member State as a worker or self-employed person under [Articles 39,52,59 EC] is entitled not just to pursue his trade or profession and to enjoy the same living and working conditions as a national of the host State: he is in addition entitled to assume that wherever he goes to earn his living in the EC, he will be treated in accordance with the common code of fundamental values, in particular those laid down in the ECHR.'[115]

Given the foregoing: what are the principles at the heart of a new normative foundation for action against race discrimination in EU law?

(1) Human Rights in EU law

An essential premise of these alternative principles and values is the centrality of fundamental human rights to EU law.

Fundamental human rights now take pride of place among the guiding principles of EU

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[112] 'Constitutions are not mere copies of a universalist ideal, they also reflect the idiosyncratic choices and preferences of the constituents and are the highest legal expression of the country's value system.'; B De Witte 'Community Law and National Constitutional Values' (1991/2) *LIEI* 1-22, 7

[113] E Szyszczak 'Limits of Market Equality' in B Hepple & E Szyszczak (eds) *Discrimination: The Limits of Law* (1992)125.

[114] TK Hervey 'Race Discrimination and Xenophobia after the Treaty of Amsterdam' in D O'Keefe & P Twomey (eds) *Legal Issues of the Amsterdam Treaty* (1999) 329, 345.

[115] AG Jacobs in *Konstantinidis* above n96.

law alongside Single Market rationales.[116] The EU has elevated the status of fundamental human rights in its law and policy,[117] and the Treaties now explicitly embody them[118] 'effectively consolidate[ing] the Court's caselaw with regard to human rights. Article 6(2)TEU commits the Union to the principles of liberty, democracy, respect for human rights and fundamental rights guaranteed by the ECHR and as determined by the constitutional traditions of the Member States.[119] Article 177 EC (ex 130 u (2)) EC creates a respect for human rights and fundamental freedoms in the sphere of EC policy in development and co-operation.[120] Human rights clauses are now included in trade agreements concluded with the EU such that some commentators identify 'conditionality' of trade preferences on respect for human rights.[121] These clauses have

[116] The literature on fundamental human rights in Community law is voluminous, the following references represent a small selection of works on the subject; JF Akandji-Kombe 'Jurisprudence Communautaire Récente en Matiere de Droits fondamentaux 1 décembere 1996 - 30 november 1997' (1998) 3-4 *Cahiers de droit européen* 353-387; P Alston (ed) *The EU and Human Rights* (1999); A Cassese, A Clapham& J Weiler (eds) *European Union: The Human Rights Challenge* Vol. I-III (1991); G de Búrca 'Fundamental Rights and the Reach of EC Law' (1993) 13 *OJLS* 283; F Hendrickx 'Fundamental Rights in the EU' in R Blanpain, M Colucci, E De Smijter, C Engels, F Hendrickx, L Salas (eds) *Institutional Changes and European Social Policy after the Treaty of Amsterdam* (1998); N Neuwahl and A Rosas (eds) *The European Union and Human Rights* (1995); P Gallagher, 'The Treaty of Amsterdam and fundamental rights' (1998) *Irish Journal of European Law* 21; M O'Neill, 'Fundamental Rights and the European Union' in Quinn (ed) (1995)*The Irish Human Rights Yearbook* 67; I Persaud, 'The Reconstruction of Human Rights in the European Union' in CA Gearty (ed) *European Civil Liberties and the ECHR* (1997) 347-391; DR Phelan, 'The Right to Life of the Unborn v. Promotion of Trade in Services: The European Court of Justice and the Normative Shaping of the European Union' (1992) 55 *Modern Law Review* 670; JHH Weiler & N Lockhart '"Taking Rights Seriously", Seriously: The European Court of Justice and Fundamental Rights Jurisprudence' (1995) Parts I & II in 32 *CML Rev* no.1; 51-94; no.2 ; 579-627 respectively; JHH Weiler 'The Jurisprudence of Human Rights in the European Union : Integration and Disintegration , Values and Process' (1996) *Harvard Jean Monnet Working Paper* 2/96; L Woods 'The European Union and Human Rights' in R Hanski and M Suski (eds) *An Introduction to the International Protection of Human Rights*,: A Textbook (1997) 283-300.

[117] For recent examples of communications illustrating this EU Commission, *Communication from the Commission to the Council and the European Parliament The European Union and the External Dimension of Human Rights Policy: From Rome to Maastricht and Beyond.* COM (1995) 567 and EP, *Rapport sur la communication de la Commission au Conseil et au Parlement européen intitulée "L'Union européene et les aspects extérieurs de la politique des droits de l'homme : de Rome a Maastricht et au-dela"[1995] (COM (95) 567* EP [1998] A 4-0409/98 Commission des affaires étrangeres, de la securité et de la politique de la défense: Rapporteur: M Yiannis Roubatis 6 Novembre 1998.

[118] Article 6.2 (ex F) TEU states that the Union 'shall respect fundamental rights, as guaranteed by the European Convention for the protection of human rights and fundamental freedoms[..] and as they result from the constitutional traditions common to the Member States, as general principles of Community law'. the fifth part of Article 11 (ex J.1) TEU sets as EU objectives the development and consolidation of democracy and the rule of law and respect for human rights and fundamental freedoms in the common foreign and security policy of the EU. The SEA Preamble contained the first human rights reference on the respect for the fundamental rights recognized in the constitutions and laws of the Member States, in the Convention and in the European Social Charter. SEA [1997] OJ L 169; Treaty Series 31/1988 Cmnd 372.

[119]TEU Article F, para.1.

[120] J Simma, JB Aschenbrenner & C Schulte 'Human Rights Considerations in the Development Co-operation Activities of the EC' in P Alston (ed) *The EU and Human Rights* (1999) 571.

[121] B Brandtner & A Rosas, 'Trade Preferences and Human Rights' in P Alston (ed) *The EU and Human Rights* (1999) 699.

taken numerous forms[122] and emerged in various agreements and instruments such as Lomé IV[123]. A standard human rights clause is now included in external agreements, as proposed by the Commission[124] and adopted by the Council in its universal systematic guidelines of 29 May 1995: these are now part of the *aquis communautaire* in this area. Most recently, the Charter of Fundamental Rights of the EU, proclaimed in at the Nice European Council on 7 December 2000, set forth a positive catalogue of the rights upheld by the Union.[125] Despite not having mandatory force, it contains an unequivocal statement of rights and fundamental values upon which the Union is founded, and by which it should be bound.

This evolution opens the way for alternative rationales for action against race discrimination.[126] Alternative values must be articulated in order to secure the human rights bases for action against race discrimination. While human rights implicate integration and constitution-building,[127] competence, the EU power of judicial review,[128] and the quandary of high and low standards,[129] they also implicate values. The Commission has asserted that 'there are a number of shared values which form the basis of the European social model. These include democracy and individual rights, free collective bargaining, the market economy, equality of opportunity for all and social welfare and solidarity.'[130] Article 11.1 TEU defines as an objective of its common foreign and security policy the safeguarding of 'common values, fundamental interests, independence and integrity of the Union in conformity with the principles of the UN Charter.' The Charter of Fundamental Rights of the EU likewise embodies assertions of shared, 'common values'[131] and a 'common spiritual and moral heritage'. It holds

[122] Eg the 'basis clause' such that respect for democratic principles and human rights are the basis for cooperation ties between the EU and the third country; the 'essential element clause'; the 'standard clause'. adp[ted by the Council *Bull.* EU 5-1995, p1.2.3.

[123] Article 5(2)(2) of Lomé IV (1989) 'Every individual shall have the right, in his own country or in a host country, to respect for his dignity and protection by the law.' Lomé IV (1995) added new sub-paragraph 3 stipulating 'Respect for human rights, democratic principles an the rule of law, which underpins relations between the ACP States and the Community and all provisions of the Convention, and governs the domestic and international policies of the Contracting Parties shall constitute an essential elements of the Convention.'

[124] COM (1995) 216 final.

[125] Charte 4422/00 [2000] OJ C 364/01.

[126] EP Annual Report on Respect for human rights in the EU (1997) A4-0410/98 (Committee on Civil Liberties and Internal Affairs); EP Annual Report on human rights in the world in 1997 and 1998 and European Human Rights Policy [1998] A-4-0468/98 (Committee on Foreign Affairs, Security and Defence Policy).

[127] JHH Weiler 'The Transformation of Europe' (1991) 100 *Yale Law Journal* 2403.

[128] D Binder The European Court of Justice and the Protection of Fundamental Rights in the European Community: New Developments and Future Possibilities in Expanding Fundamental Rights Review to Member State Action' (1995) *Harvard Law School, Jean Monnet Papers*

[129] J Weiler 'The Jurisprudence of Human Rights in the European Union : Integration and Disintegration , Values and Process' *Harvard Jean Monnet Working Paper* 2/96.

[130] EU Commission *European Social Policy A Way forward for the Union A White Paper* COM (94) p2.

[131] Charte 4433/00 [2000] OJ C/364/01 Preamble, Recital 1.

that 'the Union is founded on the indivisible, universal values of human dignity, freedom, equality and solidarity; it is based on the principles of democracy and the rule of law.'[132] The Union views itself as contributing to the preservation and development of these common values while respecting the diversity of the cultures and traditions of the peoples of Europe.

This amalgam of shared values can also be identified in the constitutional traditions common to the Member States, as articulated in *Defrenne*'[133] Rights identified as fundamental by the ECJ[134] include the right to non-discrimination on the basis of nationality, the right to private life,[135] the inviolability of the home,[136] the duty to give reasons for an unfavourable administrative decision,[137] and freedom of expression of different social, cultural, religious and philosophic backgrounds in the Member States.[138]

Finally, human rights may have their source in a 'common code of fundamental values [...] laid down in the ECHR.'[139] With this supplemental source in the ECHR, the EU may rely on its own recognised set of common values as a substantive source of fundamental human rights protection in the EU.

The values considered here are those upon which action against race discrimination may be founded. 'Fundamental rights principles upon which the battle against racism and intolerance are to be fought - the principles of nondiscrimination and tolerance -lie at the heart of the European Union.[140] These values have historically formed part of the basis for the existence of the European Union, and undermining them represents a threat to its body politic.[141] The centrality of these values is exhorted intermittently throughout the text of the Treaty on European Union [...] and '[they] form a central part of the template of the Union (Article F(2) TEU). In democracies where the majority rules, the treatment of minorities is one of the principal tests of the extent to which human rights are respected and the rule of law observed.'[142]

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[132] Charte 4433/00 [2000] OJ C/364/01 Preamble, recital 2, p1.

[133] Case 149/77 *Defrenne III* [1978] ECR 1509. A Mattera '"Civis europaeus sum" Citoyenneté européene, droit de circulation et de séjour, applicabilité directe de l'article 8A du traité CE', Editorial, 3 *Revue du Marché Unique Européen* 5 (1995) p8.

[134] D Curtin & M Geurts, above n77, 151 note the fact that the ECJ caselaw abounds with caselaw that attests to the fact that the Community institutions are bound to respect fundamental rights, both in adopting legislation and in administering Community law.

[135] Arrêt loi allemande sur les médicaments du 8 avril 1992.

[136] Case 227/99 *Hoechst* [1989] ECR 2859.

[137] Case 85/76 *Hoffman-LaRoche* [1979] ECR 461.

[138] Case C-288 *Gouda* [1991] ECR I-4007

[139] Case C-168/91 *Konstantinidis* [1993] ECR I-1191.

[140] Final Report of the Consultative Commission, 63.

[141] Final Report of the Consultative Commission, 63.

[142] D Curtin & M Geurts above n77, 151.

In acting against race discrimination 'the EU must be based on an ethical principle which is entered into and applied by all Member States. This common ethnical code of good community relations, social openness and common values is based on three principles [...] human rights, European solidarity and acceptance without exception'[143]. The following discussion also considers the values of equality, democracy, human dignity.

(2) Equality: From humble beginnings to stronger normative forms

Equality is perhaps the most important and pervasive of the normative principles underpinning EU action against race discrimination. The following discussion tracks the evolution of the principle in EU law from its economic genesis, to its newer, more humanistic incarnations.

Given the foregoing, can the principle of equality as it now exists fulfill broader, more human rights-based expectations, freed from its economic and integrative functions? Many argue that strands of a more expansive role for equality in EU law,beyond the the single market already exist:[144] some locate that wider 'telos' in the goals related to economic cohesion such as social protection[145] and solidarity among states,[146] others argue that the normative conception of equality as an independently significant, fundamental principle already exists in EU law pointing to the recent tripart equality initiative as evidence of its existence, such that 'a shift from the pure market citizen model of equal treatment is under way.'[147]

(i) Form and market origins

Form and substance are inextricably connected: the economic focus of Article 141 and Article 12 left EU law with a rather limited and formal interpretation of equality[148] concerned primarily with market access.[149] Even rights which developed beyond those original provisions, remained 'variably contingent on market activity.'[150] Do the market origins of equality persist today rendering current EU law conceptions of equality unnecessarily formal? 'While this

[143] Consultative Commission *Interim Report* 11138/94, 21 November 1994; 7.
[144] G de Búrca 'The Principle of Equal Treatment in EC Law' above n52, 26.
[145] 'If normative standards can be seen as guarantors of economic development, they also have a role in extending participation in the broad sense of that term to include economic and industrial democracy.' S Deakin & F Wilkinson above n3, 289.
[146] S Deakin & F Wilkinson above n3, 289.
[147] G More above n53, 540.
[148] H Fenwick & T Hervey 'Sex equality in the Single Market: new Directions for the European Court of Justice' (1995) 32 *CMLRev* 443-470.
[149] G More above n53, 535.
[150] G More above n53, 535.

insistence of formal equality helps assuage concerns about social dumping and goes a long way towards creating a level playing field of competition, it does not necessarily help improve the position of women.'[151] Formal equality may be a necessary, though not sufficient, part of the anti-discrimination strategy at the heart of the EU. It is unable to tackle the contextual obstacles to equality of opportunity for minorities. 'Equality cannot be restricted to technical equality. Protection against group related exclusion can only be successful if it is result-orientated.'[152] Thus the formal market origins of the principle of equality in EU law present significant limitations to it being effective in an anti-discrimination strategy against race discrimination.

(ii) Applicability *ratione personae*

A profound limitation within the classic EU conception of equality concerns the exclusion of third country nationals.[153] This limitation is enshrined in Article 12 of the Treaty, and persists post-Amsterdam in the Directive despite the latter's explicit inclusion of TCN in the coverage of the principle of equal treatment as a result of the caveat for distinctions permitted on the basis of nationality.[154] The limitation is reinforced still more in the Charter of Fundamental Rights of the EU which enshrines the distinction by providing for additional rights reserved exclusively for citizens, thereby undermining fundamental aspects of its right to equality.[155]

'The non-application of the equal treatment rule to non-member country nationals, who are resident in the EU (and can have no rights through EU family members), raises questions of legitimacy for the economic constitution. [...] it is non-member country labour resident within the European Union which is most in need of protection from discrimination.'[156] The restricted applicability of equal treatment *ratione personae* to EU nationals indicates that the principle is not entirely freed of its market origins. For it to lay claim to being a superior or general principle of law, it must operate independently of the prerequisite of citizenship and free

[151] G More above n53, 535.

[152] D Schiek 'Contract Law, Discrimination and European Integration' in T Wilhelmsson & S Hurri (eds) *Welfare State Expectations, Privatisation and Private Law* (1998) 405, 421.

[153] Some contend that because the principle embodies a fundamental right its application is not confined to EU nationals; AG F.G. Jacobs 'Introduction to the General Principle of Equality in EC Law' in A Dashwood & S O'Leary (eds) *The Principle of Equal Treatment in EC Law* (1997) 1. It is submitted that this may be a premature assessment.

[154] Article 3.2.

[155] Charte 4422/00 [2000] OJ C/364/01. Chapter V, Citizens' Rights. Indeed, one may question what rights the Charter actually adds for TCN, beyond those already protected by international human rights instruments in most of the Member States.

[156] G More above n53, 531.

movement. Since form and substance are directly linked, the presumptive formal exclusion of people because of their nationality speaks to the substantive poverty of the principle.

Thus, as much for the strength of the principle as the protection of the subjugated and vulnerable, the principle of equal treatment should cover TCN.[157] For that principle to be a principle founded on universal human rights, it must protect all persons within the territory. 'The principles underlying the EC should be seen as model for policies of inclusiveness and equality directed towards nationals of other States, rather than as a model for excluding outsiders. The European Communities should not be the old nation-state writ large.'[158]

The link between Member State citizenship and free movement[159] renders the traditional principle of equal treatment potentially incapable of covering race discrimination as such.[160] 'To base action to combat racism on the imperative of guaranteeing freedom of movement for citizens of the European Union is to base it on a distinction which is in itself potentially indirectly racially discriminatory.'[161] '[...] A measure based partly on free movement legal basis provisions and partly on Article 13 EC would not protect TCNs; paradoxically the group most in need of protection.'[162] To be effective against race discrimination, the principle of equal treatment must be freed of both EU nationality and free movement, despite the fact that anchorage in one of the four freedoms still has the benefit of mandating EU level action.[163]

(iii)Jurisdictional Applicability: holding the EU to its own norms

A very critical aspect of the EU law principle of equality is its jurisdictional

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[157] As in *Konstantinidis*, the human rights protection advocated there would be compromised if its protection were limited to EUN.

[158] Runneymede Trust, *Combating Racism in Europe* (1987) 21; see also discussion of Universal Human rights and the alien at 4.

[159] S O'Leary 'The Relationship between Community Citizenship and the Protection of Fundamental Rights in Community Law' (1995) 32 *CMLRev* 519, 522 ; C Closa 'Citizenship of the Union and Nationality of Member States' (1995) 32 *CMLRev* 487; D'Oliveira 'Plural Nationality and European Union' in d'Oliveira (ed) *Plural Nationality , New Trends* (1993); S O'Leary 'Nationality and Citizenship: A Tale of Two Uneasy Bedfellows (1992) 12 *YEL* 353.

[160] For a seminal critique of the limitations attendant to a concept of citizenship which does not go beyond nationality, J Habermas 'Citizenship and National Identity: Some Reflections on the Future of Europe'. (1992) 12:1 *Praxis International* 1-19.

[161] T Hervey above n114, 341. 'Although this contradiction is noted in the European Parliament's resolution of 1989 (14 February 1989, at recital I) and used as a basis for criticism of Council's action on racism where action has excluded (id, recital A), it does not appear to have been accepted by other institutions'.

[162] T Hervey above n114,341.

[163] T Hervey above n114, 165.

applicability,[164] particularly its applicability *to* acts of the EU.[165] A truly independent general principle with constitutional force is one to which the EU itself would be subject, and against which all EU measures would be capable of being reviewed. The absence of this and an *enforceable* instrument[166] of EU fundamental rights and duties.[167] results in a weaker principle of equality. It also prevents redress where EU law is itself the source of discrimination, even if only indirectly. Moreover, it weakens the EU's moral voice in the international trade context by requiring the respect of fundamental rights of the other signatories to these agreements, without being effectively and objectively bound to such respect in its own laws.

The absence of a fundamental text has recently been remedied, at least in part, by the proclamation of the Charter of Fundamental Rights of the EU,[168] which despite not yet having mandatory force, has normative and declaratory significance. In some general, and fairly benign sense, the Charter commits the Union to a protection of fundamental human rights by addressing provisions of the Charter to the institutions and bodies of the Union, and to the MS when they are implementing Union law. 'They shall therefore respect the rights, observe the principles and promote the application thereof in accordance with their respective powers.'[169] The 'obligating provision' is qualified by a standard, proportionality style limitation clause for any restrictions on the rights and freedoms recognised in the Charter. Restrictions are permitted while 'they are necessary and genuinely meet *objectives of general interest recognised by the Union* or the need to protect the rights and interests of others.'[170] These objectives could well be economic or integrative ones, such that even within this Charter, the recognition of human rights is potentially limited by objectives which have traditionally leaned towards economic objectives of the single market.

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[164] Guild outlines three distinct areas of applicability: 1. Where a Community institution's act is directed against a legal or natural person, where the Member States act for or on behalf of the Community, or where the act is specifically required by Community law; 2. Where Member States seek to rely on a derogation, be it directly or indirectly from one of the four fundamental free movement rights; and 3. Where Member States' implementation of Community law permits racial discrimination to constitute an obstacle to a free movement right or the full enjoyment of a social right guaranteed by Community law.

[165] It is interesting to question whether a finding that a particular measure had the effect of indirect discrimination would undermine an EU law measure? or test its legality? Until equal treatment is a condition precedent for the legality of EU acts, as well as those of Member States acting in respect of Community rights or in fulfillment of Community obligations, that principle exists primarily in the realm of rhetoric.

[166] This point is valid notwithstanding the Charter of Fundamental Rights of the EU which is not directly enforceable but may be used as a guide by the ECJ Charte 4422/00 [2000] OJ C/364/01.

[167] EU Commission Report on the Operation of the Treaty on European Union, ***Bull.*** EC 5/1995; Preface, recital 1.9.1.

[168] Charte 4422/00 [2000] OJ C/364/01.

[169] Charte 4422/00 [2000] OJ C/364/01. Article 51.1.

[170] Charte 4422/00 [2000] OJ C/364/01. Article 52.1.

What these objectives are, and how they are weighted remains within the purvey of the very entities which these rights and standards are supposed to police, rendering the Charter no great advance in terms of jurisdictional applicability of fundamental rights, or anti-discrimination standards.[171]

'Conspicuous in its absences from the activities so far of the EU institutions in respect of racism, race discrimination and xenophobia is any systemic assessment of the extent to which the Union's other policies may impact on those excluded because of race, or may implicitly encourage racism and xenophobia. [...] Article 13 should therefore urgently be used as a basis to put into effect a wide-ranging assessment of all the EU's policies, existing and post-Amsterdam, to ensure the EU's own house is in order, and that action is taken to guard against the potentially racially discriminatory effects of the European integration process.'[172]

One solution to this would be to interpret provisions of the Treaty and secondary legislation in the light of the general principle of equality, such as that found in the Charter. Not only would all of EU law be subject to that standard, but an individual would have recourse to the totality of effective remedies of EU law. Given the foregoing it is contended that any claim to the principle of equality being a general principle or constitutional right must be heavily qualified at this stage, although there is an incipient value emerging of equality as a fundamental right.

(iv) The emergence of a free-standing substantive human rights principle

Notwithstanding the foregoing, equality in EU law *is* evolving into a normative value, or 'an autonomous value of Community law, quite independently of its market-unifying and market-regulating roles.'[173]

The Advocate General's Opinions in *Konstantinidis* [174] and in *P v. S and Cornwall County Council* [175] both recognise a nascent, general equality principle. In *Konstantinidis* AG Jacobs asserted 'a Community national who goes to another Member State [...] is [...] entitled

[171] On the other hand, the remaining provisions of the Charter provide that the standards it contains are minimum only (Article 52.3), nothing in the Charter may be interpreted as restricting or adversely affecting human rights and fundamental freedoms, nor implying any right to engage in acts aimed at the destruction of any rights and freedoms recognised in the Charter. (That guarantee goes on to qualify itself as follows 'or their *limitation to a greater extent than is provided for herein*').

[172] TK Hervey 'Race Discrimination and Xenophobia after the Treaty of Amsterdam' above n114, 345.

[173] G More above n53, 544.

[174] Case C-168/91 *Christos Konstantinidis vs Stadt Altensteig-Standesamt* [1993] ECR I-1191; Opinion of the AG Jacobs.

[175] Case C-13/94 [1996] ECR I-2143 *P v. S and Cornwall County Council* regarding the application of the principle of equal treatment in the case of a transsexual.

to assume that wherever he goes to earn his living in the EC, he will be treated in accordance with the *common code of fundamental values* in particular those laid down in the ECHR.'[176] This Opinion views substantive equality as inhering in the general principles of EU law, despite its limitation to EUN. This heralds the potential for legal action race discrimination based on *fundamental values and human rights.*

In *P v. S* Advocate General Tesauro noted the role of the principle of equality in ensuring that disadvantaged persons are protected, referring to 'the universal fundamental value of equality.'[177] While the Court did find discrimination, it did not do so by following the broader thrust of the AG's Opinion, and its application of the principle of equality remained a formalistic one, which avoided any autonomous equality principle.

Very different interpretations of this judgment exist: some hail the Court's judgment as upholding the principle of equality as a genuine, moral fundamental principle of EU law at the heart of the EU constitution.[178] While the Court hinted at the possibility of a general and independent equality principle, several of the most essential features of such a principle were still lacking, rendering this view premature.[179] *Grant v South-West Trains*[180] saw the ECJ place some very significant limitations on any expansive interpretations of the equality principle upheld in *P v. S* . In *Grant*, the Court, deferring to the legislative process,[181] unequivocally rejected the idea of an independently applicable general principle of equality in EU law.

However, some formal recognition of this does exist in the Charter of Fundamental Rights of the EU. A general equality provision is set forth in the context of a declaration 'based on common values.'[182] The Charter also gives formal recognition to the role of international human rights in EU law.[183] It is clear that the principle of equality in EU law already contains human rights dimensions. Indeed, AG Jacobs' Opinion indicates that any violation of the

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[176] AG Jacobs in *Konstantinidis* above n96 (Emphasis added).

[177] Paragraph 24 of the Opinion.

[178] C Barnard '*P v. S*: Kite Flying or a New Constitutional Approach?' in A Dashwood & S O'Leary (eds) *The Principle of Equal Treatment in EC Law* (1997), 59.

[179] This is so despite interpretations of *Article 141 in the wider context of the Treaty such as that in* Case C-132/92 *Bird's Eye Walls v Robert* [1993] ECR I-5579 that *Article 141 embodied 'a specific form of the general principle of non-discrimination'.*

[180] Case C-249/96 *Grant v. Southwest Trains* [1998] ECR I-0621

[181]The ECJ has been highly activist where it perceived EU (and single market) imperatives were at issue. H Rasmussen *On Law and Policy in the European Court of Justice: A Comparative Study in Judicial Policy Making* (1986) M Cappelletti 'Is the European Court of Justice "Running Wild"?' (1987) ELRev 3; J Weiler 'The Court of Justice on Trial' (1987) 24 CMLRev 553.

[182] Preamble, recital 1.

[183] Article 53 of the Charter; see also More who notes that this as a feature relied upon to identify a nascent general equality principle in Community law; G More above n53, 544.

human rights of a migrating Community national, and presumably any EUN exercising any EU law right, should be considered a violation of EU law, as such violations are likely to impede the free movement of persons[184] . Despite remaining contingent on free movement, the implication of fundamental human rights law in EU law is significant.

This Opinion, and the decisions in *P v. S* and *Grant* demonstrate the potential for the application of international human rights standards in the interpretation the principle of equality in EU law. However, the fact that the ECHR contained no free-standing right of equality (at the time of the Opinion and judgments), and that it has been a principal source of international human rights law for EU law, limits the potential for such norms to positively influence the development of a broad based equality principle in EU law.

Notwithstanding this, it may be argued that at the core of EU equality law lies some fundamental human rights rationale. 'A human-rights perspective of equality underlies the principle of equal pay. It has also been ascribed to the prohibition of discrimination on the grounds of nationality (Article 6 [12] EC).'[185] EU law continues to recognise this foundation: 'The principle of non-discrimination is at the core of human rights protection.[...] Tolerance and non-discrimination build stability and security and promote the full development and dignity of all individuals, communities and society as a whole.'[186]

Similarly, the Charter of Fundamental Rights of the EU, recognises equality as a fundamental right. Articles 20 and 21 set forth a formal principle of 'equality before the law', the grounds of discrimination of which are substantively numerous. Though not enforceable it heralds the possibility of an independent and general principle of equality in EU law[187] .

Article 13 of the Amsterdam Treaty is of singular importance in the evolution of a general principle of equality in EU law. It is however plagued with being enabling and not autonomous.[188] It is questionable whether this style of provision lays real foundation for independent and generally applicable provisions like Articles 12 and 141, since it is submitted that they are fundamentally distinct.

[184] D Curtin & M Geurts above n77, 153; annotation of R Lawson 'Annotation of ECJ case C-168/91 Christos Konstantinidis' (1994) 31 *CMLRev* 395, 404.
[185] AG Jacobs, Conclusions in Case 92/92 *Phil Collins* No 11 ECR I-5145 [1993].
[186] Council of the EU, General Secretariat, *EU Annual Report on Human Rights 1998-1999* (1999) Brussels, Official Publications, p44. Later the Council refers to the speeches of the EU before the UN HR Commission and the UN General Assembly in which it stressed that it is one of the very purposes of the UN to promote universal respect for human rights for all, without any distinction as to race, colour, or national or ethnic origin; it further reaffirmed that its goal remains the universal ratification of the Convention.
[187] DJ Harris, *Cases and Materials on International Law* (1991) ch 2. on the development of opinio juris
[188] As More notes, 'it merely confers power to act and does not contain the potential for direct effect in national law.' above n53, 547.

This is exacerbated by the new competences for TCN being strictly circumscribed. 'The new non-discrimination clause therefore sits uneasily with the continued exclusion of non-member-country nationals from the exercise of Treaty freedoms.'[189] This critique stands despite the new Race Directive which covers TCN, but simultaneously allows for distinctions based on nationality. The foregoing chapters and criticism have aimed at showing that unless TCN discrimination can be eradicated by an EU equality principle, that principle can lay no claim to being free-standing.[190]

In EU law, the basic charge to be leveled against the norm of equal treatment with respect to race and ethnicity, is its relative weakness beside the clarity and potency of the prohibition on nationality discrimination in the Treaty and its consequent lack of 'constitutional status.'[191] There had been some expectation that a general prohibition on discrimination capable of being relied upon by individuals might be included, or that the grounds of discrimination would be extended from nationality or gender.[192] However, as became clear, 'there was no political commitment to a directly enforceable article such as [...] Article 119 of the EC Treaty.'[193] To give the principle of equal treatment on the basis of race and ethnicity its full status of fundamental right within EU law, it must be given the same status as those other equality rights, both in the interests of clarity, legal certainty and normative standard-setting.

While specific aspects of equality have been recognised in the Treaty and in individual laws, as a general principle it is still part of the amorphous, uncodified set of general principles which regrettably exists more in the universe of soft law than in the reality of enforceable constitutional principles.[194]

The EU equality principle is quite different to the German constitutional norm of equality '*Gleichheitssatz*', and the celebrated equal protection clause of the 14th Amendment of

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[189] G More above, n53, 547.

[190] As More contends, 'The test for the integrative process will be whether such a [n equality] principle is capable of equalizing the treatment of all EU residents.' G More above n53, 548; Runneymede Trust Report which, in the context of a critique of Community law and the universal human rights of 'aliens', notes that there is a 'share difference between the treatment of EC nationals in Community countries and third country nationals.' above n158, 4.

[191] A reverse critique is made with respect to race and ethnicity as heads of discrimination. Many commentators any note the relative strength of the Race Directive compared with that for other Article 13 heads of discrimination. L Waddington and M Bell 'More Equal Than Others: Distinguishing European Equality Directives' (2001) 38 *CMLRev* 586.

[192] The potential for such expansion had existed in *P v. S.*

[193] Article 141 of the revised Treaty.

[194] For insightful discussion in an analogous area of law, S Sciarra 'Social Values and the Multiple Sources of European Social Law' (1995) 1(1) *European Law Journal* 60, 81.

the United States Constitution[195] and the ECJ has not been prepared to treat breaches of this fundamental right as a free-standing basis for legal action by individuals, since 'there must be some other EU law "for the principle to bite on".'[196] Hepple asserts categorically that the 'ECJ has not developed a generally enforceable right to equality for men and women. *A fortiori*, it has not developed such a right in other areas of social discrimination.'[197] He goes on to defend such a principle as follows: 'there are political choices between, on the one hand, allowing market forces to produce grossly unequal outcomes and, on the other, mobilising business organisations to make use of positive equal opportunities practices on the foundation of a EU-wide floor of rights, in order to build up efficient, decently treated, and diverse workforces. The latter choice requires a broad and comprehensive principle of equality enforced by an effective legal strategy which embraces not only equal pay and equal treatment for men and women, but also the discrimination and disadvantage suffered by other groups, such as racial minorities, persons with disabilities and older workers.'[198]

Were the principle of equality truly conceived of as a universal right, it would apply to persons *because of their humanity*[199] and not because of their nationality or their economic function. It is evident that 'there is ample basis in the international human rights commitments of the Member States for protection from racial discrimination in the enjoyment of rights in the political, economic, social, cultural or any other field of public life to be regarded as an accepted fundamental right.'[200] Beyond this, however, the EU must find the fundamental right to be free from race discrimination *within the logic of its own law*. The Communication has recognised the possibility of this, stating 'the struggle against racism is a constituent element of the European identity.'[201] In this way, equality is a 'core principle underlying all Community

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[195] The 14th Amendment of the US Constitution (1868) reads,'All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws'.

[196] B Hepple 'Equality and Discrimination' in P Davies, S Sciarra, A Lyon-Caen, S Simitis (eds) *EC Labour Law* (1996) 246-247, quoting E Ellis *European Community Sex Equality Law* (1991)132

[197] B Hepple above n196.

[198] B Hepple above n196, 257.

[199] J Weiler 'Thou Shalt not Oppress a Stranger: on the Judicial Protection of the Human Rights of non-EC Nationals - A Critique' (1992) 3 *EJIL* 65 (Symposium: The Status of Non-Community Nationals in Community Law). *passim.*

[200] E Guild 'EC Law and the Means to Combat Racism and Xenophobia' in T Hervey & D O'Keefe (eds) *The Principle of Equal Treatment in EC Law* (1997)

[201] EU Commission, Communication from the Commission on Racism and Xenophobia and Anti-Semitism, COM (1995) 653. para 1.2.

policies'[202] but it is so as a fundamental human rights principle rather than an tool of integration.

Some have conceptualised the differential 'progress' of the principle of equality as the evolution of 'series of parallel orders, each based on its own series of values.'[203] Values at the heart of equality as a human rights principle must be accorded the same weight as values associated with integration and the single market. Until the latter values cease having the potential to trump the former, there can be no claim that a real principle of equality exists within EU law .

(3) Solidarity

Purely market based policies for integration must be supplemented 'since market integration is likely to have short- and medium-term regressive distributional consequences among social groups and urban/regional spaces.'[204] EU social policies and equality laws must counteract these growing, market-based divisions of welfare by assisting excluded groups and peripheral spaces, and protecting the casualties of a market-focused approach. 'Market integration may appear as a key variable for the restoration of high profit rates, but simultaneously, it is likely to be the source of new structural and massive-scale distributional disadvantages.'[205]

One way of protecting against such negative effects is to implement redistributive or equity-based policies and allow social policy and equality laws to be guided by principles of co-operation and altruism.[206] 'Equity may be considered generally or specifically: the concern may be with an overall distribution of income that is in some sense, 'fair', or it may be concerned with the distribution of say, health care or educational opportunities.'[207] The very idea of social cohesion in EU social policy is founded, at least in part, on a notion of European solidarity, and of parity among social contexts and conditions across all the Member States.

The principle of solidarity is embodied as foundational in both the Community Charter of the Fundamental Social Rights of Workers[208] and the Charter of Fundamental Rights of the

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[202] COM (1995) 653 para 1.2

[203] D Chalmers 'Repackaging the Internal Market-The Ramifications of the *Keck* Judgment' (1994) 17 *ELRev* 385.

[204] R Goma above n14, 220.

[205] R Goma above n14, 220.

[206] EU Council *Interim Report of the Consultative Commission on Racism and Xenophobia* 11138/94; 21.11.1994; 8.

[207] M Kleinman & D Piachaud above n5, 4.

[208] '[...] whereas, in a spirit of solidarity, it is important to combat social exclusion'.

EU.[209] Furthermore, the substantive breadth of the Directive is compatible with the principle of solidarity, in particular the provision allowing for affirmative action and that outlawing victimisation uphold equity based redistribution.[210]

'The process of economic integration is likely to lead to widening disparities and inequalities both within and between states'[211] and it is possible that European integration itself is creating additional disparities. This demands that 'the development of real social policy framework requires the economic orthodoxy to be challenged and not merely accommodated.'[212] It also demands that a balance be struck between integration and solidarity-based social policy, with 'redistributional welfare playing a primary role as an *equal partner* of growth -based economic policy.'[213]

It is however, interesting to note that the EU's social policy agenda has emerged with three different policy areas and sectoral regimes, 'deriving from the goal of counterbalancing the regressive distributional impacts of the Single Market':[214] these are strategies to combat long-term and structural unemployment, the unemployed protection schemes and the anti-poverty action programmes.[215] Furthermore, 'these policies are forged on the grounds of solidarity, external to the functioning of the Single Market',[216] although they are subject to severe fiscal constraints.[217] Though it is present in EU policy,[218] the solidarity principle in these policies has been relatively narrowly interpreted.[219] Its presence, whether rhetorical or real, is pervasive: 'The Commission's approach to the developments of policy is based on the incremental development

[209] Charte 4422/00 [2000] OJ C/364/01. Preamble, recital 2; Chapter IV rights.
[210] Articles 5 and 9 respectively.
[211] M Kleinman & D Piachaud above n5, 7.
[212] M Kleinman & D Piachaud above n5, 11
[213] R Goma above n14, 221. (Emphasis added).
[214] R Goma above n14, 221.
[215]Examples of these programmes include ELAINE, HORIZON, INTEGRA, NOW and EQUAL.
[216] R Goma above n14, 221.
[217] Goma maintains that in 1994 the budget of the EU amounted to less than 3 per cent of the total public expenditure of its Member States. In the social domain, the EU social expenditure amounted to 0.9 per cent of the welfare budget of the Member States.
[218] Eg EU Commission, *White Paper on Growth, Competitiveness and Employment: The Challenges and Ways forward into the 21st Century* (1994). Part A reads: 'Experience has shown that the market is not without its failings. It tends to underestimate what is at stake in the long term., the speed of the changes it creates affects the different social categories unequally, and it spontaneously promotes concentration, thereby creating inequality between the regions and the towns. Awareness of these insufficiencies has led our countries to develop collective solidarity mechanisms...' it goes on to describe solidarity between the employed and the unemployed, between men and women, between different generations, between more prosperous regions and the poorer regions, and overall, against social exclusion.
[219] Similar interpretative constraints exist for the definition of 'worker' within the Community Charter on the Fundamental Social Rights of Workers (1989); signed in Strasbourg on 9 December 1989 by 11 (of then 12) Heads of State.

of services, the progressive expansion of solidarity, and the insertion of those who are excluded.'[220]

How solidarity[221] is interpreted has important ramifications for the applicability of EU social policy and anti-discrimination law measures[222] in the EU, implicating deeper questions concerning citizenship and belonging as well as democratic participation and transparency within the EU. Solidarity may connote a desire for co-operation and altruism, or for provision of social services to fight exclusion, or the building of a sense of community whether at a local, national or European level.[223] However, the diversity of cultures, institutions and traditions which exist throughout Europe present serious challenges to devising policies and formulating structures which can reconcile a solidaristic approach.[224]

Solidarity would require greater protection of minorities within the EU because economic integration and deflationary macro economic policies have led to a fertile social and economic environment for the political growth of the far right and the retrenchment of social exclusion and discrimination for these minorities.

The EU has, hitherto, upheld 'the wrong set of priorities. Issues of social justice and equity need to be pushed higher up the agenda.'[225] Some charge that 'the equality and redistributional dimensions of the EU welfare system are not only underdeveloped but are permanently under stress, as a result of a balance of policy actors favourable [...] to those who advocate a social policy restricted to market efficiency normative criteria.

The model of social policy adopted by the EU has been defined as 'economic governance through fragmented sovereignty and international relations [which] is more suited to market-making by way of negative integration and efficiency enhancing regulation than to institution building and redistributive intervention, or market distortion.'[226] This contrasts with a Marshallian conception of social policy, understood generally to advocate 'the use of political

[220] Y Chassard & O Quintin 'Social Protection in the European Community: Towards a Convergence of Policies' Paper Presented to International Conference on Social Security Fifty Years After Beveridge, University of York (1992) cited in P Spicker above n230, 139.

[221] TH Marshall's social theory is an example of social policy which relies on an interpretation of the solidarity principle. TH Marshall, *Social Policy* (1975)

[222] This crucial link between combating race discrimination and combating unemployment emerges in early EP documents, and in the Joint Declaration on the Prevention of Racial Discrimination and Xenophobia and Promotion of Equal Treatment in the Workplace, Florence (21.10.1995) and the Commission's Action Plan of 25 March 1998, para 2.3.1.

[223] M Kleinman & D Piachaud above n5, 5. They cite the EU ERASMUS programme as one example of social policy founded on the solidarity principle.

[224] M Kleinman and D Piachaud above n5, 8.

[225] M Kleinman and D Piachaud above n5, 17.

[226] W Streeck 'Neo-voluntarism: A New Social Policy Regime' (1995) 1 *ELJ* 31, 34.

power to supersede, supplement of modify the operations of the economic system in order to achieve results which the economic system would not achieve on its own...*guided by values other than those determined by market forces*',[227] which might be classified as 'market correcting'.[228]

EU social policy is therefore endowed with an initially *market making rather than market correcting* aim of the Single Market, 'aimed at creating an integrated European labour market and enabling it to function efficiently, rather than with correcting its outcomes in line with political standards of social justice.'[229] Some view it as a 'backward step, because it emphasises the concern that the development of social policy might conflict with economic priorities [...].[230]' Indeed the Commission White Paper has been critiqued because it 'emphasizes the concern that the development of social policy might conflict with economic priorities.'[231] That being said, it is clear that it no longer revolves exclusively around such objectives, and interpretations of the principle of solidarity may offer a more tempering influence. Solidarity has substantial relevance for the fight against racism: it promotes a cooperative approach to anti-discrimination, and it highlights the connection between racism and economic and social deprivation.

(4) Democracy and Participation

The Union is required by Article 6 EC to respect fundamental rights and democracy. Democracy is a value which underpins EU action against race discrimination.[232] Democratic participation is central to equality in the way it protects the dignity and voice of each individual regardless of race or ethnicity. 'Given that past discrimination or other social mechanisms have

[227] TH Marshall *Social Policy* (1975) 15.

[228] W Streeck 'From Market Making to State Building? Reflections on the Political Economy of European Social Policy' in S Liebfried & P Pierson (eds) *European Social Policy: Between Fragmentation and Integration* (1995) 360; 399.

[229] W Streeck above n228, 399.

[230] P Spicker 'Exclusion' (1997) 35(1) *Journal of Common Market Studies* 133, 135. He notes the White Paper's failure to question the legitimacy of intervention in these areas, and its going so far as to refer to the European model of the welfare state.

[231] P Spicker, above n230 citing B-O Kuper 'The Green and White Papers of the European Union'. (1994) 4(2) *Journal of European Social Policy* 129-137.

[232]This was reiterated in the World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance, Durban, 31 August- 7 September. UNGA, A/CONF. 189/4 p26.91. 'We recognize that democracy, transparent, responsible, accountable and participatory governance responsive to the needs and aspirations of the people, and respect for human rights, fundamental freedoms and the rule of law are essential for the effective prevention and elimination of racism, racial discrimination, xenophobia and related intolerance, We reaffirm that any form of impunity for crimes motivated by racist and xenophobic attitudes plays a role in weakening the rule of law and democracy and tends to encourage the recurrence of such acts'. Adopted by 3rd Prep.Com.)

blocked the avenues for political participation by particular minorities, legal rights, particularly equality laws, are needed to both compensate for this absence of political voice and to open up the channels for greater participation in the future.'[233]

Beyond the foundational justification for equality laws to be found in democracy, equality laws may be viewed as fostering democratic participation in and of themselves, through the ways in which they *include*. Equality laws can also be endowed with a different, though related meaning where they act as a corrective supplement, used by the courts in judicial review to counter the self-perpetuating exclusionary tendencies of majoritarian democracies. This theory is often attributed to Ely,[234] and has its roots in the Justice Stone's famous footnote 4 in *Carolene Products*: 'Prejudice against discrete and insular minorities tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities.'[235] Ely's theory is relevant to the question of democracy's relation to equality, and to democracy as a value underpinning action against discrimination. His theory rested on 'a participation-orientated, representation-reinforcing' approach to judicial review.[236] He envisioned the courts having a role in reviewing legislation where those included by the political system were ensuring their inclusion and the exclusion of marginalised groups by choking off the channels of political change; he also envisioned such judicial intervention where despite the existence of a formal vote or voice, representatives who remained beholden to a majority were systemically disadvantaging a minority.

Ely's theory is relevant where any number of a minority's participation rights are impaired or compromised. These participation rights, whether they relate to voting, association, or speech, are central to a healthy democracy and to the protection of equality within it.

There exist more radical theories of participatory or strong democracy endorsing wholesale changes in the manner in which we include, represent, and protect minorities through radical reforms of the rights discourse, the concept of community and the very notions of citizenship and democracy. Roberto Unger's theory of empowered democracy might be relied upon to ground normative justifications for action against race discrimination in democracy.[237]

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[233] S Fredman 'Equality: A New Generation?' (2000) 30(2) *ILJ* 145, 157.
[234] JH Ely *Democracy and Distrust: A Theory of Judicial Review* (1980).
[235] Justice Stone footnote 4, *United States v Carolene Products Co.* 304 U.S. 144 (1938).
[236] JH Ely *Democracy and Distrust* (1980) 87.
[237] RM Unger *Social Theory: Its Situation and its Task* (1987); *False Necessity: Anti-necessitarian Social Theory in the Service of Radical Democracy* (1987); *Plasticity into Power: Comparative Historical Studies on Institutional Conditions of Economic ad Military Success* (1987). Other relevant works include *Knowledge and Politics* (1975); *Law in Modern Society* (1976); *The Critical Legal Studies Movement* (1986).

Although Unger's theories are too complex and portentous to elaborate upon here, there are strands of his theory of democracy and social reconstruction worth highlighting in respect of anti-discrimination laws. In particular, Unger's positive programme of individual empowerment is pertinent to the plight of minorities who suffer from discrimination and marginalisation. His theory targets institutional arrangements and social contexts in order to diminish the gap between context-preserving routines and context-transforming struggle, thereby weakening established forms of social division and hierarchy. This empowered democracy is designed to foster individual and collective empowerment through subjecting more aspects of social life to democratic participation and conflict. For minorities, it would bring new scrutiny to the hierarchic arrangements and systemic or structural forms of discrimination that result in a diminishing of their social and political rights within modern liberal democracies.

(5) Citizenship and Membership

Some heralded the inclusion of citizenship of the Union in the Maastricht Treaty[238] as 'a new objective: to extend, *without any discrimination*, the right of entry and residence to all categories of Nationals of the Member States.'[239] It is difficult to see what is 'new' about this objective, or about EU citizenship while its symbiotic relationship with free movement and Member State nationality persists and while it continues to complement the EU's stringent immigration policies.[240] There are, however, important questions to be asked as to whether European citizenship in fact goes beyond its free movement and market-orientated genesis, and whether it might ever, in its present form, be able generate reasons to combat race discrimination which are independent of the rationales of the Single Market.[241]

Were EU citizenship to evolve into something new, guided by fundamental human rights rather than the Single Market, it might better resemble 'world citizenship.'[242] Citizenship should

[238] Article 8a-8e EC, now Articles 17-22 EC; Article 17.1 EC states: ' Citizenship of the Union is hereby established. Every person holding the nationality of a Member State shall be a citizen of the Union. Citizenship of the Union shall complement and not replace national citizenship. 2. Citizens of the Union shall enjoy the rights conferred by the Treaty and shall be subject to the duties imposed thereby.' D Rudden & D Wyatt (eds) *Basic Community Laws* 8.

[239] (Emphasis added) High Level Panel on Free Movement of Persons, *Report of High Level Panel on the free movement of persons chaired by Mrs Simone Veil*, presented to the Commission 18 March 1997. A number of these proposals were taken up by the Commission in its *Plan of Action on the Single Market* (1998) 403 final.

[240] EU Commission *White Paper on Social Policy: a Way Forward for the Union* likewise relies on Article 8 to reinforce its arguments about the importance of free movement, referring to 'free movement based on free movement of persons who draw their rights from the Treaty, which contributes to a concrete and practical expression of European Citizenship.'

[241] J Grahl & P Teague 'Economic Citizenship in the New Europe' (1994) *Political Quarterly* 379.

[242] J Habermas above n160, 17.

provide a means of including, rather than a mode of reinforcing exclusion; it should go beyond economic integration into the realm of social integration. As Habermas states, 'this *system integration* [market integration] competes with another form of integration running through the consciousness of the actors involved i.e. social integration through values, norms and processes of reaching understanding. Just one aspect of social integration is political integration via citizenship.'[243]

Weiler describes this 'freed' conception of citizenship as something which would unify 'citizens who by definition do not share the same nationality. The substance of membership[...] is in a commitment to shared values of the Union as expressed in its constituent documents, a commitment, *inter alia*, to the duties and rights of a civic society covering discrete areas of public life, a commitment to membership in a polity which privileges exactly the opposites of nationality, -- those human features which transcend the differences of organic ethno-culturalism.'[244]

These enriched conceptions of citizenship could provide a normative basis for action against discrimination, and generate values that can ground equality law.

(6) Diversity

Diversity has been held up as a value capable of justifying a broad range of equality laws and measures. It emerges as a non-remedial goal and compelling justification for affirmative action, based on the importance of minority participation and representation in a pluralistic society. Diversity is thus a rich value upon which to ground action against discrimination. Diversity protects the *equal* dignity of *all* persons, benefiting not only those newly included minorities, but also the broader community into which the minorities are embraced.

In *University of California Regents v Bakke* 438 U.S. 265 (1978)[245] the US Supreme

[243] J Habermas above n160, 8.

[244] J Weiler 'The Selling of Europe: The Discourse of European Citizenship in the IGC 1996' Harvard Jean Monnet Working Papers 3/96 (1996).

[245] Cert. to the Supreme Court of California. Bakke was a white male applicant considered under the general admissions program who was twice denied admission in years where applicants were admitted under the special admissions program who had significantly lower scores than Bakke. After the second rejection, Bakke sued the University alleging that the special applicant program violated the state and federal constitution as well as Title VI of the 1964 Civil Rights Act. The trial court agreed with Bakke but refused to order his admission; both sides appealed, and the Supreme Court of California while agreeing that the goal of integration and increasing minority physicians were important state goals, the program was not the least intrusive means of achieving those goals on the basis of the Fourteenth Amendment.

Court, led by Justice Powell, famously considered diversity in the antidiscrimination context. Reviewing the constitutionality of affirmative action where the implementing 'special admissions' program of U.C. Davis Medical School appeared to benefit minorities at the expense of non-minorities, the Court made clear that 'the attainment of a diversity student body was a constitutionally permissible goal for an institution of higher education.' The Court acknowledged that diversity could further a compelling state interest, but viewed this as encompassing a far broader array of qualifications than race or ethnic origin alone. The Court found the narrowness of the program's focus to be a fatal flaw, holding that focusing on racial or ethnic diversity exclusively would hinder rather than advance 'genuine diversity' and that the use of an explicit racial classification denies individual rights guaranteed by the Fourteenth Amendment. While the specific outcome of the case turned on the validity of race as a factor and racial quotas, it also articulated the importance of diversity to fostering an integrated future, enhancing the understanding of professionals to serve heterogeneous populations, securing a robust exchange of ideas in universities and professional communities, and increasing the numbers of professionals willing and best able to serve minority groups.

Diversity and pluralism lie at the heart of the Treaty's commitment to build 'an ever closer union among the peoples of Europe.'[246] Concurrent with Ely's theory outlined above, pluralism cannot countenance the refusal to represent minorities, which despite being technically or formally franchised, may find themselves in a disadvantageous position for long periods of time, leaving them susceptible to discriminatory treatment. Fostering cultural diversity has been central to the work of the European Monitoring Centre on Racism and Xenophobia.[247] It has recognised that safeguarding and promoting diversity in Europe is deeply interwoven with accepting new identities as Europeans: 'If we are going to valorise cultural diversity and realise that it is here to stay then we need to recognise that belonging [...] to Europe, is going to come through very diverse routes and cultural traditions which are going to inflect the way we are and what it means to be [...] European.'[248]

Multiculturalism and diversity pervade the Race Directive[249] which while appealing to the commonality of values shared by Europeans, simultaneously safeguards and fosters the politics of difference. Nowhere is this more important than in the context of race and the EU.

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[246] EC Treaty Preamble, recital 3.

[247] EMC *European Media Conference: Cultural Diversity-Against Racism* (1999)

[248] M Gillespie 'Breaking Boundaries? New British TV comedy and anti-racism' in EMC, *European Media Conference: Cultural Diversity-Against Racism* (1999) 80, 90.

[249] D Chalmers, above n132, 192.

The philosophy of the Directive demands that 'the presence of multi-cultural communities be recognised and that their differences and resonance be respected.'[250] and its provisions on indirect discrimination uphold this since 'the principle of indirect discrimination is a means of recognising th positive claims of different cultural communities'[251]

(7) Human Dignity

Human dignity is perhaps the most auspicious of all the values upon which action against race discrimination may be based, since it is an 'egalitarian concept. It is both a quality which inheres in everybody and it also implies duties of equal recognition. Not only is my dignity to be respected, but I must respect the dignity of others. [252] It is identified as a fundamental basis for the Universal Declaration on Human Rights (1948),[253] and is to be found in the Preamble to the Charter of the United Nations (1945)[254]. The Universal Declaration refers to the dignity and worth of the human person. The Preamble reads: 'We the peoples of the United Nations determined to save succeeding generations from the scourge of war, [...] and to reaffirm faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small [...] have resolved to combine our efforts to accomplish these aims.'

The Preambles of both the International Covenant on Civil and Political Rights (1966) and the International Convention on Economic, Social and Political Rights (1966)[255] declare that 'in accordance with the principles in the Charter of the United Nations, recognition of the inherent dignity and of the equal and inalienable rights of all member of the human family is the foundation of freedom, justice and peace in the world'. They go on to proclaim that 'these rights derive from the inherent dignity of the human person'. These value declarations are replicated in the jurisprudence and measure of the European Convention on Human Rights and Fundamental Freedoms either through references to these Preambles, or through the exhortation of human dignity as a foundational value.

The Preamble of the Charter of Fundamental Rights of the European Union echoes these commitments: 'Conscious of its spiritual and moral heritage, the Union is founded on the

[250] D Chalmers, above n132, 246.
[251] D Chalmers, above n132, 246.
[252] D Chalmers, above n132, 196.
[253] British State Papers, BFSP 151,604.
[254] <www.un.org/aboutun/charter>
[255] ICCPR 660 UNTS 195 (1996); ICESCR 999 UNTS 3 (1966). Published together, UK Treaty Series No. 006/1977, Cmnd 6702.

indivisible, universal values of human dignity, freedom, equality and solidarity; it is based on the principles of democracy and the rule of law.'[256]

Human dignity eludes precise definition, being more a quality or characteristic than something one can have a right to.[257] 'Relying on "the inherent dignity of the human person" as a foundation for rights is different from conferring a right to dignity.'[258] Human dignity is nevertheless something worth protecting in people, and a value upon which action and rights against discrimination can be founded. Its wealth as a value stems from the fact that 'the fundamental, shared quality of human beings gives rise automatically to an irrebuttable presumption of human dignity, which attaches to individuals by virtue of their membership of the human species. An umbrella of rights may be justified as preventing interference with this general human dignity.'[259]

Human dignity provides a rich normative basis for rights against discrimination. Having one's human dignity respected is closely tied to having one's equality respected since it is on the basis of one's humanity that one is considered 'equal'. Almost any right to be free from discrimination can be understood to protect human dignity, since most forms of discrimination question the dignity of the person, and discrimination based on race or ethnicity assaults the dignity of the person. Human dignity also provides justification for rights *related to* equality such as those which protect autonomy, diversity, tolerance and participation. Conversely, the respect of these rights safeguard contexts in which human dignity itself can flourish.

4. THE COMPATIBILITY OF TWO STRANDS

This chapter has considered normative bases for action against race discrimination 'woven in two threads, one vividly coloured with fundamental rights principles, and the other with labour market policies.'[260]

While considerable reliance is still placed on Single Market justifications, the EU has significantly advanced its endorsement of fundamental human rights as an independent basis for action such that 'there are fewer references to free movement in more recent documents, which may suggest that the free movement rational is unlikely to form the basis for future action

[256] Charte 4422/00 [2000] OJ C/364/01

[257] Although the American Convention on Human Rights, Article 11(1) states: 'Everyone has the right to have his honor respected and his dignity recognised.' and Article 1 of the German Grundgesetz provides: '(1) The dignity of man shall be inviolable. To respect and protect it shall be the duty of all state authority.'

[258] D Feldman 'Human Dignity as a Legal Value Part I' [1999] *P. L. Winter* 682, 689.

[259] D Feldman above n258, 689.

[260] S Fredman above n2, 184

combating racism, race discrimination and xenophobia.'[261] There is no longer a 'Single Market monopoly' on justifications for action.

The Race Directive illustrates this, establishing law in accordance with the principles of human rights and fundamental freedoms and with a declaration of the right to equality. It is no longer the case that 'the development of a free-standing social policy is seemingly prevented by the need to find economic justifications for interventionist Community level.'[262]

Although the two strands now co-exist in EU law on a more visible and equal footing their compatibility cannot be presumed.[263] The potential tension between them is clear, especially given the sometimes uneven nature of their respective development in EU law. Human rights goals do not always efficiently serve Single Market aims, and compliance with anti-discrimination norms is often viewed as burdening business and associational freedoms or private property rights. The economic constraints and costs of enforcing equality in the market may be considerable. This tension has been perpetuated by the use of fundamental rights discourse within an economic legal paradigm, and by the legitimating function fundamental rights discourse can fulfill in a legal order in the process of expansion and evolution.

This tension underpins the Commission's White Paper: 'long-run competitiveness is to be sought, not through dilution of the European model of social protection, but through the adaptation, rationalization and simplification of regulations, so as to establish a better balance between social protection, competitiveness, and employment creation.'[264] This assumes the compatibility of the two bases, though it tacitly acknowledges that social protection can result in economic inefficiency, and that this might be minimized through the *correct choice* of regulation.

Can the tension between the two bases be mediated? Could it be *positively* used to maintain a balanced anti-discrimination strategy which is both openly humanistic and yet efficient. After all, a market without normative underpinning or limitation is hollow, and a human rights discourse without economic infrastructure to support it wholly ineffective. The fact remains that both these strands of justification and aim exist in EU law, and present a significant legal and political challenge. The tension between these goals may be positively

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[261] T Hervey above n114, 341.

[262] S Deakin above n16, 92.

[263] Yet see *contra* Barnard, who, referring to the dual purposes of Article 119 in *Defrenne No 2* states that the ECJ 'had set itself the task of trying to reconcile the irreconcilable: the conflicting aims of protecting economic and social interests.' C Barnard above n32, 331.

[264] EU Commission *White Paper on Social Policy: a Way Forward for the Union* COM (1994) 333 at 11.

exploited such that the two exist in 'dynamic compatibility,'[265] where each is mediated by the other, and both are improved and transcended.

Combating social exclusion is an example of a value which successfully embodies both fundamental human rights rationales and Single Market goals, and it combines and transcends the two traditional justifications. It is about 'ensuring that people have the opportunity to fulfill their potential in economic terms, thus being able to provide for themselves and their dependent to best effect and to reduce their dependence on the state.'. This benefit (still wedded to autonomy and the value of self sufficiency and individual economic prosperity) is linked to the wider commercial interest of enterprises, through the way 'it ensures that enterprises have at their disposal the best qualified employees, thus contributing to the competitiveness and the strength of the firm and of the economy more widely.'[266] Social exclusion is thus related to the *exclusion of people* on the one hand, highlighting the human rights dimension of unfair exclusion and arbitrary bars on participation; and employment, related to labour market participation, which has a definite economic ramification and relevance.

The Commission White Paper[267] presents the two goals as mutually defining: 'the pursuit of of high social standards should not be seen only as a cost but also as a key element in the competitive formula, it is or these essential reasons that the Union's social policy cannot be second string to economic development or to the functioning of the internal market.'[268]

The Directive also embodies the challenge of 'dynamic compatibility', and is a micro example of the challenge faced by EU as a whole. It also tacitly acknowledges that neither justification alone is sufficient, and that there are limitations extant in each. Given the uniqueness of the Race Directive and its challenge, it is obvious that traditional justifications for action will not suffice alone.

While the two bases ideally operate in tandem, the persistent, potential tension between them also demands that EU equality law rest on openly normative foundations, where the political choices and values are made explicit. That is, where convergence or dynamic compatibility fail, there must be some normative baseline from which conflicts and through

[265] This resembles the convergence thesis, S Deakin & F Wilkinson above n3.

[266] EU Commission, Proposal Directive for the Implementation of the Principle of Equal Treatment irrespective of Race or Ethnicity; Impact Assessment Form; COM(1999) 566 final 99/0225 Part 4. Para.1.

[267] EU Commission *Social Action Programme 1998-2000*, April 1998; Document drawn up on the basis of COM(1998) 259 final. In Part II; recital 4, it states that the completion of the Single Market as a new economic framework makes the interplay between social and economic policy even more important [...] In particular, EMU will help reinforce transparency and competition, thereby contributing to more dynamic growth, and employment, helping to underpin social progress'.

[268] EU Commission, *Social Action Programme 1998-2000*, April 1998.

which a prioritisation is possible.

A human rights baseline would offer anti-discrimination measures greater normative force and would concur with targeting a broader range of discrimination, endorsing stronger remedies. Moreover, it would uphold action against discrimination as a good in itself, rather than as a means to attaining other goals. EU action against race discrimination should be based not on a person's economic function in an integrated market, but on their inherent human dignity.

The European Union must therefore resist following the US model, and giving in to the assumptions that 'Commerce' or the Single Market should be the primary or even significant basis for action against race discrimination. Although the history of the 1964 Civil Rights Act[269] is complex,[270] it provides a clear example of where the deployment of a bifurcated legal basis shrouded the humanistic and egalitarian impulse for the legal action, and ultimately failed to secure the human rights foundation of the measure. Here the bifurcated base created a potential for the economic justification to become the favoured pole, relegating the human rights or equal protection justification to being the dangerous supplement.[271] The Kennedy administration's arguments for the Act had relied primarily on the 'affecting commerce' rationale under the Commerce Clause. That changed with the advance of the Civil Rights Movement, and the Act was supported by the nation's moral outrage at racial discrimination, leading to calls for the Act to be based on the post-Civil War amendments, particularly the Fourteenth Amendment. With the strong moral motivation that now existed, these amendments provided a more germane constitutional source for the new law. Although the decision to include (and later rely on) the Commerce clause was not founded on a desire to limit or compromise the effectiveness of the Civil Rights Act,[272] the normative import of it was certainly weakened.

There is the additional consideration of the strain put on economic justifications when

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[269] Civil Rights Act of 1964, Public Law 88-352, July 2, 1964; 78 Stat. 241.

[270] G Gunther *Constitutional Law* (1991) 148. See for instance the important legal obstacles resulting from the 14th Amendment being addressed to states, and the attendant complexities of the 'state action doctrine'. Gunther contends that the 13th Amendment would now readily support prohibitions on private race discrimination, but that as a legislative base it was not validated until 1968 and was barely mentioned in the debates of the 1960's.

[271] *Heart of Atlanta Motel v United States* 379 US 241, 85 S.Ct. 348 (1964); *Katzenbach v McClung*, 379 US 294; 85 S.Ct. 377 (1964), where the US Supreme Court upheld Title II (public accommodations) of the 1964 Civil Rights Act on the basis of the Commerce Clause.

[272] In fact, the object was to strengthen the law since the Commerce clause had been treated leniently by the Supreme Court for decades, and the Fourteenth Amendment was (and is) severely complicated and limited by the state action doctrine it contains. Moreover, when defending reliance on the Commerce Clause before the Senate Commerce Committee in July and August of 1963, then Attorney General Robert F Kennedy stated that the commerce clause would make the law "clearly constitutional", where reliance on the Fourteenth Amendment left the risk that the Court might find that Commerce lacked the power to legislate under that Amendment.

they are used to justify action in the realm of fundamental human rights, and the violence done to both when such expansions are undertaken by a legislature or by a court.[273]

The more fundamental concern, however, is the pervasive reliance on 'Commerce' or the Single Market to outlaw discrimination on the basis of racial or ethnic origin, or to vindicate personal dignity, proving that 'the laws of trade are stronger than the laws of men'.[274] This objection was eloquently expressed by Justice Douglas in *Katzenbach v McClung*:[275] 'I am somewhat reluctant to rely on the Commerce Clause. My reluctance is not due to any conviction that Congress lacks the power to regulate commerce in the interests of human rights. It is rather my belief that the right of people to be free of state action that discriminates against them because of race, [...] "occupies a more protected position in our constitutional system than does the movement of cattle, fruit, steel and coal across state lines". The result reached by the Court is fore me much more obvious as a protective measure under the Fourteenth Amendment than under the Commerce Clause.'[276] Justice Goldberg concurred with the Court in these cases, but emphasised that the primary purpose of the 1964 Act was the 'vindication of human dignity and not mere economics.'[277]

The EU legal frameworks of Article 13 and the Race Directive are, however, distinguishable since the Commerce clause was explicitly and predominantly relied upon for the 1964 Act, and the EU Treaty provisions and Directive only implicitly rely on a Single Market foundation. That should deter serious scrutiny of the more implicit underpinnings of the EU initiatives, and the way in which the legal frameworks are systemically ingrained with economic and market predilections such that future reliance on them is by no means precluded. 'The free movement rationale might be revived by the Commission or even by Parliament, perhaps linked with the 'area of freedom, security and justice', in an attempt to propel policy development.'[278]

High levels of social protection and a rich concept of equality can co-exist with economic growth. Ideally, these values and aims operate in a mutually defining way, and their

[273] On submissions objecting to reliance on the Commerce Clause, see G Gunther above n270, 148.

[274] W Cook *The Corporation Problem* (1891) GP Putnam& Sons 226, cited by M Horwitz *The Transformation of American Law; The Crisis of Legal Orthodoxy 1870-1960* (1992) 85.

[275] Above n271.

[276] Justice Douglas also emphasised the settling effect reliance on the 14th Amendment would have, making much litigation unnecessary as to whether a particular establishment was within or outside of the meaning of interstate commerce definitions of the Act.

[277] Opinion of Justice Black as discussed in Brest & Levison, *The Processes of Constitutional Decisionmaking* (1992) 394. The authors interpret the opinions of Justice Douglas (explicitly) and Justices Goldberg and Black (implicitly) as holding that Congress has the power to prohibit discrimination in privately owned places of public accommodation under section 5 of the 14th Amendment.

[278] TK Hervey above n114, 345. Hervey also notes that such a justification would not sufficiently guard against the potentially discriminatory effects of such policy developments

co-existence offers opportunities for each strand of justification to be transcended. 'These values [...] are held together by the conviction that economic and social progress must go hand in hand. Competitiveness and solidarity have both to be taken into account in building a successful Europe for the future.'[279]

However, the question remains, where irreconcilable conflict emerges and where we are forced to choose, which values guide us and which goals do we prioritise? Hence the need for a baseline of values and commitments. It is submitted that the eradication of equality as a moral goal must not be subject to an efficiency calculus, and must prevail in a non-contingent way: 'subservience to the process of market integration fatally hinders the development of a rationale for EU action in the social policy field.'[280]

To hope for a Union truly based on fundamental human rights, one must also hope for the articulation of explicit value commitments animating actions in the realm of equal treatment. The EU has become more a Europe of its people, than a Europe solely of business people, bankers, investors and traders. It is, however, still not a community in which values and their relative weight in the legal discourse are made explicit.

This is an argument committed to defending human rights on the basis of moral and political values, values which are openly declared and capable of being debated. It is also about the choice of making anti-discrimination law subservient to no other law than that of human rights and human dignity. This is also a statement of hope, and an articulation of values that should guide the future development of EU equality laws and perhaps EU law itself.

[279] EU Commission *White Paper on Social Policy: a Way Forward for the Union* COM (1994) 333, 2.
[280] S Deakin & F Wilkinson above n3, quoting PL Davies' The emergence of European labour law ' in WEJ McCarthy (ed) *Legal Intervention in Industrial Relations: Gains and Losses* (1992) 346.

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