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TACKLING RACISM SERIOUSLY

HUMAN RIGHTS AND THE UNDERPINNINGS OF ETHNIC RECOGNITION

Doctoral thesis

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Because they are rational creatures, sailors go to sea with the calculations already done; and *all* rational creatures go out on the sea of life with their minds made up on the common questions of *right and wrong*, as well as on many of the much harder questions of *wise and foolish*. And we can presume that they will continue to do so long as foresight continues to be a human quality. Whatever we adopt as the fundamental principle of morality, we need subordinate principles through which to apply it.

John Stuart Mill

It is important to be quite careful before seeing any tension between equality and liberty. Tension exists only when we specify conceptions of these broad terms that cannot peacefully coexist. Perhaps such incompatible conceptions cannot be defended. Perhaps the best conceptions of equality are entirely compatible with the best understandings of liberty.

Cass Sunstein

Neither in interpreting statutes nor precedents are judges confined to the alternatives of blind, arbitrary choice, or 'mechanical' deduction from rules with predetermined meaning. Very often their choice is guided by an assumption that the purpose of the rules which they are interpreting is a reasonable one, so that the rules are not intended to work injustice or offend settled moral principles.

HLA Hart

Rights is the child of law; from real law come real right; but from imaginary laws, from 'laws of nature', come imaginary rights… Natural rights is simple nonsense […], nonsense upon stilts.

Jeremy Bentham

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List of abbreviations

CEDAW	Convention on the Elimination of All Forms of Discrimination against Women
CRPD	Convention on the Rights of Persons with Disabilities
CMW	Committee on Migrant Workers
CoE	Council of Europe
ComESCR	Committee on Economic, Social and Cultural Rights
ComRC	Committee on the Rights of the Child
CRC	Convention on the Rights of the Child
ECHR	European Convention of Human Rights
ECRI	European Commission against Racism and Intolerance
ECtHR	European Court of Human Rights
EU	European Union
FCNM	Framework Convention for the Protection of National Minorities
FRA	European Union Agency for Fundamental Rights
GC	General Comment
HRCom	Human Rights Committee
ICCPR	International Convention on Civil and Political Rights
ICERD	International Covenant on the Elimination of Racial Discrimination
ICESCR	International Convention on Economic, Social and Cultural Rights
ICRMW	International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families

IOM	International Organisation for Migration
OECD	Organisation for Economic Co-operation and Development
OHCHR	Office of the High Commissioner for Human Rights
UN	United Nations
UNESCO	United Nations Educational, Scientific and Cultural Organization

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Resumen

Ante el persistente reto del racismo, los estados de Europa occidental están buscando maneras de mejorar las actitudes de su población hacia los inmigrantes no blancos procedentes de los países en desarrollo, así como hacia sus descendientes. Sin embargo, dos importantes obstáculos dificultan la puesta en marcha de ambiciosas reformas antirracistas. Por un lado, la enorme brecha entre el número de votantes nativos y de origen extranjero, combinada con la relativa inmunidad de los primeros a la discriminación étnica, hace electoralmente difícil mantener el tema en la agenda política, especialmente con la competencia de partidos de extrema derecha y retórica xenófoba. Por otra parte, los partidarios del multiculturalismo y el interculturalismo siguen enzarzados en una disputa teórica en torno al impacto de diferentes tipos de gobernanza cultural sobre las actitudes racistas, con el segundo bando defendiendo un retorno a ciertas formas de asimilación de las minorías.

Esta tesis explora cómo los derechos humanos a la no discriminación y la educación, reconocidos en varios tratados internacionales, pueden ayudar a superar ambos obstáculos, y qué interpretaciones judiciales permitirían sacar el máximo provecho de su potencial antirracista. Puesto que pretendemos destacar el impacto de la ley sobre procesos sociales moralmente problemáticos, nuestra investigación es crítica e interdisciplinar, combinando perspectivas jurídicas, filosóficas, políticas, sociológicas, antropológicas y psicológicas. El acervo jurídico se extrae de los tratados de derechos humanos adoptados en el marco de las Naciones Unidas y el Consejo de Europa, así como de la jurisprudencia del Tribunal Europeo de Derechos Humanos y los comentarios generales e informes temáticos de los comités y expertos de las Naciones Unidas. Estas interpretaciones autorizadas se contrastan con las recomendaciones de varios organismos internacionales especializados, los principios defendidos desde la filosofía política y las prescripciones que pueden derivarse de la investigación empírica sobre la etiología del racismo.

El punto de partida de nuestro análisis es que los derechos humanos delimitan el espectro de políticas legalmente permitidas, las cuales a su vez inciden en los

determinantes estructurales del racismo. Dado que la relación entre el derecho internacional de los derechos humanos, las políticas públicas y las actitudes es altamente indirecta y rara vez se puede observar fácilmente mediante experimentos o correlaciones, recurrimos principalmente al razonamiento deductivo, utilizando teorías empíricamente fundamentadas para predecir las consecuencias a largo plazo de la ley. Nuestros resultados se dividen en dos categorías, dirigidas a diferentes públicos. Por un lado, desvelamos estándares existentes de derechos humanos que podrían ponerse al servicio de la lucha contra el racismo. Ello puede concebirse como un intento de ampliar los conocimientos jurídicos de los decisores políticos, activistas y otros agentes sociales. Por otro lado, defendemos el principio del reconocimiento étnico como un argumento moral para la modificación de algunas normas establecidas o el desarrollo de otras nuevas. Ello puede leerse como un intento de perfeccionar las herramientas filosóficas y sociológicas a disposición de los jueces y otros profesionales del derecho.

Empezando con el derecho a la no discriminación, analizamos críticamente la implementación e institucionalización de las directivas de igualdad de la Unión Europea en el ámbito del empleo. En particular, sostenemos que el modelo de derecho antidiscriminatorio basado en demandas judiciales individuales, el recurso escaso o mal concebido a las acciones positivas y la falta de acomodación de las diferencias culturales en los lugares de trabajo contribuyen problemáticamente a la segregación, estratificación y asimilación étnicas. A continuación, ponemos el foco en el derecho a la educación, caracterizando las políticas educativas como una fuente institucional clave de racismo infantil. Más concretamente, defendemos que solo mediante el desarrollo de currículos críticos dotados de múltiples perspectivas, la creación de incentivos para la diversidad étnica de alumnos y profesores y la extensión de algunos estándares de las escuelas públicas a su homólogas privadas se conseguirá establecer sistemas educativos igualitarios. La conclusión propone un modelo de reforma antirracista de las políticas públicas basado en los derechos.

Summary

Faced with the persisting challenge of racism, Western European states are actively seeking ways of improving the population's attitudes toward non-White immigrants from developing countries as well as their descendants. However, two main obstacles stand in the way of ambitious anti-racist policy reform. On the one hand, the vastly unequal voting power of native and immigrant-origin citizens, combined with the former's relative immunity to ethnic discrimination, makes it electorally difficult to keep the issue on the political agenda, especially with the competition of far-right parties trading on xenophobic rhetoric. On the other hand, there is an on-going theoretical dispute between multiculturalists and interculturalists on the long-term link between different approaches to cultural governance and racist attitudes, with the latter favouring a return to some forms of minority assimilation.

This thesis explores how the human rights to non-discrimination and education, enshrined in various international treaties, may help overcome both obstacles, and how courts should interpret them in order to take advantage of their anti-racist potential. Since we wish to highlight the law's relationship with morally problematic social processes, our inquiry is critical and interdisciplinary, combining insights from law, philosophy, political science, sociology, anthropology and psychology. Current legal standards are extracted from the human rights treaties adopted in the framework of the United Nations and the Council of Europe, as well as European Court of Human Rights case law and the General Comments and thematic reports of the United Nations monitoring committees and experts. These authoritative interpretations are contrasted with the recommendations of specialised international organisations, the principles defended by political philosophers and the prescriptions that can be derived from empirical research on the etiology of racism.

Our analytical starting point is that human rights delimit the range of legally permissible policies, which in turn affect the structural drivers of racism. Since the relationship between human rights law, policies and attitudes is a highly indirect one that can rarely be observed straightforwardly through correlational or experimental

evidence, we primarily rely on a deductive mode of reasoning, using empirically grounded theories to predict the long-term consequences of the law. Our results fall in two different categories targeted at different audiences. On the one hand, we unveil existing human rights standards that could be harnessed in the service of anti-racism. This may be seen as a way of increasing the legal expertise of policymakers, activists and other social agents. On the other hand, we defend the principle of ethnic recognition as a moral argument for modifying current human rights standards or developing new ones. This can be read as an attempt to expand the philosophical and sociological toolbox of judges and other legal practitioners.

Starting with the right to non-discrimination, we critically analyse the implementation and institutionalisation of EU employment equality law. In particular, we contend that the complaint-based model of anti-discrimination enforcement, the scarce or misconceived recourse to positive action and the lack of accommodation of cultural differences problematically contribute to ethnic segregation, stratification and assimilation. We then turn the spotlight on the right to education, characterising education policy as a key institutional source of racism among children. More specifically, we claim that only by developing a critical and multi-perspectival curriculum, creating incentives for ethnically mixed schools and extending some public school regulations to private ones will policymakers succeed in establishing egalitarian education systems. The conclusion puts forward a rights-based approach to anti-racist policy reform.

1. Introducción

Desde cualquier punto de vista, los países de Europa occidental constituyen importantes focos de atracción para los migrantes internacionales fuera del área de libre circulación de la Unión Europea. En 2014, más de 80 000 se establecieron legalmente en España por motivos laborales, familiares, humanitarios u otros. Los nacionales marroquíes fueron los más numerosos, seguidos de las personas originarias de China, Colombia, Rusia, República Dominicana y Venezuela. En el mismo año se admitieron en Italia cerca de 140 000 inmigrantes de Marruecos, China, Bangladesh, Albania, India, Ucrania, Pakistán, Egipto y Senegal. En Francia, las principales nacionalidades de los migrantes no pertenecientes a la UE eran Argelia, Marruecos, Túnez, China, Comoras, Turquía, Senegal, Rusia, Congo y Côte d'Ivoire. Los Países Bajos y Gran Bretaña recibieron un gran número de inmigrantes procedentes de la India y China, mientras que Suecia fue un destino clave para los sirios, eritreos, somalíes, afganos, indios, iraníes y chinos.[1] En 2016, según Eurostat, el peso demográfico de la población nacida fuera de la UE alcanzó el 11,6% en Suecia, 11,2% en Suiza, 9,9% en Austria, 8,8% en los Países Bajos, 8,7% en Bélgica, 8,5% en España y Francia, 8,3% en Reino Unido, 8,1% en Noruega y Grecia, 8% en Alemania, 7,4% en Dinamarca, 6,7% en Italia, 6,2% en Portugal, 5,3% en Irlanda y 3,8% en Finlandia.[2]

Para muchos migrantes, la oportunidad de asentarse en algunos de los estados más prósperos, pacíficos y democráticos del mundo supone un cambio de vida. Los refugiados se libran de persecuciones políticas y sociales, guerras civiles y condiciones de pobreza extrema. Aquellos que no se enfrentaban a tales adversidades acceden a unos niveles de seguridad laboral e ingresos que su país de nacimiento solo proporciona a unos pocos privilegiados, abriendo la puerta a enormes mejoras en su nivel de vida y el de sus familias. Las personas de clase media pueden satisfacer aspiraciones profesionales que requieren infraestructuras sofisticadas, organizaciones eficientes y libertades individuales que escapan a los países en desarrollo o autoritarios.

[1] OECD, *International Migration Outlook 2016* (OECD Publishing 2016) 259, 271, 285, 303, 305, 310.
[2] Eurostat, 'Foreign-born population by country of birth, 1 January 2016' <http://ec.europa.eu/eurostat/statistics-explained/index.php/File:Foreign-born_population_by_country_of_birth,_1_January_2016_(¹).png> consultado el 10 de mayo de 2017.

Estas enormes ventajas explican por qué los inmigrantes a menudo están dispuestos a aceptar, al menos temporalmente, un estatus legal de infra-ciudadanos. A diferencia de los autóctonos, a menudo carecen del derecho de sufragio activo y pasivo, de recibir prestaciones sociales y subsidios, de reagrupar a sus familiares, de acceder a la educación superior gratuita o de bajo coste e incluso de mantener la residencia si se quedan desempleados o cometen un delito. En un número creciente de estados, también están legalmente obligados a seguir cursos de 'integración cívica' sobre el idioma, la historia y las instituciones del país anfitrión.[3] En la concepción nacional de la ciudadanía que sigue estructurando las democracias liberales, estas restricciones y obligaciones son el precio que deben pagar para convertirse en miembros de pleno derecho de la comunidad política, un estatus que se consigue mediante la naturalización.

Desde los años noventa, un número creciente de pensadores está poniendo en duda el sentido común del nacionalismo. Preguntan, ¿por qué damos por supuesto que los inmigrantes deben ganar su ciudadanía mientras los autóctonos la reciben automáticamente? ¿Cuál es el problema de que los recién llegados tengan los mismos derechos que el resto de la población? ¿Quién tiene interés en crear una clase de infra-ciudadanos? Y quizás lo más importante, ¿cómo repercute esta subordinación sobre las dinámicas de las sociedades de Europa occidental, incluida la integración de los hijos de los inmigrantes?[4]

Según De Lucas, el hecho de que no se tomen en serio los derechos de los inmigrantes está estrechamente relacionado con uno de los retos más acuciantes a los que se enfrentan las sociedades europeas: el racismo. La cadena causal es compleja pero se puede reconstruir como sigue. En primer lugar, los principales mecanismos de protección de los derechos humanos no tienen alcance universal sino que se integran en

[3] Thomas Huddleston, Özge Bilgili, Anne-Linde Joki y Zvezda Vankova, *Migrant integration policy index 2015* (CIDOB/MPG 2015); Javier de Lucas and María José Añón (eds), *Integración y derechos: A la búsqueda de indicadores* (Icaria 2013).

[4] Joseph Carens, *The ethics of immigration* (Oxford University Press 2013); Ángeles Solanes Corella (ed), *Derechos humanos, migraciones y diversidad* (Tirant lo Blanch 2010); María José Añón, 'Integración: Una cuestión de derechos' (2010) 744 *ARBOR Ciencia, Pensamiento y Cultura* 625-638; Javier de Lucas y Ángeles Solanes (eds), *La igualdad en los derechos: Claves de la integración* (Dykinson 2009); Javier de Lucas, 'Inmigración y ciudadanía: Visibilidad, presencia, pertenencia' (2003) 37 *Anales de la Cátedra Francisco Suárez* 81-103.

un sistema de estados relativamente independientes que facilita la persistencia de enormes desigualdades mundiales en los niveles de libertad y bienestar. Este sistema también permite a los estados ricos cerrar sus fronteras a los habitantes de los estados más pobres, a excepción de los refugiados, cuya identificación generalmente permanece de igual forma en manos de las autoridades estatales. Por supuesto, las fronteras no son completamente impermeables, y algunos miembros del proletariado global logran cruzarlas sin autorización con la esperanza de acceder a los recursos del mundo rico. Sin embargo, se enfrentan a la constante amenaza de la deportación y carecen de muchos de los derechos que los nacionales disfrutan por nacimiento. La discrecionalidad de la que gozan los estados ricos a la hora de vigilar sus fronteras y elegir quién disfrutará de qué derechos institucionaliza un enfoque instrumental y egoísta en el tratamiento de los inmigrantes. En lugar de seres humanos dotados de igual dignidad, las leyes y políticas estatales los conciben como simples trabajadores que pueden ser legítimamente explotados y, en caso de que pierdan el empleo o se conviertan en una carga, expulsados. Mientras cumplen con el papel que tienen asignado, es decir, el de trabajar en condiciones que la mayoría de los autóctonos encontrarían inaceptables, estos ciudadanos de segunda clase permanecen invisibles y, por lo tanto, tolerables. Viven en barrios segregados de clase baja; pasan la mayor parte de su tiempo libre entre ellos, en lugares determinados; rara vez reclaman bienes públicos y privados codiciados tales como empleos prestigiosos, becas, escuelas y hospitales de primera categoría, infraestructuras deportivas o parques atractivos. Dado que carecen del derecho de voto, tampoco participan de manera significativa en las decisiones políticas sobre la distribución de estos bienes.

Tarde o temprano, algunos de ellos se asientan, conocen o reagrupan a sus parejas y tienen hijos. Habiendo nacido en el territorio estatal o llegado a una edad temprana, estos últimos no comparten el sentimiento de gratitud que tienen sus padres por haber escapado de la pobreza relativa, el autoritarismo y/o la violencia. Tras haber estudiado en las escuelas locales, también están mejor preparados para –y más deseosos de– ocupar los mismos puestos de trabajo estables y prestigiosos que ocupan los autóctonos. Sin embargo, rápidamente descubren que los autóctonos no están tan dispuestos a tenerlos como compañeros. Hablan los dialectos dominantes, conocen la

historia local y se ven a sí mismos como parte de la comunidad, pero su nombre, dirección, color de piel o religión los marcan como forasteros con menos derecho a toda una gama de recursos escasos. Cuando plantean reivindicaciones políticas, éstas se interpretan como síntomas de repliegue identitario y falta de compromiso con el bien común. Por muy asimilados que estén, frecuentemente se sospecha que se adhieren secretamente a valores pre-modernos que pueden socavar la cohesión social e importantes logros morales. Las menores diferencias en sus costumbres o gustos se manipulan discursivamente para reforzar estas ideas preconcebidas, que los partidos de extrema derecha y algunos medios de comunicación reproducen y amplifican con fines electorales o lucrativos. De vez en cuando, las tensiones suben hasta el punto de que estallan disturbios cerca de los barrios donde sus padres se habían asentado una generación antes. Estos se aplacan rápidamente con intervenciones policiales de mano dura, pero el daño simbólico ya está hecho. El vecindario entero, junto con sus habitantes, pasa a suscitar temores de juventud anti-social, crimen organizado e incluso actividades terroristas.[5]

Por supuesto, el retrato es demasiado sombrío y omite deliberadamente el gran número de ciudadanos de origen inmigrante que logran cumplir sus sueños ante circunstancias desfavorables. Sin embargo, el razonamiento básico es incontestable. El racismo sigue siendo una fuerza poderosa en las sociedades de Europa occidental, y el desprecio generalizado por los derechos de los migrantes y sus hijos tiene mucho que ver con esta situación. Por lo tanto, mejores garantías de los derechos humanos podrían ayudar considerablemente a cambiarla. Esta es la idea central que recorre el presente trabajo.

[5] Javier de Lucas, 'Sobre los fundamentos de la igualdad y del reconocimiento. Un análisis crítico de las condiciones de las políticas de integración ante la inmigración' en *Inmigración e integración en la UE. Dos retos para el s. XXI* (EUROBASK 2012) 11-92; Javier de Lucas, 'Las globalizaciones y los derechos' (2008) 40/41 *Enrahonar* 55-66. Para una descripción del caso francés, véase Géraldine Galeote, 'Nuevos planteamientos de la política de la ciudad en Francia: La búsqueda de una cohesión social y urbana en los barrios prioritarios' en Ángeles Solanes Corella (ed), *Diversidad cultural y conflictos en la Unión Europea. Implicaciones jurídico-políticas* (2nd edn, Tirant lo Blanch 2016) 71-88.

1.1. El racismo en Europa occidental

En 2014, la Encuesta Social Europea bianual incluyó un módulo detallado dirigido a medir la opinión pública hacia la inmigración. Más de 40 000 encuestados residentes en Alemania, Austria, Bélgica, Dinamarca, Eslovenia, España, Finlandia, Francia, Alemania, Hungría, Irlanda, Israel, Lituania, Noruega, Países Bajos, Polonia, Portugal, Suecia, Suiza y Reino Unido fueron entrevistados de forma presencial, repitiendo varias preguntas formuladas en un ejercicio similar realizado en 2002. Si bien el alcance geográfico de la encuesta ni abarcaba ni se circunscribía a Europa occidental, sus resultados proporcionan buenos indicadores sobre actitudes racistas en la región.[6]

Destacan tres patrones claves. En primer lugar, los inmigrantes no se perciben como una categoría homogénea sino diferenciada en términos raciales, étnicos, socioeconómicos y religiosos. Así pues, sólo el 7% de las personas encuestadas se mostraron dispuestas a impedir la llegada de cualquier inmigrante de su raza o grupo étnico, pero esta proporción subía alrededor del 13% para inmigrantes de diferente raza o grupo étnico, el 20% para aquellos procedentes de países pobres fuera de Europa y el 26% para los musulmanes. La tendencia fue similar en 2002, a excepción de un fuerte aumento en el rechazo de los migrantes de países pobres fuera de Europa (no había pregunta específica sobre musulmanes en 2002). En segundo lugar, los problemas percibidos de la inmigración se relacionan principalmente con la delincuencia, seguida del deterioro de los servicios públicos, la pérdida de puestos de trabajo y la dilución de la vida cultural. Curiosamente, los tres primeros factores habían perdido cierta importancia entre 2002 y 2014, mientras que los temores de dilución cultural habían aumentado ligeramente. En tercer lugar, la opinión pública no era consensual sino fuertemente dividida por edad, educación y nivel de ingresos. En todos los estados de Europa occidental se observaba más de un 20% de diferencia en los apoyos a la admisión de 'algunos' o 'muchos' migrantes de países más pobres entre los encuestados mayores con bajo nivel educativo y los jóvenes con alto nivel educativo. La brecha era

[6] La discusión que sigue se basa en una síntesis del informe publicada por el grupo de investigación que realizó la encuesta. Véase Anthony Heath y Lindsay Richards, *Attitudes towards immigration and their antecedents: Topline results from Round 7 of the European Social Survey* (European Social Survey ERIC 2016).

particularmente grande en Francia, donde menos del 30% de los primeros pero más del 80% de los segundos se declaraban favorables a su llegada. Según los analistas de la encuesta, la diferencia probablemente se debía a las normas y los entornos sociales en que las personas estaban inmersas antes que a su edad y nivel educativo *per se*.

Una de las premisas en las que descansan las encuestas sobre actitudes es que los patrones de simpatía y aversión que detectan frecuentemente, aunque no siempre, se manifiestan en la conducta de las personas.[7] Por motivos metodológicos, sin embargo, la fuerza de esta relación solo puede medirse a través de experimentos controlados que no reflejan las condiciones de las interacciones en el mundo real. Esto lleva a que los estudios representativos a gran escala deban centrarse o bien en variables cognitivas y afectivas (como las mencionadas anteriormente), o bien en manifestaciones concretas de discriminación en contextos específicos, como la vivienda y el mercado laboral (véase el capítulo 4). Una forma de salvar la brecha entre actitudes y conductas consiste en preguntar sobre las percepciones de discriminación racial, étnica, lingüística, nacional o religiosa vivida por la población de origen inmigrante. Si bien las percepciones no necesariamente se corresponden con la discriminación real, su correlación general con los resultados de encuestas sobre actitudes sugiere que ofrecen un indicador fiable.[8]

Un análisis de este tipo se ha realizado recientemente combinando los resultados de seis oleadas de la Encuesta Social Europea, de 2004 a 2014, en la UE-27.[9] La muestra incluía cerca de 30 000 personas 'no autóctonas', definidas como aquellas que han nacido en el extranjero o tienen al menos un padre inmigrante. Todas ellas, así como más de 250 000 'autóctonos', debían indicar si percibían discriminación contra su propio grupo lingüístico, racial, nacional, étnico o religioso. En consonancia con las encuestas sobre actitudes, la proporción de respuestas afirmativas fue mucho (en promedio diez veces) mayor entre los encuestados de origen inmigrante que entre los

[7] Andreas Zick, Thomas Pettigrew y Ulrich Wagner, 'Ethnic prejudice and discrimination in Europe' (2008) 64 [2] *Journal of Social Issues* 233-251.
[8] Mirna Safi y Patrick Simon, 'Les discriminations ethniques et raciales dans l'enquête Trajectoires et Origines: representations, experiences subjectives et situations vécues' (2013) 464-466 *Économie et Statistique* 245-275.
[9] Stéphanie André y Jaap Dronkers, 'Perceived in-group discrimination by first and second generation immigrants from different countries of origin in 27 EU member-states' (2017) 32 [1] *International Sociology* 105-129.

autóctonos. De hecho, las percepciones de discriminación basada en uno de los motivos antes mencionados se circunscribían casi exclusivamente a las personas no autóctonas, excepto en Reino Unido, tal vez debido a su larga historia de inmigración no blanca.[10] Aunque el porcentaje medio de respuestas afirmativas era relativamente bajo, oscilando entre 6,5% en Noruega y 19% en Grecia y Portugal, el desglose por nacionalidad revela la importancia de los factores raciales, religiosos y socioeconómicos. Entre los países emisores con un número relativamente alto de residentes europeos (más de 50 encuestados), aquellos cuyos nacionales percibían la mayor discriminación eran Nigeria (42,1%), Ghana (37%), Albania (36,1%), Marruecos (29,8%), Pakistán (29,8%), Jamaica (29,2%), Congo-Brazzaville (29%), Afganistán (27,3%), Surinam (25,8%), Irán (25,2%), Túnez (25,2%), Bangladesh (25%), Irak (24,2%), Somalia (23%) y Brasil (21,6%). Por el contrario, menos del 5% de los encuestados originarios de Europa occidental, con excepción de los irlandeses (9,5%), percibían discriminación étnico-racial. El análisis multinivel de los resultados confirmaba que los creyentes no cristianos eran más propensos que los cristianos y los no creyentes a percibir discriminación, al igual que los inmigrantes procedentes de los países más pobres. *Ceteris paribus*, las percepciones de discriminación aumentaban en proporción con la educación de los encuestados, probablemente debido a que esta trae consigo una mayor interacción con la población autóctona y conciencia de las desigualdades grupales.

En los últimos años, una serie de conflictos armados en países de mayoría musulmana y ataques islamistas altamente mediatizados en suelo europeo ha multiplicado la popularidad de los discursos políticos que representan el Islam como una amenaza para la civilización y los valores occidentales[11] y enfocado el interés de los

[10] Austria: 13/0,7%; Bélgica: 10,7/0,9%; Dinamarca: 10,2/0,7%; Finlandia: 11,4/1,3%; Francia: 12,2/1,6%; Alemania: 9,4/0,7%; Grecia: 19,2/1,7%; Irlanda: 9,3/0,9%; Italia: 10,8/0,9%; Países Bajos: 16,5/1,8%; Noruega: 6,5/1,2%; Portugal: 19,1/0,5%; España: 15,0/1,6%; Suecia: 8,8/0,7%; Suiza: 7,0/0,6%; Reino Unido: 15,0/5,2%.

[11] Farid Hafez, 'Shifting borders: Islamophobia as common ground for building pan-European right-wing unity' (2014) 48 *Patterns of Prejudice* 479-499; Christopher Allen, *Islamophobia* (Ashgate 2010) 109 ss; Toril Aalberg et al. (eds), *Populist political communication in Europe* (Routledge 2017); Acar Kutay, 'Dominant pluralism and discursive strategies of contemporary racism against Muslim minorities in Europe' (2015) 35 *Journal of Muslim Minority Affairs* 1-16; Mattias Ekman, 'Online islamophobia and the politics of fear' (2015) 38 *Ethnic and Racial Studies* 1986-2002; Jocelyne Cesari, *Why the West fears Islam: An exploration of Muslims in liberal democracies* (Palgrave MacMillan 2013); Tariq Modood y Anna Triandafyllidou, *Multiculturalism, Muslims and citizenship: A European approach* (Routledge 2006).

investigadores hacia la medida y las manifestaciones de la islamofobia. Los datos recabados en varios países sugieren que los musulmanes ya se percibían de manera más negativa que la mayoría de las otras minorías a finales de los años noventa, pero que las actitudes han ido empeorando significativamente desde entonces.[12] En un estudio a gran escala realizado por la Agencia Europea de Derechos Fundamentales, el 11% de los encuestados musulmanes declararon haber sufrido ataques, amenazas o acoso por su fe durante el año anterior.[13] Entre los jóvenes franceses, españoles y británicos, los musulmanes tenían entre cuatro y doce veces más probabilidades que los demás de sufrir acoso por su religión.[14] Otro estudio, basado en fuentes secundarias, identificó cientos de actos de vandalismo contra mezquitas, tumbas, carnicerías y otras propiedades musulmanas, así como prácticas de empleo discriminatorias, agresiones físicas, abusos verbales y folletos, páginas web y cartas hostiles.[15] En 2015 y 2016, en el punto álgido de la crisis siria, se registraron alrededor de mil ataques contra centros de acogida de refugiados en Alemania.[16] Como cabría predecir, también se ha encontrado que los inmigrantes musulmanes tenían mayores dificultades que los cristianos a la hora de incorporarse al mercado de trabajo británico, neerlandés y alemán.[17] Sea cual sea la forma específica que adopte la discriminación racista, la

[12] Zan Strabac y Ola Listhaug, 'Anti-Muslim prejudice in Europe: A multilevel analysis of survey data from 30 countries' (2008) 37 *Social Science Research* 268-286; Eric Bleich, 'Where do Muslims stand on ethno-racial hierarchies in Britain and France? Evidence from public opinion surveys, 1988-2008' (2009) 43 *Patterns of Prejudice* 379-400; Bram Spruyt y Mark Elchardus, 'Are anti-Muslim feelings more widespread than anti-foreigner feelings? Evidence from two split-sample experiments' (2012) 12 *Ethnicities* 800-820; Michael Savelkoul, Peer Scheepers, William Van der Veld y Louk Hagendoorn, 'Comparing levels of anti-Muslim attitudes across Western countries' (2012) 46 *Quality & Quantity* 1617-1624. Para pruebas en contra de la mayor estigmatización de los inmigrantes musulmanes respecto a los demás, véase Zan Strabac, Toril Aalberg y Marko Valenta, 'Attitudes towards Muslim immigrants: Evidence from survey experiments across four countries' (2014) 40 *Journal of Ethnic and Migration Studies* 100-118.

[13] FRA, *EU-MIDS Data in Focus Report 2: Muslims* (2009) 12.

[14] FRA, *Experience of discrimination, social marginalisation and violence: A comparative study of Muslim and non-Muslim youth in three EU member states* (2010) 36.

[15] European Monitoring Centre on Racism and Xenophobia, *Muslims in the European Union: Discrimination and Islamophobia* (2006).

[16] FRA, *Current migration situation in the EU: Hate crime* (2016) 4.

[17] Matthias Koenig, Mieke Maliepaard y Ayse Güveli, 'Religion and new immigrants' labor market entry in Western Europe' (2016) 16 *Ethnicities* 213-235.

gravedad de sus consecuencias para sus víctimas individuales y la sociedad en conjunto parece difícil de exagerar.[18]

1.2. La promesa de los derechos humanos

En todas las sociedades, el amplio alcance del racismo es un hecho incómodo. Socava el sentimiento de integridad moral de las personas, pone a prueba su visión positiva de las comunidades nacionales, regionales o locales a las que se sienten fuertemente vinculadas y desplaza la responsabilidad de la situación desventajosa en la que se encuentran muchos inmigrantes y sus hijos desde sus propias deficiencias, supuestamente heredadas de la cultura de origen, hacia las condiciones con las que se enfrentan en el país de acogida. Dado que la mayoría de los ciudadanos con derecho de voto está formada por autóctonos que rara vez sufren discriminación étnico-racial, la eliminación del racismo no suele figurar entre las principales prioridades políticas. De hecho, al igual que otras políticas de apoyo a la integración de los inmigrantes, las medidas antirracistas frecuentemente se implementan de forma descentralizada mediante una constelación de organismos especializados y organizaciones no gubernamentales, tanto étnicas como transversales,[19] a veces con el apoyo directo o indirecto de la Unión Europea.[20] Si bien este enfoque de 'perfil bajo' protege a los representantes políticos de los costes electorales que suele generar la adopción de políticas contra-mayoritarias, también reduce considerablemente las oportunidades de transformación estructural e intersectorial en las administraciones públicas. Por añadidura, su limitada institucionalización exacerba la vulnerabilidad de las políticas a

[18] Para una visión de conjunto sobre este problema, véase Ariane Chebel d'Appollonia, *Migrant mobilization and securitization in the US and Europe: How does it feel to be a threat?* (Palgrave Macmillan 2015).

[19] Elizabeth Collet y Milica Petrovic, *The future of immigrant integration in Europe: Mainstreaming approaches for inclusion* (Migration Policy Institute 2014) 3-4. Para unos análisis detallados sobre el caso español, véase Pier-Luc Dupont, 'El Estado español y la lucha contra el racismo: Un balance preliminar' in Ángeles Solanes Corella y Encarnación La Spina (eds), *Políticas migratorias, asilo y derechos humanos: Un cruce de perspectivas entre la Unión Europea y España* (Tirant lo Blanch 2014) 423-455; Ángeles Solanes Corella, 'Inmigración, integración y tercer sector' (2006) 4 *Revista Española del Tercer Sector* 15-52.

[20] Jesús García Cívico, 'Hay realmente un horizonte intercultural en la Unión Europea?' (2013) 17 *Universitas. Revista de Filosofía, Derecho y Política* 97-138.

los cambios de ciclo electoral y especialmente al disparo esporádico de la opinión anti-inmigrante, como la actual reacción europea contra ciertos tipos de diversidad cultural.[21] Dicho de otro modo, abre la puerta a la eliminación las medidas antirracistas precisamente en las circunstancias que las hacen más necesarias. Otro problema es que las políticas descentralizadas y débilmente coordinadas resultan más fáciles de implementar en el número limitado de ciudades grandes o medianas donde los inmigrantes tienden a asentarse, organizarse e incidir en la formulación de políticas.[22] Sin embargo, por motivos que examinaremos en el capítulo 3, el racismo generalmente arraiga con especial facilidad en las localidades principalmente autóctonas o blancas.

En un nivel más básico, lo que parece faltar en las políticas actuales es la conciencia de que la eliminación del racismo no es una reivindicación como cualquier otra sino una obligación jurídica impuesta a las autoridades públicas por varios tratados internacionales de derechos humanos. En particular, el artículo 2.1 de la Convención Internacional sobre la Eliminación de todas las Formas de Discriminación Racial (CERD), aprobada en 1966 y ratificada por 175 estados,[23] los compromete a 'seguir, por todos los medios apropiados y sin dilaciones, una política encaminada a eliminar la discriminación racial en todas sus formas y a promover el entendimiento entre todas las razas'. Con este fin, insta a los estados partes a que adopten 'medidas eficaces para revisar las políticas gubernamentales nacionales y locales, y para enmendar, derogar o anular las leyes y las disposiciones reglamentarias que tengan como consecuencia crear la discriminación racial o perpetuarla donde ya exista'. Cabe señalar que la Convención no define la discriminación racial de manera puramente biológica o fenotípica sino como cualquier 'distinción, exclusión, restricción o preferencia basada en la raza, el color, la descendencia o el origen nacional o étnico' con efecto restrictivo sobre el

[21] Jeffrey Alexander, 'Struggling over the mode of incorporation: Backlash against multiculturalism in Europe' (2013) *Ethnic and Racial Studies* 1-26; Alana Lentin y Gavan Titley, *The crises of multiculturalism: Racism in a neoliberal age* (Zed Books 2011); Steven Vertovec y Susanne Wessendorf (eds), *The multiculturalism backlash: European discourses, policies and practices* (Routledge 2010).
[22] Els de Graauw y Floris Vermeulen, 'Cities and the politics of immigrant integration: A comparison of Berlin, Amsterdam, New York City and San Francisco' (2016) 42 [6] *Journal of Ethnic and Migration Studies* 989-1012; Martin Bak Jorgensen, 'The diverging logics of integration policy making at national and city level' (2012) 46 [1] *International Migration Review* 244-278.
[23] Véase United Nations Treaty Collection, https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-2&chapter=4&clang=_en consultado el 12 de mayo 2017.

ejercicio de los derechos. La amplitud de esta definición la hace muy relevante para el tratamiento de los inmigrantes y sus hijos en Europa.

La importancia de la Convención en la arquitectura contemporánea del derecho internacional de los derechos humanos no se deduce únicamente de su ratificación casi universal sino también del hecho de que entró en vigor en 1969, siete años antes que el Pacto Internacional de Derechos Civiles y Políticos y el Pacto Internacional de Derechos Económicos, Sociales y Culturales. Otra característica notable es que muchos países de Europa occidental han reconocido la competencia del Comité para la Eliminación de la Discriminación Racial para examinar demandas individuales por violaciones de los derechos establecidos en la Convención: Austria (2002), Bélgica (2000), Dinamarca (1985), Finlandia (1994), Francia (1982), Alemania (2001), Islandia (1981), Irlanda, Italia (1978), Luxemburgo (1996), Noruega (2000), España (1998), Suecia y Suiza (2003).[24] A enero de 2012, el Comité había registrado 48 quejas, de las cuales una se retiró, 17 fueron declaradas inadmisibles y 27 se decidieron sobre los méritos. Se identificaron violaciones de la Convención en 11 casos, incluyendo uno ligado a la discriminación por nacionalidad en un banco danés y otro relativo a la inadecuada investigación y sanción de amenazas raciales contra un beneficiario de viviendas subvencionadas de origen extranjero por parte de las autoridades neerlandesas.[25]

La relevancia potencial del derecho internacional de los derechos humanos para el desarrollo de políticas antirracistas va mucho más allá de las decisiones de los comités y tribunales encargados de su aplicación. Mediante el diálogo entre jueces internacionales y nacionales, las normas que establece pueden ejercer una significativa influencia indirecta en las jurisdicciones inferiores, incluso en la interpretación de leyes ordinarias y preceptos constitucionales. Por lo tanto, dentro de los límites impuestos por la autonomía parcial de los sistemas jurídicos y el principio de subsidiariedad, los

[24] Véase United Nations Treaty Collection, https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-2&chapter=4&clang=_en consultado el 12 de mayo de 2017.
[25] OHCHR, *Selected decisions of the Committee on the Elimination of Racial Discrimination Volume 1. Thirst-sixth to seventy-fifth sessions* (United Nations 2012) 2, 18-22, 43-49.

tratados de derechos humanos pueden catalizar la progresiva consolidación de normas antirracistas aplicadas localmente en todos los estados democráticos de derecho.[26] A su vez, estas normas pueden reforzar la autoridad de los gobiernos dispuestos a poner en práctica políticas necesarias pero impopulares, así como obligar a los más reticentes a revisar su postura.

Afrontar el racismo en el marco de los derechos humanos también tiene una ventaja más sutil. Como hemos visto, el racismo no es un problema idiosincrático que afecta a un número limitado de individuos despistados o trastornados sino una actitud generalizada arraigada en las dinámicas estructurales de las sociedades contemporáneas. Sin embargo, la dificultad de reconocer este hecho a menudo conduce a la adopción de instrumentos antirracistas altamente coercitivos, motivados por el deseo de condenar acciones patentemente injustas antes que de eliminar sus causas subyacentes. Ofrece una buena ilustración de esta tendencia la Decisión marco 2008/913/JAI del Consejo de la Unión Europea, en virtud de la cual los estados miembros deben tipificar como delito la incitación pública a la violencia o al odio dirigidos contra los miembros de un grupo racial, religioso, nacional o étnico, así como 'la apología pública, la negación o la trivialización flagrante de los crímenes de genocidio, crímenes contra la humanidad y crímenes de guerra'.[27] Si bien las prohibiciones contra el discurso del odio pueden hacer una contribución importante a la contención de discursos estigmatizantes e incluso prevenir brotes de violencia racista, su aplicación a gran escala inevitablemente acarrearía costes considerables en términos de libertades individuales. Lo mismo ocurre con las sanciones punitivas contra el acoso racista, que podrían desviar la atención de los factores estructurales mediante el uso de unos cuantos chivos expiatorios. La atención prioritaria del derecho internacional de los derechos humanos hacia el control de las autoridades públicas y otros actores poderosos le confiere una capacidad intrínseca de minimizar estos riesgos.[28]

[26] Olivier De Schutter, *International human rights law: Cases, materials, commentary* (Cambridge University Press 2010) 729-740.
[27] Council Framework Decision 2008/913/JHA of 28 November 2008 on combating certain forms and expressions of racism and xenophobia by means of criminal law [2008] OJ L 328/55 art 1.1.
[28] El derecho internacional de los derechos humanos solo limita las libertades individuales indirectamente, a través de la obligación de los estados de prevenir las violaciones cometidas por entes

1.3. Objetivos y método

Esta tesis explora algunas formas en que los derechos humanos a la no discriminación y la educación podrían ser movilizados por los tribunales y otros operadores jurídicos de Europa occidental para obligar a las autoridades públicas a desarrollar políticas antirracistas ambiciosas y efectivas. La elección de estos derechos se debe a consideraciones pragmáticas, contextuales y académicas. Pragmáticamente, las obligaciones que crean guardan una estrecha afinidad con las medidas que parecen necesarias para erradicar las causas estructurales del racismo. Contextualmente, ambos derechos están reconocidos en tratados internacionales fuertemente institucionalizados y ratificados por todos los estados de Europa occidental desde hace varias décadas. Académicamente, la dimensión antirracista de estos derechos todavía no parece haber sido analizada de manera exhaustiva, lo que nos permite esperar que nuestras conclusiones abran nuevos horizontes teóricos. En particular, trataremos de reconocer pero ir más allá de las implicaciones jurídicas y sociales de la dicotomía entre nacionales y extranjeros, arrojando luz sobre vulneraciones de derechos humanos que afectan a los ciudadanos naturalizados además de los inmigrantes recientes.

Es importante destacar que no consideramos los derechos a la no discriminación y la educación como los únicos relevantes para la lucha contra el racismo. Al contrario, damos por supuesto que los derechos humanos son complementarios e indivisibles, de modo que su ejercicio universal y efectivo solo puede garantizarse mediante la interpretación de cada uno de una manera que refuerce a los demás en lugar de socavarlos. Por ejemplo, la obligación de revisar las políticas públicas desde una perspectiva antirracista impuesta por la Convención Internacional sobre la Eliminación de la Discriminación Racial proporciona una meta hacia la que dirigirse, pero pocos detalles sobre el camino que tomar. Para llenar sus disposiciones con contenido

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privados. Sin embargo, esta obligación tiene un alcance más restringido que la obligación de no interferir con los derechos en el ejercicio del poder político. Véase Olivier De Schutter, *International human rights law: Cases, materials, commentary* (Cambridge University Press) 365-460.

específico, los tribunales necesariamente deben basarse en principios adicionales, incluidas otras normas de derechos humanos.

Nuestra investigación moviliza principalmente dos acervos jurídicos: los tratados universales de derechos humanos adoptados en el marco de las Naciones Unidas y el Convenio Europeo de Derechos Humanos, en vigor desde 1953. Estos instrumentos han generado una cantidad considerable de jurisprudencia, donde extraeremos estándares relevantes para nuestros objetivos de investigación. Debido a su autoridad jurídica, se prestará una atención especial a las normas establecidas en los comentarios generales de los comités de las Naciones Unidas y los informes temáticos de sus relatores especiales y expertos independientes. También se comentará la jurisprudencia del Tribunal Europeo de Derechos Humanos, tanto mediante referencias directas como síntesis académicas.

Puesto que queremos destacar la incidencia de las leyes en procesos sociales moralmente problemáticos, nuestra investigación es crítica e interdisciplinar, combinando perspectivas jurídicas, filosóficas, políticas, sociológicas, antropológicas y psicológicas. De este modo, las interpretaciones autorizadas de los derechos a la no discriminación y la educación se contrastarán con: 1) las recomendaciones de las organizaciones internacionales especializadas en estos ámbitos, como la UNESCO y la OCDE; 2) los principios defendidos por los filósofos políticos y otros académicos con orientación normativa; y 3) las prescripciones que pueden derivarse de la investigación empírica sobre la etiología del racismo. Si bien reconocemos que estas diferentes fuentes normativas no influyen en el razonamiento judicial de la misma manera o en la misma medida, consideramos que todas ellas tienen un papel legítimo que desempeñar en la interpretación de los derechos humanos (véase el capítulo 2).

Desde varios puntos de vista, la parte más innovadora de la investigación es la empírica, que requiere algunas aclaraciones metodológicas. El punto de partida de nuestro análisis es que los derechos humanos delimitan el espectro de políticas legalmente permitidas, las cuales, debido al poder que detentan las autoridades públicas, inciden en los determinantes estructurales del racismo. Sin embargo, la relación entre el

derecho internacional, las políticas públicas y las actitudes dista de ser directa, de forma que rara vez se puede observar fácilmente mediante experimentos o correlaciones. Por lo tanto, la mayoría de los estudios en que nos basamos no están diseñados desde un enfoque explícitamente evaluativo. Para compensar esta laguna, recurriremos principalmente al razonamiento deductivo, utilizando teorías empíricamente fundamentadas para predecir las consecuencias a largo plazo de la ley.

Al trabajar en un nivel intermedio de abstracción entre el idealismo filosófico y las ciencias sociales, la tesis se inscribe en la tradición de la teoría crítica o la filosofía no ideal, que busca arrojar luz sobre el valor normativo de prácticas concretas.[29] Una característica clave de la teoría crítica o no ideal es su sensibilidad a las variaciones contextuales, debida a una convicción de que las injusticias resultan más fáciles de entender y remediar prestando atención a las relaciones sociales en las que se enmarcan.[30] Esta voluntad de contextualización plantea el problema de elegir la unidad más apropiada para el análisis crítico, ya sea en términos geográficos o institucionales. Por regla general, cuanto mayor sea la unidad, más difícil resultará identificar todos los procesos sociales relevantes y las instituciones específicas que necesiten reforma. En otras palabras, la elección pasa por la búsqueda de un equilibrio entre la especificidad y el alcance de las propuestas normativas. Además, un análisis genuinamente crítico debería huir del nacionalismo metodológico, que lleva a presuponer que las dinámicas sociales coinciden con fronteras estatales hasta que se demuestre lo contrario.[31] Este sesgo inevitablemente conduce a exagerar la homogeneidad interna y las diferencias externas de las comunidades nacionales. En los estudios sobre migraciones, el nacionalismo metodológico a menudo se ha manifestado en la incansable búsqueda de modelos o filosofías nacionales de integración, que no reflejan la complejidad y el

[29] Raymond Morrow y David Brown, *Critical theory and methodology* (SAGE Publications 1994).
[30] Elizabeth Anderson, 'Moral bias and corrective practices: A pragmatist perspective' (2015) 89 *Proceedings and Addresses of the APA* 21-47; Joseph Carens, 'A contextual approach to political theory' (2004) 7 [2] *Ethical Theory and Moral Practice* 117-132; Veit Bader y Ewald Engelen, 'Taking pluralism seriously: Arguing for an institutional turn in political philosophy' (2003) 29 [4] *Philosophy & Social Criticism* 375-406.
[31] Andreas Wimmer y Nina Glick Schiller, 'Methodological nationalism, the social sciences, and the study of migration: An essay in historical epistemology' (2003) 37 [3] *International Migration Review* 576-610.

dinamismo de las políticas públicas y los procesos de integración de los inmigrantes más allá de la retórica oficial.[32]

Nuestra decisión de centrarnos en el contexto de Europa occidental es un intento de evitar el escollo del nacionalismo metodológico y de maximizar la especificidad y el alcance de nuestras propuestas. Desde el punto de vista jurídico, todos los estados incluidos en el análisis son miembros de la Unión Europea o están sujetos a muchas de sus normas. También forman parte del Consejo de Europa y, por lo tanto, están sometidos a la jurisdicción del Tribunal Europeo de Derechos Humanos. Sociológicamente, reciben un número significativo de inmigrantes no europeos, aunque sus descendientes son más numerosos en los países septentrionales con mayor historia de inmigración. Económica y políticamente, son sociedades relativamente prósperas de libre mercado, con instituciones democráticas consolidadas y tribunales independientes. Los últimos factores explican nuestra exclusión de los estados de Europa del Este pese a su membresía en la Unión Europea y el Consejo de Europa.

Más allá de estas consideraciones sustanciales, la disponibilidad de datos también ha desempeñado un papel en nuestra elección de escala geográfica. En la última década, muchos fondos europeos se han asignado a proyectos de investigación comparada sobre la integración de los inmigrantes, especialmente desde perspectivas sociológicas y políticas. Esta financiación ha generado un salto cualitativo y cuantitativo en las publicaciones académicas y proporcionado una gran cantidad de datos recientes y rigurosos sobre los cuales fundamentar nuestro análisis. Dado que nos interesan principalmente las tendencias transnacionales, muchos de los estudios que citamos se han realizado en el marco de tales proyectos internacionales. Para compensar su frecuente enfoque en los países del norte y especialmente aquellos de habla inglesa, hemos buscado en la medida de lo posible contrastar sus resultados con los de estudios de menor alcance realizados en la región meridional. Otra forma en que intentamos reducir la interferencia de procesos localizados o contingentes en nuestro análisis

[32] Adrian Favell, 'Integration nations: The nation-state and research on immigrants in Western Europe' en Grete Brochmann (ed), *Multicultural challenge* (Emerald 2003) 13-42; Christophe Bertossi, 'National models of integration in Europe: A comparative and critical analysis' (2011) 55 [12] *American Behavioral Scientist* 1561-1580.

consiste en recurrir a los marcos teóricos desarrollados en otros entornos comparables, como los Estados Unidos.

Si bien la perspectiva antirracista domina nuestros argumentos, reconocemos que tanto los decisores políticos como los jueces frecuentemente deben conciliar esta preocupación con otras consideraciones morales o pragmáticas. Dentro de lo que nos permite predecir la experiencia, identificamos estas últimas y analizamos su racionalidad, legitimidad y posibilidad de reconciliación con objetivos antirracistas. Otro dilema inherente a cualquier intento de desarrollar estándares específicos pero generalizables para las políticas públicas es el de dejar suficiente espacio para la diversidad y la innovación. Cuando encontramos que una norma determinada debe ser adaptada con flexibilidad al contexto social, la matizaremos con adverbios como 'progresivamente', 'en general' etc. Por lo demás, entendemos que todas las normas de derechos humanos deben aplicarse con cierto sentido de proporcionalidad, aunque sin renunciar al papel legítimo de los tribunales como últimos guardianes de la labor legislativa y administrativa.

Nuestro enfoque iusfilosófico está diseñado para generar dos tipos de resultados, implícitamente dirigidos a diferentes lectores. Por un lado, queremos desvelar estándares existentes de derechos humanos susceptibles de contribuir a la lucha antirracista. Ello puede concebirse como un intento de ampliar los conocimientos jurídicos de los decisores políticos, activistas y otros agentes sociales. Por otro lado, defendemos el principio del reconocimiento étnico como un argumento moral para la modificación de algunas normas establecidas o el desarrollo de otras nuevas. Ello puede leerse como un intento de perfeccionar las herramientas filosóficas y sociológicas de los jueces y otros profesionales del derecho.

Cabría formular una última observación antes de pasar a introducir los contenidos de los próximos capítulos. A pesar de la cantidad excepcional de atención académica que ha recibido, el racismo no es un fenómeno único sino una entre muchas manifestaciones de prejuicio y discriminación que interactúan entre sí, incluyendo el sexismo, el heterosexismo, el cissexismo, el capacitismo, la gerontofobia, el clasismo y

otros.[33] Si bien no haremos más que referencias esporádicas a estas otras injusticias, muchas de las políticas y dinámicas sociales que se abordarán resultan igualmente relevantes para la emancipación de las mujeres y las personas homosexuales, transexuales, discapacitadas, mayores y pobres. Para facilitar el diálogo interseccional entre académicos, activistas, abogados y legisladores, haremos un esfuerzo deliberado para utilizar teorías y conceptos extrapolables a varias minorías siempre que sea posible.

La tesis procede en tres pasos. El capítulo 2 establece el marco filosófico necesario para caracterizar la eliminación del racismo como un imperativo moral que debe tenerse en cuenta en la interpretación de los derechos humanos. Su principal objetivo consiste en describir el principio del reconocimiento étnico, rastrear su aparición en las teorías liberales de la justicia y examinar su movilización en los debates filosófico-políticos sobre la integración de los inmigrantes. El capítulo 3 sintetiza varias décadas de investigación empírica sobre el prejuicio, principalmente en el campo de la psicología social, para ofrecer un retrato preciso y a la vez sencillo de sus condicionantes estructurales. Partiendo de la construcción de identidades políticas exclusivas, muestra como las desigualdades socioeconómicas y las percepciones de amenaza cultural y material conspiran para reforzar las fronteras simbólicas entre 'ellos' y 'nosotros'. También aborda el papel que desempeña la segregación en la reproducción del racismo al reducir las oportunidades de contactos intergrupales. Basándose en estos fundamentos morales y sociológicos, los capítulos 4 y 5 examinan críticamente la interacción entre las normas internacionales de derechos humanos, las políticas públicas y el racismo en Europa occidental. Ambos capítulos arrancan con una breve discusión sobre la relación aparente entre los fenómenos racistas y la inadecuada protección de los derechos humanos. Posteriormente se abordan una por una algunas deficiencias en las política actuales y se explica cómo resolverlas mediante interpretaciones actuales o posibles del derecho correspondiente. El capítulo 4, centrado en la no discriminación, arroja una mirada crítica sobre la implementación e institucionalización de las directivas de igualdad de la Unión Europea en el ámbito del empleo. En particular, sostiene que el

[33] Letizia Mancini, 'Introduction' (2016) 2 *Sociologia del Diritto* 7-9; Rosario Serra Cristóbal (coord), *Multidiscriminación en los ordenamientos jurídicos español y europeo* (Tirant lo Blanch 2013); María José Añón, 'El acceso de las mujeres inmigrantes a los derechos humanos: La igualdad inacabada' (2010) 17 [2] *Revista de Filosofía Jurídica, Social y Política* 241-271.

modelo de derecho antidiscriminatorio basado en demandas judiciales individuales, el recurso escaso o mal concebido a las acciones positivas y la falta de acomodación de las diferencias culturales en los lugares de trabajo contribuyen problemáticamente a la segregación, estratificación y asimilación étnicas. El capítulo 5 pone el foco en el racismo infantil, localizando sus fuentes institucionales en las políticas educativas. Combinando diferentes líneas de investigación en este ámbito, defiende que solo mediante el desarrollo de currículos críticos dotados de múltiples perspectivas, la creación de incentivos para la diversidad étnica de alumnos y profesores y la extensión de algunos estándares de las escuelas públicas a su homólogas privadas se conseguirá establecer sistemas educativos auténticamente igualitarios. La conclusión propone un modelo de reforma antirracista de las políticas públicas basado en los derechos.

1. Introduction

By any measure, Western European countries are powerful magnets for international migrants beyond the European Union (EU) area of free movement. In 2014, over 80 000 of them legally settled in Spain for work, family, humanitarian or other purposes. Moroccan nationals were the most numerous, followed by people originating from China, Colombia, Russia, the Dominican Republic and Venezuela. In the same year, nearly 140 000 migrants from Morocco, China, Bangladesh, Albania, India, Ukraine, Pakistan, Egypt and Senegal were admitted to Italy. In France, non-EU migrants' main nationalities were Algeria, Morocco, Tunisia, China, Comoros, Turkey, Senegal, Russia, Congo and Côte d'Ivoire. The Netherlands and Great Britain both received large numbers of migrants from India and China, whereas Sweden was a key destination for Syrians, Erithreans, Somalians, Afghans, Indians, Iranis and the Chinese.[1] In 2016, according to Eurostat, the demographic weight of the population born outside the EU reached 11,6% in Sweden, 11,2% in Switzerland, 9,9% in Austria, 8,8% in the Netherlands, 8,7% in Belgium, 8,5% in Spain and France, 8,3% in the United Kingdom, 8,1% in Norway and Greece, 8% in Germany, 7,4% in Denmark, 6,7% in Italy, 6,2% in Portugal, 5,3% in Ireland and 3,8% in Finland.[2]

For many migrants, the opportunity to settle in some of the world's most prosperous, peaceful and democratic states is a life-changing one. Refugees can escape political and social persecution, civil wars and dire poverty. Those who did not face such adversity have the chance to access levels of employment security and income that their country of birth only provides to a privileged few, enabling huge improvements in their own and their family's standards of living. Members of the middle class can fulfil professional aspirations requiring sophisticated infrastructure, efficient organisations and individual freedoms that elude less developed or authoritarian countries.

[1] OECD, *International Migration Outlook 2016* (OECD Publishing 2016) 259, 271, 285, 303, 305, 310.
[2] Eurostat, 'Foreign-born population by country of birth, 1 January 2016' <http://ec.europa.eu/eurostat/statistics-explained/index.php/File:Foreign-born_population_by_country_of_birth,_1_January_2016_(¹).png> accessed 10 May 2017.

These huge gains explain why immigrants are often willing to accept, at least temporarily, a legally enshrined status of second-class citizens. Unlike the native population, they are regularly excluded from the right to vote and stand for election, receive welfare support, child benefits and housing subsidies, reunite with family members, access free or low-fee higher education, seek public employment and even remain in the country if they become unemployed or commit an offence. In a growing number of states, they are also compelled by law to follow 'civic' courses on the host country's language, history and institutions.[3] In the national conception of citizenship that currently permeates liberal democracies, these restrictions and obligations are the price immigrants must pay in order to become full members of the political community, a status that comes with naturalisation.

Since the 1990s, a number of critical scholars have begun to question this nationalist common sense. Why, they have asked, do we assume that immigrants must earn their citizenship while natives receive it automatically? What is the problem with newcomers enjoying the same rights as the rest of the population? Who has an interest in creating a class of lesser citizens? And perhaps most importantly, how does this subordination shape the long-term social relations and dynamics of Western European societies, including the integration of immigrants' children?[4]

According to De Lucas, the failure to take migrant rights seriously finds itself at the heart of one of the most pressing challenges currently faced by European societies: racism. The causal chain is complex but goes something like this. To begin with, the main mechanisms of human rights protection are not universal in scope but embedded in a system of relatively independent states that enables the persistence of stark global inequalities in the enjoyment of individual liberties and general wellbeing.

[3] Thomas Huddleston, Özge Bilgili, Anne-Linde Joki and Zvezda Vankova, *Migrant integration policy index 2015* (CIDOB/MPG 2015); Javier de Lucas and María José Añón (eds), *Integración y derechos: A la búsqueda de indicadores* (Icaria 2013).

[4] Joseph Carens, *The ethics of immigration* (Oxford University Press 2013); Ángeles Solanes Corella (ed), *Derechos humanos, migraciones y diversidad* (Tirant lo Blanch 2010); María José Añón, 'Integración: Una cuestión de derechos' (2010) 744 *ARBOR Ciencia, Pensamiento y Cultura* 625-638; Javier de Lucas and Ángeles Solanes (eds), *La igualdad en los derechos: Claves de la integración* (Dykinson 2009); Javier de Lucas, 'Inmigración y ciudadanía: Visibilidad, presencia, pertenencia' (2003) 37 *Anales de la Cátedra Francisco Suárez* 81-103.

Crucially, this system also allows wealthy states to close their borders to the dwellers of poorer ones, except for refugees, whose identification nonetheless largely remains in the hands of national authorities. Of course, borders are not completely impermeable, and some of the global poor do manage to get through in the hope of eventually gaining access to rich-world resources. However, they remain exposed to the constant threat of deportation and lack many of the rights that nationals enjoy by birth. Wealthy states' power to police their borders and choose who will enjoy which citizenship rights institutionalises an instrumental, self-interested approach to the treatment of immigrants. Rather than human beings endowed with equal dignity, these are framed in state laws and policies as mere workers who can legitimately be exploited and, in the event they lose their jobs or otherwise become too much of a burden, dispensed with. As long as they stick to their assigned role of toiling in conditions that most natives would find unacceptable, such second-class citizens tend to remain invisible and thus tolerable. They live in segregated, lower-class neighbourhoods; they spend most of their free time among themselves in a limited number of meeting places; they seldom make claims on coveted public and private goods, such as prestigious jobs, scholarships, good schools and hospitals, sports infrastructure or beautiful parks. Since they lack the right to vote, neither do they meaningfully participate in political decisions on the distribution of these goods.

Sooner or later, some of them put down roots, meet or reunite with their partners and have children. Being born on national territory or having arrived at an early age, the latter lack their parents' sense of gratitude for escaping the relative poverty, authoritarianism and/or violence of some distant society. Having studied in local schools, they are also better prepared and more willing to take up the same stable and prestigious jobs as natives. However, they quickly find that natives are not so willing to welcome them as colleagues. They may speak mainstream dialects, know the local history and see themselves as part of the community, but their name, address, skin colour or religion mark them out as outsiders and less entitled to a range of social rewards. When they raise political demands, these are interpreted as signs of ethnic retrenchment and lack of commitment to the common good. However well assimilated, they are frequently suspected of secretly adhering to backward values that may

undermine social unity and hard-won moral achievements. The slightest differences in customs or tastes are discursively manipulated to support these preconceptions, which far-right parties and some media outlets reproduce and amplify for electoral or financial purposes. From time to time, tensions rise to the point where riots erupt near the neighbourhoods where their parents had settled a generation earlier. These are quickly quelled by heavy-handed police interventions, but the symbolic harm is done. The whole neighbourhood, together with its inhabitants, becomes associated with fears of anti-social youth, organised crime and perhaps even terrorist activities.[5]

The picture is overly bleak, of course, and it deliberately omits the large number of immigrant-origin citizens who manage to fulfil their dreams in the face of unfavourable circumstances. Yet, the overall argument is incontestable. Racism is a powerful force in contemporary Western Europe, and much of it is due to widespread disregard for the human rights of migrants and their children. Hence, stronger human rights safeguards could do much to improve the situation. This is the central idea that runs throughout the present work.

1.1. Racism in Western Europe

In 2014, the biannual European Social Survey included a detailed module aiming to gauge public opinion toward immigration. Over 40 000 respondents from Austria, Belgium, the Czech Republic, Denmark, Estonia, Finland, France, Germany, Hungary, Ireland, Israel, Lithuania, the Netherlands, Norway, Poland, Portugal, Slovenia, Spain, Sweden, Switzerland and the United Kingdom were interviewed face to face, repeating many of the questions asked in a similar exercised conducted in 2002. While the

[5] Javier de Lucas, 'Sobre los fundamentos de la igualdad y del reconocimiento. Un análisis crítico de las condiciones de las políticas de integración ante la inmigración' in *Inmigración e integración en la UE. Dos retos para el s. XXI* (EUROBASK 2012) 11-92; Javier de Lucas, 'Las globalizaciones y los derechos' (2008) 40/41 *Enrahonar* 55-66. For a description of the French case, see Géraldine Galeote, 'Nuevos planteamientos de la política de la ciudad en Francia: La búsqueda de una cohesión social y urbana en los barrios prioritarios' in Ángeles Solanes Corella (ed), *Diversidad cultural y conflictos en la Unión Europea. Implicaciones jurídico-políticas* (2nd edn, Tirant lo Blanch 2016) 71-88.

survey's geographical scope neither encompassed nor confined itself to Western Europe, its results provide timely indicators on racist patterns in the region.[6]

Three key findings stand out. First of all, immigrants are not perceived as a homogenous category but differentiated along racial, ethnic, socioeconomic and religious lines. Thus, only 7% of respondents expressed a willingness to impede the settlement of any immigrant of their own race or ethnic group, but this proportion rose to around 13% for those of a different race or ethnic group, 20% for those of poorer countries outside Europe and 26% for Muslims. The trend was broadly similar in 2002, except for a sharp increase in the rejection of migrants from poorer countries outside Europe (the survey did not ask specifically about Muslims). Secondly, the perceived negative effects of immigration mainly related to crime problems, followed by the deterioration of public services, the loss of jobs and the dilution of cultural life. Interestingly, the first three factors had lost some prominence between 2002 and 2014, whereas fears of cultural dilution had slightly increased. Thirdly, public opinion was not consensual but strongly shaped by age, education and income. In all Western European states, there was more than 20% difference in support for the admission of 'some' or 'many' migrants from poorer countries between old, low-educated and young, high-educated respondents. The gap was particularly wide in France, where less than 30% of the former but over 80% of the latter declared themselves favourable to their settlement. According to the survey's analysts, the difference was likely to be due to differential exposure to inclusive norms and social environments rather than age and education *per se*.

The underlying premise of attitude surveys is that the patterns of sympathy and aversion they detect frequently, though not always, manifest themselves in people's behaviour.[7] For methodological reasons, however, the strength of this relationship can only be measured through highly controlled experiments that do not reflect the

[6] The following discussion is based on a synthesis report published by the survey's research team. See Anthony Heath and Lindsay Richards, *Attitudes towards immigration and their antecedents: Topline results from Round 7 of the European Social Survey* (European Social Survey ERIC 2016).
[7] Andreas Zick, Thomas Pettigrew and Ulrich Wagner, 'Ethnic prejudice and discrimination in Europe' (2008) 64 [2] *Journal of Social Issues* 233-251.

conditions of real-world interactions. Because of this, large-scale representative studies either focus on cognitive and affective variables (such as those mentioned above) or on concrete manifestations of discrimination in specific settings, such as housing and labour markets (see Chapter 4). One way of bridging the gap between attitudes and behaviour is to enquire about the immigrant-origin population's perceptions of racial, ethnic, linguistic, national or religious discrimination. While perceptions do not necessarily correspond to actual exposure to discrimination, their general correlation with attitudinal findings suggests that they offer a reliable proxy.[8]

Such an analysis was recently performed by pooling the results of six waves of the European Social Survey, from 2004 to 2014, on the EU-27.[9] The sample included nearly 30 000 'non-native' respondents, defined as people who were born abroad or had at least one immigrant parent. All of these, as well as over 250 000 'natives', were asked if they perceived discrimination against their linguistic, racial, national, ethnic or religious in-group. As attitude surveys would predict, the proportion of immigrant-origin respondents who answered affirmatively was much higher than that of natives, multiplying it by an average factor of ten. In fact, perceptions of in-group discrimination on one of the aforementioned grounds were almost exclusively confined to non-natives, except in the United Kingdom, perhaps due to its longer history of non-White immigration.[10] While the average percentage remained relatively low, ranging from 6,5% in Norway to 19% in Greece and Portugal, the nationality-sensitive breakdown of the results immediately revealed the importance of racial, religious and socioeconomic factors. Among sending countries with relatively large numbers of European residents (over 50 respondents), those whose nationals perceived the most discrimination were Nigeria (42,1%), Ghana (37%), Albania (36,1%), Morocco (29,8%), Pakistan (29,8%), Jamaica (29,2%), Congo-Brazzaville (29%), Afghanistan (27,3%), Suriname (25,8%),

[8] Mirna Safi and Patrick Simon, 'Les discriminations ethniques et raciales dans l'enquête Trajectoires et Origines: representations, experiences subjectives et situations vécues' (2013) 464-466 *Économie et Statistique* 245-275.

[9] Stéphanie André and Jaap Dronkers, 'Perceived in-group discrimination by first and second generation immigrants from different countries of origin in 27 EU member-states' (2017) 32 [1] *International Sociology* 105-129.

[10] Austria: 13/0,7%; Belgium: 10,7/0,9%; Denmark: 10,2/0,7%; Finland: 11,4/1,3%; France: 12,2/1,6%; Germany:9,4/0,7%; Greece: 19,2/1,7%; Ireland: 9,3/0,9%; Italy: 10,8/0,9%; Netherlands: 16,5/1,8%; Norway: 6,5/1,2%; Portugal: 19,1/0,5%; Spain: 15,0/1,6%; Sweden: 8,8/0,7%; Switzerland: 7,0/0,6%; United Kingdom: 15,0/5,2%.

Iran (25,2%), Tunisia (25,2%), Bangladesh (25%), Iraq (24,2%), Somalia (23%) and Brazil (21,6%). Conversely, less than 5% of immigrant-origin respondents from all Western European countries except Ireland (9,5%) perceived ethno-racial discrimination. A multilevel analysis of the results confirmed that non-Christian believers were more likely than both Christians and non-believers to perceive discrimination, as were immigrants from poorer origin countries. All other things being equal, respondents' perceptions of discrimination increased in proportion to their level of education, probably due to their greater interaction with the larger population and awareness of their in-group's comparative disadvantage.

In recent years, the proliferation of military conflicts in majority Muslim countries and highly mediatised Islamist attacks on European soil has simultaneously boosted the popularity of political discourses that portray Islam as a threat for Western civilisation and values [11] and drawn researchers' attention to the extent and manifestations of islamophobia. Cross-national evidence suggests that Muslims were already viewed more negatively than most other minorities in the late 1990s, but that attitudes have worsened significantly since then.[12] In a large-scale survey conducted by the European Union Agency for Fundamental Rights (FRA), 11% of Muslim respondents reported having suffered faith-based attacks, threats or harassment during the previous year. [13] Among French, Spanish and British youth, Muslims are four to

[11] Farid Hafez, 'Shifting borders: Islamophobia as common ground for building pan-European right-wing unity' (2014) 48 *Patterns of Prejudice* 479-499; Christopher Allen, *Islamophobia* (Ashgate 2010) 109 ff; Toril Aalberg et al. (eds), *Populist political communication in Europe* (Routledge 2017); Acar Kutay, 'Dominant pluralism and discursive strategies of contemporary racism against Muslim minorities in Europe' (2015) 35 *Journal of Muslim Minority Affairs* 1-16; Mattias Ekman, 'Online islamophobia and the politics of fear' (2015) 38 *Ethnic and Racial Studies* 1986-2002; Jocelyne Cesari, *Why the West fears Islam: An exploration of Muslims in liberal democracies* (Palgrave MacMillan 2013); Tariq Modood and Anna Triandafyllidou, *Multiculturalism, Muslims and citizenship: A European approach* (Routledge 2006).

[12] Zan Strabac and Ola Listhaug, 'Anti-Muslim prejudice in Europe: A multilevel analysis of survey data from 30 countries' (2008) 37 *Social Science Research* 268-286; Eric Bleich, 'Where do Muslims stand on ethno-racial hierarchies in Britain and France? Evidence from public opinion surveys, 1988-2008' (2009) 43 *Patterns of Prejudice* 379-400; Bram Spruyt and Mark Elchardus, 'Are anti-Muslim feelings more widespread than anti-foreigner feelings? Evidence from two split-sample experiments' (2012) 12 *Ethnicities* 800-820; Michael Savelkoul, Peer Scheepers, William Van der Veld and Louk Hagendoorn, 'Comparing levels of anti-Muslim attitudes across Western countries' (2012) 46 *Quality & Quantity* 1617-1624. For evidence against the unique stigmatisation of Muslim immigrants, see Zan Strabac, Toril Aalberg and Marko Valenta, 'Attitudes towards Muslim immigrants: Evidence from survey experiments across four countries' (2014) 40 *Journal of Ethnic and Migration Studies* 100-118.

[13] FRA, *EU-MIDS Data in Focus Report 2: Muslims* (2009) 12.

twelve times more likely to be picked on because of their religion.[14] Another study, based on secondary sources, identified hundreds of acts of vandalism on Muslim mosques, graves, butcheries and other property, as well as discriminatory employment practices, physical assaults, verbal abuse and hostile tracts, websites and letters.[15] In Germany, around a thousand attacks against refugee accommodation centres were reported in 2015 and 2016, at the height of the Syrian crisis.[16] Consistent with these findings, recent Muslim immigrants have been found to experience greater difficulty than Christian ones in getting a foothold in the British, Dutch and German labour markets.[17] Whatever the specific form it takes, the implications of racist discrimination for its individual victims and society as a whole can hardly be overstated.[18]

1.2. The promise of human rights law

In all societies, the pervasivess of racism is an inconvenient truth. It goes against individuals' sense of moral integrity, challenges their pride in the national, regional or local communities to which their feel strongly attached and shifts responsibility for the disadvantage of immigrants and their children from their own deficiencies, putatively inherited from their origin culture, to the conditions they face in the host country. Since a vast majority of voting citizens is made up of natives who seldom experience ethno-racial discrimination, the elimination of racism rarely ranks among top political priorities. In fact, like other policies in favour of immigrant integration, anti-racist measures are frequently implemented indirectly by a constellation of specialised agencies and non-governmental organisations, both ethnic and mainstream,[19] often with

[14] FRA, *Experience of discrimination, social marginalisation and violence: A comparative study of Muslim and non-Muslim youth in three EU member states* (2010) 36.
[15] European Monitoring Centre on Racism and Xenophobia, *Muslims in the European Union: Discrimination and Islamophobia* (2006).
[16] FRA, *Current migration situation in the EU: Hate crime* (2016) 4.
[17] Matthias Koenig, Mieke Maliepaard and Ayse Güveli, 'Religion and new immigrants' labor market entry in Western Europe' (2016) 16 *Ethnicities* 213-235.
[18] For an overview, see Ariane Chebel d'Appollonia, *Migrant mobilization and securitization in the US and Europe: How does it feel to be a threat?* (Palgrave Macmillan 2015).
[19] Elizabeth Collet and Milica Petrovic, *The future of immigrant integration in Europe: Mainstreaming approaches for inclusion* (Migration Policy Institute 2014) 3-4. For detailed analyses of the Spanish case, see Pier-Luc Dupont, 'El Estado español y la lucha contra el racismo: Un balance preliminar' in Ángeles

direct or indirect support from the EU.[20] While this low-key approach may shield political representatives from the electoral costs entailed by the adoption of counter-majoritarian policies, it also considerably reduces opportunities for deeper, cross-sectoral transformations in the public administration. No less importantly, limited institutionalisation heightens policies' vulnerability to changing political cycles and especially to sporadic surges in anti-immigrant opinion, including the current European backlash against (specific types of) cultural diversity.[21] In other words, it exposes anti-racist measures to be discontinued precisely in the circumstances that make them most necessary. Another problem is that decentralised, weakly coordinated anti-racist measures are easiest to implement in the limited number of large or mid-sized cities where immigrants tend to cluster, organise and influence the policymaking process.[22] Yet, for reasons we will examine in Chapter 3, racism tends to reach its highest levels in mainly White localities.

At a more fundamental level, what seems to be missing in current policies is any awareness that the elimination of racism is not a demand like any other but a legal duty imposed on public authorities by various international human rights treaties. In particular, Article 2.1 of the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD), adopted in 1966 and ratified by 175 states,[23] mandates them to 'pursue by all appropriate means and without delay a policy of eliminating racial discrimination in all its forms and promote understanding among all

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Solanes Corella y Encarnación La Spina (eds), *Políticas migratorias, asilo y derechos humanos: Un cruce de perspectivas entre la Unión Europea y España* (Tirant lo Blanch 2014) 423-455; Ángeles Solanes Corella, 'Inmigración, integración y tercer sector' (2006) 4 *Revista Española del Tercer Sector* 15-52.

[20] Jesús García Cívico, 'Hay realmente un horizonte intercultural en la Unión Europea?' (2013) 17 *Universitas. Revista de Filosofía, Derecho y Política* 97-138.

[21] Jeffrey Alexander, 'Struggling over the mode of incorporation: Backlash against multiculturalism in Europe' (2013) *Ethnic and Racial Studies* 1-26; Alana Lentin and Gavan Titley, *The crises of multiculturalism: Racism in a neoliberal age* (Zed Books 2011); Steven Vertovec and Susanne Wessendorf (eds), *The multiculturalism backlash: European discourses, policies and practices* (Routledge 2010).

[22] Els de Graauw and Floris Vermeulen, 'Cities and the politics of immigrant integration: A comparison of Berlin, Amsterdam, New York City and San Francisco' (2016) 42 [6] *Journal of Ethnic and Migration Studies* 989-1012; Martin Bak Jorgensen, 'The diverging logics of integration policy making at national and city level' (2012) 46 [1] *International Migration Review* 244-278.

[23] See United Nations Treaty Collection, https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-2&chapter=4&clang=_en accessed 12 May 2017.

races'. To this end, it calls on state parties to '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'. Interestingly, the Convention does not define racial discrimination in a purely biological or phenotypical manner but takes it as encompassing any rights-impinging 'distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin'. Such a definition makes it highly relevant for the treatment of immigrants and their children in Europe.

ICERD's prominence in the contemporary architecture of international human rights law cannot be deduced only from its near-universal ratification but also from the fact that it came into force in 1969, seven years earlier than the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR). Another remarkable feature is that a large number of Western European states have recognised the competence of the UN Committee on the Elimination of Racial Discrimination (CERD) to examine individual complaints for violations of the rights set forth in the Convention: Austria (2002), Belgium (2000), Denmark (1985), Finland (1994), France (1982), Germany (2001), Iceland (1981), Ireland, Italy (1978), Luxembourg (1996), Netherlands, Norway (1976), Portugal (2000), Spain (1998), Sweden and Switzerland (2003).[24] By 2012, the Committee had registered 48 complaints, of which one was discontinued, 17 were declared inadmissible and 27 were decided on the merits. Violations were found in 11 cases, including one concerning Dutch authorities' failure to investigate and sanction racial threats against a foreign-origin beneficiary of subsidised housing and another regarding nationality discrimination by a Danish bank.[25]

The potential importance of international human rights law for the development of effective anti-racist policies goes way beyond the decisions of the

[24] See United Nations Treaty Collection, https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-2&chapter=4&clang=_en accessed 12 May 2017.
[25] OHCHR, Selected decisions of the Committee on the Elimination of Racial Discrimination Volume 1. Thirst-sixth to seventy-fifth sessions (United Nations 2012) 2, 18-22, 43-49.

committees and courts in charge of its enforcement. Through the on-going dialogue between international and domestic judges, the standards it sets can exert significant indirect influence on lower jurisdictions, including through the interpretation of statutes and constitutional precepts. Within the limits imposed by the partial autonomy of legal systems and the principle of subsidiarity, human rights treaties can therefore spur the progressive consolidation of locally enforced anti-racist norms in all democratic states under the rule of law.[26] In turn, these norms may buttress the authority of governments that are willing to implement necessary but unpopular policies as well as compel reluctant ones to revise their stance.

Tackling racism within a human rights framework also has another, more subtle advantage. As we have seen, racism is not an idiosyncratic ill affecting a limited number of deluded or deranged individuals but a widespread attitude rooted in the structural dynamics of contemporary societies. Yet, the difficulty of recognising this fact often leads to the adoption of highly coercive anti-racist instruments, motivated by a desire to express moral condemnation against patently unjust actions rather than to eliminate their underlying causes. An illustration of this can found in the EU Council Framework Decision 2008/913/JHA, which obliges member states to criminalise the public incitement to violence or hatred against members of a racial, religious, national or ethnic group, including by disseminating print material and 'condoning, denying or grossly trivialising' crimes of genocide, crimes against humanity and war crimes'.[27] While such prohibitions on hate speech can make an important contribution to the containment of stigmatising discourses and even prevent surges in racist violence, their large-scale application would come at the cost of considerable restrictions on individual freedoms. The same can be said about punitive sanctions for racist harassment, which could draw attention away from structural problems by scapegoating a few bigoted individuals. The fact that international human rights law is primarily concerned with the

[26] Olivier De Schutter, *International human rights law: Cases, materials, commentary* (Cambridge University Press 2010) 729-740.
[27] Council Framework Decision 2008/913/JHA of 28 November 2008 on combating certain forms and expressions of racism and xenophobia by means of criminal law [2008] OJ L 328/55 art 1.1.

action of public authorities and other powerful actors endows it with a built-in capacity to minimise these risks.[28]

1.3. Aims and method

This thesis explores the ways in which the human rights to non-discrimination and education could be mobilised by Western European courts and other legal actors in order to compel public authorities to develop ambitious and effective anti-racist policies. The choice of these specific rights owes to pragmatic, contextual and academic considerations. Pragmatically, the obligations they create bear a close *prima facie* affinity with the measures that would be necessary in order to eradicate the structural sources of racism. Contextually, both rights are enshrined in well-institutionalised international treaties ratified by all Western European states several decades ago. Academically, the anti-racist dimension of these rights does not yet seem to have been analysed in a comprehensive manner, which gives us reason to hope that our conclusions may break new theoretical ground. In particular, we seek to recognise but go beyond the legal and social implications the national/foreigner dichotomy, shedding light on human rights issues that affect naturalised citizens as well as recent immigrants.

Importantly, we do not claim that the rights to non-discrimination and education are the only relevant ones for the struggle against racism. On the contrary, it is taken for granted that human rights are complementary and indivisible, so that their universal and effective exercise can only be ensured by interpreting each one in a way that strengthens rather that undermines the others. For instance, ICERD's mandate to review public policies from an anti-racist perspective provides a clear end toward which to strive but few details on how to get there. To fill its provisions with specific content,

[28] International human rights law only indirectly restricts individual freedom through states' obligation to prevent rights violations by private parties, which is more limited in scope than their obligation not to interfere with these rights in the exercise of political power. See Olivier De Schutter, *International human rights law: Cases, materials, commentary* (Cambridge University Press 2010) 365-460.

courts must necessarily draw on additional legal principles, including other human rights standards.

Two main bodies of law will be drawn upon: the universal human rights treaties adopted in the framework of the United Nations (UN) and the European Convention on Human Rights (ECHR).[29] All these instruments have generated a sizeable amount of jurisprudence, from which we will select relevant information in accordance with our research aims. Due to their legal authority, special attention will be paid to the standards set out in the General Comments of UN monitoring committees and the thematic reports of UN Special Rapporteurs and Independent Experts. The case law of the European Court of Human Rights (ECtHR) will also be commented upon, both through direct references and academic syntheses.

Since we wish to highlight the law's relationship with morally problematic social processes, our inquiry is critical and interdisciplinary, combining insights from law, philosophy, political science, sociology, anthropology and psychology. Authoritative interpretations of the rights to non-discrimination and education will thus be contrasted with 1) the recommendations of international organisations specialising in these fields, such as UNESCO and the OECD; 2) the principles defended by political philosophers and other normatively oriented academics; and 3) the prescriptions that can be derived from empirical research on the etiology of racism. While we acknowledge that these normative sources do not influence judicial reasoning in the same way or to the same extent, we do consider that they all play a role in human rights interpretation (see Chapter 2).

In many respects, the most innovative part of the research is the empirical one, which calls for further methodological clarifications. Our analytical starting point is that human rights delimit the range of legally permissible policies, which, because of the considerable power wielded by public authorities, affect the structural drivers of racism. However, the relationship between human rights law, policies and attitudes is a highly

[29] Convention for the Protection of Human Rights and Fundamental Freedoms (adopted 4 November 1950, entered into force 3 September 1953).

indirect one that can rarely be observed straightforwardly through correlational, let alone experimental, evidence. Therefore, most of the studies we rely on are not explicitly evaluative in nature. Instead, we primarily rely on a deductive mode of reasoning whereby the empirically grounded theories developed in various disciplines are used to predict the long-term consequences of the law.

By working at an intermediate level of abstraction between ideal philosophy and the social sciences, the thesis inscribes itself in the tradition of critical theory or non-ideal philosophy, which seeks to shed light on the normative value of real-world practices.[30] A key feature of critical or non-ideal theory is its sensitivity to contextual variations, stemming from a conviction that patterns of injustice are best understood and remedied by looking closely at the social relations in which they are embedded.[31] This immediately raises the problem of choosing an appropriate unit of critical analysis, either in geographical or institutional terms. A rule of thumb is that the larger the unit, the more difficult it will be to identify all relevant social processes and the specific institutions in need of reform. In other words, the choice of unit involves a trade-off between the specificity and scope of normative theory. In addition, a genuinely critical analysis should steer clear of methodological nationalism, which entails an assumption that social dynamics map onto state borders until proof is provided to the contrary.[32] This inevitably leads researchers to cast national communities as much more internally homogenous and externally differentiated than they are. In migration studies, methodological nationalism has often manifested itself in a relentless search for national 'models' or 'philosophies' of integration, which fail to capture the complexity and dynamism of public policies and immigrant integration beyond official rhetoric.[33]

[30] Raymond Morrow and David Brown, *Critical theory and methodology* (SAGE Publications 1994).
[31] Elizabeth Anderson, 'Moral bias and corrective practices: A pragmatist perspective' (2015) 89 *Proceedings and Addresses of the APA* 21-47; Joseph Carens, 'A contextual approach to political theory' (2004) 7 [2] *Ethical Theory and Moral Practice* 117-132; Veit Bader and Ewald Engelen, 'Taking pluralism seriously: Arguing for an institutional turn in political philosophy' (2003) 29 [4] *Philosophy & Social Criticism* 375-406.
[32] Andreas Wimmer and Nina Glick Schiller, 'Methodological nationalism, the social sciences, and the study of migration: An essay in historical epistemology' (2003) 37 [3] *International Migration Review* 576-610.
[33] Adrian Favell, 'Integration nations: The nation-state and research on immigrants in Western Europe' in Grete Brochmann (ed), *Multicultural challenge* (Emerald 2003) 13-42; Christophe Bertossi, 'National

Our decision to focus on the Western European context is an attempt to avoid the pitfall of methodological nationalism while simultanously maximising the specificity and scope of our proposals. Legally speaking, all the states included in our analysis are either members of the EU or directly subjected to many of its regulations; all of them are also part of the Council of Europe (CoE) and thus within ECtHR jurisdiction. Sociologically, they host significant numbers of non-European immigrants, although their descendants are more numerous in Northern countries with a longer immigration history. Economically and politically, they are relatively affluent market economies with consolidated democratic institutions and independent courts. The last factors explain our exclusion of Eastern European states despite their EU and CoE membership.

Beyond these substantive factors, data availability has also played a non-neglible role in our choice of geographical scale. Over the last decade or so, much EU research funding has gone to comparative projects in the area of immigrant integration, especially from sociological and policy perspectives. This has stimulated a qualitative and quantitative leap in related academic publications and provided a wealth of recent and high-quality evidence on which to ground our analysis. Since we are primarily interested in cross-national patterns, many of the studies we cite have been conducted in the course of such international projects. To counteract their frequent bias in favour of Northern and especially English-speaking countries, an effort is made to contrast their findings with those of smaller-scale studies conducted in the Southern region. Another way in which we attempt to reduce the interference of idiosyncratic or contingent processes in our analysis is by drawing on well-established theoretical frameworks developed in other comparable settings, such as the United States.

While the argument fundamentally adopts an anti-racist perspective, we acknowledge that policymakers and courts frequently need to balance this concern with other principled or pragmatic considerations. To the extent that the latter can be foreseen, we identify them and discuss their rationality, legitimacy and possibility of

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models of integration in Europe: A comparative and critical analysis' (2011) 55 [12] *American Behavioral Scientist* 1561-1580.

reconciliation with anti-racist goals. Another conundrum that besets any attempt to develop specific yet generalisable policy standards is that of leaving sufficient room for diversity and innovation. Where we find that a given norm should be flexibly adapted to the social context, we will signal it with appropriate qualifications such as 'progressively', 'generally' and so on. More broadly, we understand that all human rights norms should be applied with a sense of proportionality, albeit without relinquishing courts' legitimate role as ultimate overseers of legislative and administrative activity.

Our critical legal approach is expected to generate two qualitatively different types of results, implicitly targeted at different audiences. On the one hand, we seek to unveil existing human rights standards that could be harnessed in the service of anti-racism. This can be seen as a way of increasing the legal expertise of policymakers, activists and other social agents. On the other hand, we defend the principle of ethnic recognition as a moral argument for modifying current human rights standards or developing new ones. This can be read as an attempt to improve the philosophical and sociological expertise of judges and other legal practitioners.

One last remark is in order before introducing the contents of the next chapters. Despite the exceptional amount of scholarly attention it has received, racism is not a unique phenomenon but one among many and interrelated manifestations of prejudice and discrimination, which include sexism, heterosexism, cissexism, ablism, ageism, classism and others.[34] While we will make no more than sporadic references to these other injustices, many of the policies and social processes we discuss are directly relevant for attempts to improve the situation of women, homosexuals, transsexuals, the disabled, elders and the working class. To facilitate intersectional dialogue among academics, activists, lawyers and policymakers, we deliberately use theories and concepts that can be transposed to non-ethnic minorities wherever possible.

[34] Letizia Mancini, 'Introduction' (2016) 2 *Sociologia del Diritto* 7-9; Rosario Serra Cristóbal (coord), *Multidiscriminación en los ordenamientos jurídicos español y europeo* (Tirant lo Blanch 2013); María José Añón, 'El acceso de las mujeres inmigrantes a los derechos humanos: La igualdad inacabada' (2010) 17 [2] *Revista de Filosofía Jurídica, Social y Política* 241-271.

The thesis proceeds in three steps. Chapter 2 sets out the philosophical framework buttressing our claim that the elimination of racism is a moral imperative that should be taken into account in the interpretation of human rights. Its main concern is to flesh out the principle of ethnic recognition, explain how it emerged in liberal democratic theories of justice and examine its deployment in recent policy debates on immigrant integration. Chapter 3 synthesises various decades of prejudice research, mainly conducted by social psychologists, in order to provide a precise yet parsimonious account of the structural conditions that enable its (re)production. Starting with the construction of exclusive political identities, it shows how socioeconomic inequalities and perceived material and cultural threats conspire to thicken insider/outsider boundaries. It also examines the role of segregation in sustaining racism by foreclosing prejudice-reducing forms of intergroup contact. Building on these moral and sociological foundations, Chapters 4 and 5 critically scrutinise the interplay between international human rights standards, Western European public policies and racism. Both chapters open up with a short discussion on the apparent link between racist patterns and inadequate rights protection. Subsequently, they address one by one specific policy deficiencies and explain how they should be redressed through current or potential interpretations of the right at hand. Chapter 4, concerned with non-discrimination, takes a critical look at the implementation and institutionalisation of EU employment equality law. In particular, it contends that the complaint-based model of anti-discrimination enforcement, the scarce or misconceived recourse to positive action and the lack of accommodation of cultural differences problematically contribute to ethnic segregation, stratification and assimilation. Chapter 5 turns the spotlight on racist attitudes among children, locating their institutional source in education policy. Drawing on various strands of educational research, it claims that only by developing a critical multiperspectival curriculum, creating incentives for ethnically mixed schools and extending some public school regulations to private ones will policymakers succeed in establishing genuinely egalitarian education systems. The conclusion puts forward a rights-based approach to anti-racist policy reform.

2. Toward an anti-racist interpretation of human rights

Like all legal concepts, human rights are slippery signifiers: the more we strive to pin down their meaning, the more elusive it appears.[35] Part of this indeterminacy can be attributed to contextual variations. For instance, the right to freedom of movement will carry different meanings when invoked by a political activist fleeing government persecution, an EU third-country national wishing to work outside her country of settlement, an irregular migrant awaiting deportation in a detention centre or a victim of human trafficking whose passport has been confiscated by her employer. Even within a given context, however, people often disagree on rights' specific content. In a consolidated democracy, most citizens may think that the right to life always entails freedom from cold-blooded murder, but not necessarily freedom from the death penalty, lethal police force, euthanasia, abortion, destitution, curable diseases and exposure to air or water pollution.

The context-sensitive and contested nature of legal concepts in general and rights in particular oblige courts to engage in the task of interpretation, which boils down to deciding whether an action (the facts of the case) falls within the scope of a legal provision. If the case at hand reaches the sentencing stage, this leads to any of three mutually exclusive conclusions: the action may either be declared prohibited, allowed or mandatory. In turn, these findings legitimise courts to impose sanctions and compensations or compel institutions to change their practices. State agents (police officers, prison guards, tax authorities, other civil servants) are subsequently invested with a duty to enforce court orders in a number of ways, ranging from financial incentives to confiscation of property, house arrest and imprisonment. The intricacies of legal interpretation are thus not merely formal, lexical or intellectual matters. By spurring state coercion, they can dramatically constrain or enhance individuals' capacity to act unimpeded, secure scarce resources, influence each other's behaviour and otherwise pursue their vision of the good life.

[35] The gist of the discussion in this section, if not its exact wording, draws extensively on HLA Hart, *The concept of law* (2nd edn, Oxford University Press 1994); Ronald Dworkin, *Law's Empire* (Harvard University Press 1986); and Joseph Raz, *The authority of law* (Oxford University Press 1979).

In some judicial cases, which may be called ‘easy’, the width of social consensus on the appropriateness of including an impugned action within the scope of a legal provision is such that the latter’s interpretation remains entirely implicit. In these circumstances, the external observer may be tempted to think that it did not take place since the law’s wording was ‘clear’. However, the intrinsic clarity of concepts is no more than an illusion created by the absence of disagreement on the meaning they should take in a specific context. When this fragile consensus dissipates, expressions that once seemed transparent and immutable suddenly reveal their constructed and socially embedded character.

In other, ‘harder’ cases, courts do not benefit from the luxury of interpretive consensus. Whereas some citizens (including jurists, and perhaps judges) read the law as prohibiting a defendant’s action, others understand it as a permission or even an obligation. To complicate things further, parties may not only squabble on single words or provisions but on several articles scattered across a variety of legal sources, as well as on the vertical or horizontal relationships between these sources. Such discrepancies force courts to unveil their reasons for investing legal concepts with a specific meaning – in other words, to disclose their method of interpretation.

Individual judges may favour some methods over others. These preferences may be rooted in their intellectual style, training, ideology or a combination thereof. They may also be shaped by national legal traditions as well as by the jurisdictional functions entrusted to the court that employs them. For instance, a given judge may tend to choose interpretations that best fit words’ prototypical meaning in everyday language. Another may give greater weight to the meaning they held for legislators at the time of their enactment, regardless of any changes that have occurred in the meantime. Systematically minded judges will scrutinise whether an interpretation conflicts with the mandates of constitutional texts or international treaties, examine if it dovetails with the reasoning used in other jurisdictions, or try to maximise the conceptual coherence of different areas of the law. Courts influenced by the common law tradition will pay close attention to the solutions reached in similar ‘leading’ cases.

All these interpretive methods or types of legal arguments play an important role in legal reasoning, and most will make an appearance at some point during Chapters 4 and 5. Nevertheless, the philosophical nature of our inquiry displays greater affinity with a different method, commonly labelled 'teleological'. Unlike the other arguments, which hinge on contemporary or past interpretations of legal concepts, teleological ones are forward-looking and creative. When resorting to them, judges do not explain their decisions exclusively by invoking sources of authority (be it statutes, jurisprudence or public opinion) but by appealing to an ideal state of affairs that the law should bring about. Their reasoning proceeds in two steps. The first step, which is essentially normative, consists in determining the legitimate purpose of the disputed provision. This usually involves a combination of backward-looking analysis of legislators' intentions and an evaluation of their compatibility with widely accepted moral principles (see Section 2.1). The second step, which is empirical, is an inquiry into the causal relationship between the defendant's action and the ideal identified in the previous step. Such an inquiry necessarily rests on a set of theoretical premises about the dynamics of the social and/or natural world, which may or may not be stated explicitly in the final sentence.

Beyond their philosophical relevance, three general properties of teleological arguments render them well suited for our attempt to develop an anti-racist interpretation of human rights. Most importantly for a comparative analysis, teleological arguments enable a greater degree of cross-fertilisation among jurisdictions than those based on authority, whose sources may vary considerably from one society to the next. While geographical and temporal specificities also bear on the relative salience of collective goals or public interests, morally grounded ones such as the elimination of racism tend to find at least some purchase everywhere. In addition, teleological arguments do not merely take law as it stands but invest it with a dynamic character. This opens the door to legal improvements that would be impossible through purely backward-looking methods of interpretation. Finally, human rights' high level of abstraction makes them more permeable than most other areas of the law to creative reinterpretation and development. As we will see, they may even be seen as a primary vehicle for the gradual conversion of principles of justice into positive law.

To show the plausibility and importance of incorporating ethnic recognition as a fundamental purpose of human rights law, the next sections articulate various strands of legal theory and political philosophy in ascending order of specificity. Section 2.1 unpacks the interpretive link between human rights and justice, whereas Section 2.2 documents the consolidation of recognition as as key principle of justice in liberal democratic societies. Section 2.3 shows how this principle has already been used to shed critical light on ethno-racial inequalities. As for Section 2.4, it outlines the philosophical dilemma that the following chapters will set out to elucidate, namely the implications of different approaches to cultural governance for the long-term elimination of racism.

2.1. Human rights and justice

As we have seen, teleological approaches to interpretation start from the identification of a law's underlying aims, assessed from the perspective of legislators' intentions and broader principles of justice. In general, these two perspectives do not completely overlap, so that courts have to determine whether they can be reconciled before accepting the legitimacy of the former and proceeding to the empirical stage of their analysis. If a law is enacted or maintained for patently unjust reasons, these reasons should not be taken into account in teleological reasoning.

The uniqueness of human rights interpretation comes from the fact that it collapses legislators' intentions and principles of justice into a single perspective. In other words, it does not take the latter as a boundary condition for the legitimacy of the former but as its very substance. This means that when interpreting human rights, courts cannot limit themselves to a superficial analysis or moral issues before moving on to the concrete purpose of the legal provision at hand. On the contrary, moral issues must permeate their entire reasoning, for they are the law's purpose itself.

The centrality of justice in human rights law can be established through various backward-looking interpretive methods. The most straightforward, and perhaps the most illuminating, is to look at the meaning of human rights in everyday language. When ordinary people claim that their own or someone else's human rights have been violated, they do not normally see themselves as discussing a merely technical issue, to be settled by lawyers in courtrooms. In fact, they may not think at all about the legal implications of the violation. More often than not, people invoke human rights to pass a moral judgment. They draw on them to express that a person's dignity has been trampled, that someone was responsible, and that something should be done to redress the injustice.

The intrinsically moral nature of human rights also transpires from their historical emergence. Long before their codification in statutes, constitutions and international treaties, human rights were posited by religious and secular philosophers alike, mobilised as rhetorical weapons against oppression and enshrined in declarations embodying popular hopes for a better future. Like most people today, philosophers did not conceive rights merely as the contingent product of legislative debates but as universal and enduring requirements for human fulfilment. The moral force of rights is such that those who lacked them often counted on it to persuade the powerful to forego their privileges. In some cases they succeeded and enlisted their support, facilitating the progressive expansion of the category of rights-holders. Human rights declarations, from the 1776 Virginia Declaration of Rights to the 1789 Declaration of Human and Civic Rights to the 1945 Universal Declaration of Human Rights, crystallised a common will to live together in peace and still provide widely endorsed standards against which to gauge the legitimacy of national and global political institutions.[36]

The preambles of human rights treaties, like those of declarations, commonly synthesise the political morality of their drafters, which makes them strikingly similar in some respects. ICCPR thus states that 'recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of

[36] Gregorio Peces-Barba, *Curso de derechos fundamentales: Teoría general* (Universidad Carlos III de Madrid 1995).

freedom, justice and peace in the world'. The ECHR affirms a 'profound belief in those fundamental freedoms which are the foundation of justice and peace in the world and are best maintained […] by an effective political democracy'. The EU Charter of Fundamental Rights proclaims the Union's foundation on 'the indivisible, universal values of human dignity, freedom, equality and solidarity', as well as on 'the principles of democracy and the rule of law'. The African Charter of Human and Peoples' Rights stipulates that 'freedom, equality, justice and dignity are essential objectives for the achievement of the legitimate aspirations of the African peoples'. The American Convention of Human Rights asserts an intention to 'consolidate […], within the framework of democratic institutions, a system of personal liberty and social justice based on respect for the rights of man'.

A number of contemporary legal theorists driven by diverging interests and problems have acknowledged the exceptionally strong link between human rights and justice. For instance, Dworkin includes them among the moral principles judges should and do take into account when deciding 'hard' cases (see above). According to him, the weight or importance of these principles does not only derive from their codification in statutes or constitutions, for some of them are altogether absent from positive law or can only indirectly be deduced from it. Instead, principles' legitimacy stems from their contribution to the on-going improvement of the law as a 'living instrument' or an unfolding narrative for the self-government of political communities. This invests them with a series of characteristics that mark them out from 'rules', which may or may not further moral imperatives. Most importantly for this discussion, principles cannot simply be enacted or repealed by a legislature. Since they are rooted in the self-understanding and aspirations of a political community, they can only gradually gain or loose prominence in the process of social transformation and the concomitant evolution of moral ideals.[37] Like philosophers and activists, Dworkin thus sees rights as based on, and even equivalent to, long-standing (though not necessarily perennial) principles of justice rather than settled merely by political negotiations and contingent interests.

[37] Ronald Dworkin, *Taking rights seriously* (Harvard University Press 1978) 14-130.

Alexy's discourse-based conception of fundamental rights also gives a prominent place to moral principles, even while leaving considerable room for disagreement about the translation of these principles into concrete legal obligations. Similar to Dworkin's, Alexy's theory does not only purport to offer normative interpretive guidelines but also to bring out the implicit structure of real-life legal (and especially constitutional) reasoning. One of its central assumptions is that any practice of giving and asking for reasons presupposes ideas of freedom and equality, as well as objectivity and truth. The fact that rights are attributed universally expresses an existential choice to recognise the discursive nature and autonomy of all human beings, a premise that can only be postulated in Kantian fashion.[38] From a different perspective, Buchanan likewise asserts that the modern enterprise of international human rights has mirrored improvements in thinking about justice, particularly by espousing a liberal cosmopolitan outlook according to which 'all people are of equal fundamental moral worth' and 'both domestic and global political institutions should reflect that equality'. Among other things, this had entailed a rejection of the idea that justice and rights can only arise as a matter of instrumental reciprocity, that is to say, as a self-interested attempt to secure benefits or avoid harm.[39]

Indeed, a final proof of human rights' structural connection with altruistic motives is the creation of numerous legal instruments specifically protecting the most excluded and vulnerable social categories.[40] In the UN framework, for instance, international treaties have been adopted to uphold the rights of indigenous, national, ethnic, religious and linguistic minorities, women, children, victims of human trafficking, prostitution and pornography, older persons, the disabled, the mentally ill, prisoners and other detainees, civilians in times of war, victims of genocide, torture, enforced disappearance and forced labour, migrants, stateless persons and refugees.[41]

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[38] Robert Alexy, 'Discourse theory and fundamental rights' in Agustín José Menéndez and Erik Oddvar Eriksen (eds), *Arguing fundamental rights* (Springer 2006) 15-22.
[39] Allen Buchanan, 'Moral progress and human rights' in Cindy Holder and David Reidy (eds), *Human rights: The hard questions* (Cambridge University Press 2013) 399-417.
[40] Rafael de Asís Roig, 'Hacia una nueva generalización de los derechos. Un intento de hacer coherente a la teoría de los derechos' in Ignacio Campoy Cervera (ed), *Una discusión sobre la universalidad de los derechos humanos y la inmigración* (Dykinson 2006) 35-40.
[41] See OHCHR, 'Universal human rights instruments' <http://www.ohchr.org/EN/ProfessionalInterest/Pages/UniversalHumanRightsInstruments.aspx> accessed 4 May 2017.

The underlying premise of these instruments is that while all human beings share a set of needs and aspirations, structural constraints often put some of them at a particular disadvantage that should be redressed in order to respect their equal dignity. One of the most prominent and widespread is the discrimination that comes with their identification with a stigmatised social category. It is to this issue that we will now turn.

2.2. Justice and recognition

If human rights are the product of struggles for justice, it follows that their teleological interpretation must necessarily rely on some ideal of justice. But what is justice? To be sure, it is no 'easy' concept that readily garners interpretive consensus. In public debates, people often make claims of (in)justice with little regard to the level of support for their own ideal among other participants. In fact, many of these claims even appear to work the other way around: instead of using justice as a conceptual lense to interpret a factual situation, they use factual situations as lenses to interpret justice. Such acute definitional ambiguity forecloses any possibility for courts to address arguments of justice in an unreflective, taken-for-granted manner. In other words, it places all justice-relate decisions (and thus many human rights decisions) in the category of 'hard' cases that require judges to reveal their interpretive methods.

The difficulty and inescapable importance for democratic societies under the rule of law to sustain a degree on consensus on the meaning of justice may explain why so much philosophical effort has been invested in the endeavour. Within the Western contractual tradition, the starting point for justice theorising has consisted in asking what institutional arrangements, eventually enforced through coercion, the members of a political community would prefer to govern their mutual relationships. To the extent that human beings were seen as possessing equal moral standing, the result of their choice could only be fair if freely endorsed by all those subjected to political authorities' coercive power – in short, by all citizens. In Rawls' slightly more sophisticated version of contractualism, the 'fair terms of cooperation' were described

as those that citizens would choose in an original position characterised by sound general knowledge about the social and natural world but complete ignorance regarding their own particular characteristics.[42]

Having set out a procedural framework for deliberations on issues of justice, contractual theorists (or at least those that aimed to advance a substantive rather than merely procedural theory) were faced with the challenge of predicting how such deliberations would play out. This, in turn, involved a psychologically oriented assessment of the issues free and equal citizens would care about. Of course, such an assessment could not rely merely on what mattered to people in the real world, since real-world preferences were shaped by a host of vested interests, inequalities and conflicts that would play no role in the original position. Therefore, the identification of human concerns necessarily had to be hypothetical rather than empirical – it was based on a moral, not a scientific human psychology.

Still, a cursory look at the history of Western political philosophy reveals that real-world problems have often exerted considerable influence on speculations about fundamental human interests and aspirations. In the midst of the English civil war, Hobbes thus proposed that citizens' most pressing concern would be to secure the peace that was necessary for the protection of their life and limb, even at the cost of significant state interference with their personal liberty. While landowners were fighting to curb royal powers and expelling indigenous peoples from their North American territories, Locke asserted a fundamental interest in enjoying the fruits of one's labour and productive property. In the run-up to the French Revolution, Rousseau extolled the virtues of participation in the exercise of sovereignty through the election of representative assemblies. When industrialisation and urbanisation led to the formation of impoverished and alienated working classes, Marx advocated universal public education financed through progressive taxes.[43] Synthesising the concerns of his predecessors, Rawls proposed that a just society should fairly distribute a number of

[42] John Rawls, *A theory of justice* (revised edn, Oxford University Press, 1999).
[43] For a general overview, see Luigi Ferrajoli, *Los fundamentos de los derechos fundamentales* (Trotta 2014) 39-40.

'primary goods', including the right to vote and hold political office, the freedom of speech and assembly, liberty of thought and conscience, physical integrity, personal property, freedom from arbitrary arrest, income, wealth and self-esteem.[44] Not incidentally, many of these primary goods corresponded to human rights already enshrined in international and constitutional law.

In the 1960s, however, some activists started to make claims that previous liberal, republican and socialist philosophies did not seem able to capture adequately. Women, ethnic minorities, homosexuals and others had made important strides toward the full enjoyment of their civil, political, social and economic rights, but they still found themselves unable to participate in society on an equal footing with men, Whites and heterosexuals. Their subordination took various, mutually reinforcing forms, which varied in importance from one social group and context to the next. According to Young, these included exploitation, through which the labour and energy of the have-nots systematically serve to sustain the power, status and wealth of the haves; marginalisation, whereby a category of people is excluded from active participation and thus not only exposed to severe material deprivation but also to boredom, feelings of uselessness and the invasive scrutiny of administrative authorities; powerlessness, consisting in limited opportunities to participate in daily decision-making, exercise authority over others and enjoy professional autonomy; cultural imperialism, involving dominant discourses that neglect subordinated groups' perspectives and simultaneously mark them out as inferior; and violence, accompanied by chronic fears of random attacks on one's person or property, caused by no other motive than a will to damage, humiliate or destroy. In reaction, the victims of these harms started to question assimilationist paradigms that either denied the moral relevance of their differences or conceived them as temporary by-products of their historical exclusion from full citizenship. In particular, they claimed that many of the norms that dominant discourses presented as universal were not neutral and impartial but rooted in dominant groups' perspectives, interests and characteristics. Their effect was to cast the bearers of

[44] John Rawls, *A theory of justice* (revised edn, Oxford University Press, 1999) 53.

minority identities as deviant, less fully human and thus less deserving of social respect and rewards.[45]

Until the 1990s, most philosophers either thought that identity claims had no place in a contractual, universally endorseable conception of justice or saw them as proof that the quest for such a conception was doomed to reproduce ideological hegemony and inequality.[46] However, not everyone adhered to the idea of an unbridgeable rift between identity and mainstream philosophy. Drawing inspiration from the Hegelian tradition and Rawls' mention of the 'social bases of self-respect' among primary goods, philosophers such as Taylor and Honneth found a way of couching identity claims in a universally intelligible moral vocabulary. Identity politics, they asserted, was not a struggle for the predominance of one's in-group but for the obtention of external recognition, a necessary condition for the construction and protection of individual self-esteem.[47]

The self-esteem theory of recognition was morally compelling but strategically and empirically problematic. Strategically, it inadvertently reinforced the stigma it denounced by representing subordinated social categories as more insecure and fragile than dominant ones. Empirically, it relied on the highly contested idea that prevalent stereotypes are generally internalised in a way that cripples self-esteem. Yet, social psychology teaches us that self-views tend to develop at a relatively early age, based on the feedback of primary caregivers and a reduced number of significant others. Such established self-images then go on to shape people's subsequent interpretations of their peers' reactions. While those high in self-esteem tend to believe they are perceived favourably, the opposite is true for their less confident counterparts.[48] In addition, people engage in a wide variety of strategies to maintain, protect and enhance their self-

[45] Iris Marion Young, *Justice and the politics of difference* (Princeton University Press 1990) 39-65, 156-191.
[46] For a review of the dispute between Enlightenment and post-modernist philosophers on issues of identity and difference, see Craig Calhoun, *Critical social theory* (Blackwell 1995) 1-42, 97-131.
[47] Axel Honneth, 'Integrity and disrespect: Principles of a conception of morality based on the theory of recognition' (1992) 20 *Political Theory* 187-201; Charles Taylor, *Multiculturalism: Examining the politics of recognition* (Princeton University Press 1994).
[48] William Swann and Jennifer Bosson, 'Self and identity', in Susan Fiske, Daniel Gilbert and Gardner Lindzey (eds), *Handbook of social psychology* (5th edn, Wiley 2010) 600.

esteem in the face of chronic stereotyping. These include attributing negative feedback to unfair prejudice, comparing their situation to that of their peers rather than members of the advantaged group and devaluing the positive traits on which their group objectively fares poorly.[49] Once it is acknowledged that strong identities can often resist social stigma, the self-esteem theory of ethnic recognition arguably loses much of its plausibility.

The merit of rescuing recognition from the self-esteem pitfall, as well as of according it a prominent position within a renewed and complexified definition of social justice, largely belongs to Nancy Fraser. Like Young, Fraser acknowleged that theories concerned with the exercise of civil and political rights and the distribution of material goods failed to bring into view the subordination that often flowed from difference and perceived deviance. Unlike Young, however, she zeroed in on the concept of cultural imperialism, relabelling it as 'misrecognition' and linking it to the various discriminations (from disparagement to avoidance, exclusion from professional opportunities, harassment and violence) attached to characteristics such as sex, race and sexual orientation. In order to redress such 'status' injustice, she argued, public bodies had a moral duty to promote the transformation of cultural values that systematically hampered the social participation of stereotyped individuals. In some cases, this could be achieved through the dilution of their distinctiveness; in others, it could entail acknowledging a previously concealed trait, highlighting the particularism of presumably universal norms or deconstructing existing social categories. Since material deprivation often exacerbated status inequalities, an effective politics of recognition would also need to address it.[50] Thus understood, the 'cultural' politics of symbolic recognition and the 'economic' politics of material redistribution did not collide but complement each other. Their shared aim was to achieve 'parity of participation', which Fraser proposed as an epistemic alternative to the social contract for theorising about

[49] Jennifer Crocker and Brenda Major, 'Social stigma and self-esteem: The self-protective properties of stigma' (1989) 96 [4] *Psychological Review* 608-630; Jennifer Crocker, Brenda Major and Claude Steele, 'Social stigma' in Daniel Todd Gilbert, Susan Fiske and Gardner Lindzey (eds), *The handbook of social psychology* (4th edn, McGraw-Hill 1998) 518.

[50] Nancy Fraser, 'Rethinking recognition' (2000) 3 *New Left Review* 107-120; Nancy Fraser, 'From redistribution to recognition? Dilemmas of justice in a post-socialist age' (1995) I [212] *New Left Review* 68-93.

justice. This conceptual framework was later expanded to include political representation as a third essential dimension of social justice.[51]

By highlighting the striking similarity between the forms of oppression inflicted on a variety of social categories and by linking them primarily, though not exclusively, to cultural factors, Fraser catalysed the consolidation of an enlarged conception of justice that paid due consideration to the problems of prejudice and discrimination. The increasing dialogue and strategic alliances among stereotyped groups,[52] the spectacular development of European anti-discrimination law (see Chapter 4) and the growing prominence of recognition issues in egalitarian thinking[53] bear witness to the success of her enterprise. Whatever the discrepancies about its legal and political implications, the moral imperative of rehabilitating stigmatised collective identities simply cannot be overlooked anymore.

2.3. Recognition and multiculturalism

Ethnic minorities played an important role in Fraser's account of contemporary injustice, which described their situation as a prototypical example of bidimensional subordination combining low symbolic and socioeconomic status. However, it is multiculturalist philosophers who put international migration at the centre of their analyses and unpacked the specific challenges it posed to traditional conceptions of the relationship between justice, states and culture. The first one to address these challenges systematically within a liberal framework and use them to criticise established principles was Kymlicka.[54] While he did not initially use the vocabulary of recognition and indeed proved reluctant to conflate ethnic minority concerns with those of feminist

[51] Nancy Fraser, *Scales of justice: Reimagining political space* (Columbia University Press 2010) 12-29.
[52] Amnistía Internacional, *Convivir con la diferencia: Marco para combatir la discriminación en Europa* (2009).
[53] Carina Fourie, Fabian Schuppert and Ivo Wallimann-Helmer (eds), *Social equality: On what it means to be equal* (Oxford University Press 2015).
[54] Will Kymlicka, *Multicultural citizenship: A liberal theory of minority rights* (Clarendon Press 1995).

and LGBT rights activists, his recent work explicitly acknowledges that all these identities give rise to similar problems of social justice.[55]

Kymlicka's great contribution to liberal philosophy was to expose the fallacy of one of its key ideals: the state's neutrality toward citizens' diverse 'conceptions of the good life', or cultural preferences. At the time when his landmark books were published, social scientists commonly situated states along an 'ethnic/civic' continuum, asserting that ethnic states portrayed the nation in racial and cultural terms (descent, history, language, religion, folklore) whereas civic ones represented it as bound by universal values (freedom, equality, dignity, solidarity, democracy, the rule of law, etc). The underlying assumption was that ethnic states placed undue restrictions on citizens' individual freedoms and only civic ones could be reconciled with liberal principles.[56] Kymlicka rejected this narrative as empirically naive and normatively unsound. Empirically, he noted, all states –including those that were usually classified as 'civic'– embodied and promoted what he called a 'societal culture', defined by specific languages, symbols, histories, celebrations and so on. In some cases this was done explicitly, such as when a given language or holiday was officialised. At other times, the drawing of territorial boundaries and the distribution of powers among administrative units ensured that specific cultural practices would *de facto* impose themselves. Normatively, he continued, there was nothing intrinsically wrong about the promotion of a societal culture by public authorities. On the contrary, such a culture crucially underpinned individual autonomy by creating the context within which people could choose fulfilling and meaningful ways of leading their lives. Without a 'rich and secure' (though constantly revised) language, history and artistic heritage, children and adolescents would be deprived of role models and sense of worth, condemned to hopeless lives of 'despondency and escapism'.[57]

[55] Will Kymlicka, *Revisiting multiculturalism in Canada: Theories, policies, and debates* (Sense Publishers 2015) 17-35.
[56] The ethnic/civic continuum has also structured debates on European citizenship and its implications for migrant rights. See Jesús García Cívico, 'La Unión Europea y la implementación efectiva de los derechos relacionados con la diversidad cultural: Entre dos modelos de construcción política y de ciudadanía' (2014) 17 *Revista Telemática de Filosofía del Derecho* 5-34.
[57] Will Kymlicka, *Liberalism, community and culture* (Clarendon Press 1989) 164-168.

Since states were pervasively and justifiably shaped by the preferences and practices of their citizens, the question was not how to make them more 'civic' but rather how to ensure that everyone would enjoy sufficient opportunities to pursue their culturally determined vision of the good life. To answer this question, Kymlicka started by observing that not all citizens were equally immersed, or educated, in the state-promoted culture: for instance, not all American citizens had English as their mother tongue or felt their personal history coincided with the one taught in public schools. This meant that some citizens saw themselves, and were seen by others, as belonging to the cultural majority, whereas the rest was relegated to a minority status. Among themselves, however, cultural minorities differed in important respects. Some of them, which Kymlicka labelled 'indigenous', had been stripped by colonisers of their former territories and obliged to disperse or cluster in smaller enclaves. Others, characterised as 'national', had retained a degree of political control on their historical homeland but joined, voluntarily or under military coercion, a larger state promoting a different societal culture. A final category of minorities, identified as 'ethnic', had formed as a result of international migration, whose degree of voluntariness could also range from nearly zero (in the case of refugees) to considerable (for those proceeding from wealthy democracies).

According to Kymlicka, these historical differences mattered because they gave rise to distinct expectations, opportunity structures and legitimate claims. Most importantly for the purpose of this discussion, only indigenous and national minorities could reasonably ask public institutions to embody and reproduce their societal culture. As for immigrants and their children, they were entitled to 'fair terms of integration' in the majority culture. As we will see in Section 2.4, this did not entail a renouncement to their specific cultural identities and practices, which would unnecessarily deprive them and other citizens from important sources of meaning and fulfilment, but rather their full participation in the political and economic institutions of the larger society, which

could only be secured if these identities were expressed without fear of prejudice and discrimination.[58]

Because of his overriding interest in the general value of culture as a context for individual choice, Kymlicka did not engage in a fine-grained analysis of its different components (linguistic, religious, political, historical and so on) and their relationship with race and racism. When his theory, largely based on the Canadian experience, entered Western European philosophical debates, the limitations of an all-encompassing 'ethnic' category and its interpretation in terms of self-ascribed identity quickly became apparent. On the one hand, many of the cultural categories mobilised in public debates on immigrant integration referred either to religions (especially Islam) or broad regions (South Asia, the Maghreb, Subsaharan Africa, the Carribean) that did not neatly overlap with 'societal cultures'. On the other hand, far-right populists were thriving on xenophobic discourses that simultaneously magnified the cultural differences of immigrants and denounced their unwillingness to integrate. In such a context, the dynamic nature of cultural identities and the pervasiveness of racism could not be treated as an afterthought. To shed critical light on contemporary conflicts, multiculturalists had to tackle these issues head on.

The philosophical turn away from 'context of choice' perspectives on ethnic identities was nicely, if somewhat hyperbolically, epitomised in Phillips' vindication of 'multiculturalism without culture'. Drawing extensively on anthropological accounts of immigrants' day-to-day negotiation of their identities and states' influence on the construction of social categories, Phillips stressed that cultural boundaries were much more porous and fluid than Kymlicka had suggested but simultaneously admitted that their influence on social life and public debates could not be wished away. A key reason for this is that cultural politics seemed to be organised around a racially coded Western/non-Western binary, whereby White-coded Western cultures went largely unnoticed and non-White, non-Western ones were systematically blamed for the wrongs committed by their bearers. This exposed non-White immigrants to constant suspicions

[58] Will Kymlicka, *Multicultural citizenship: A liberal theory of minority rights* (Clarendon Press 1995) 30-31.

of adhering to reprehensible beliefs and practices, which no degree of behavioural assimilation could overcome. To the extent that cultural representations participated in the reproduction of phenotypical racism, the elimination of the latter could only be achieved by rehabilitating the former.[59]

If Phillips filled in Kymlicka's blind spot on the interaction between culture and biological racism, Modood corrected his 'benign neglect' of religious identities, reflected in the blanket assertion that states can do without an established church but not without a (partly) established language.[60] For Modood, the liberal notion that religions could and should remain confined to the private sphere (however defined) was just as mistaken as the ideal of the state's cultural neutrality. Just like ethnic minorities, women and gays had mobilised to have their specific experiences legitimised in public discourses and policies, religious minorities in general and Muslims in particular were demanding states to move from mere toleration to recognition of their identity. This created the need for a rigorous examination of the ways in which states had been shaped by, and still supported, Christian organisations and traditions, from the mainly symbolic (such as prayers, political declarations and flags) to the financially relevant (the funding of schools, civil society organisations and cultural heritage, as well as direct tax transfers) and the politically consequential (the representation of Christian parties, the inclusion of religious leaders in parliaments and their appointment on consultative committees). Without repudiating the principle of secularism as such, Modood underscored its frequent use to withhold the recognition of religious identities and advocated its flexible and pragmatic reinterpretation.[61] Going somewhat further, Bader rejected even moderate defences of secularism for their in-built tendency to construct religious fundamentalism as a more serious threat to liberal democracy than non- or anti-religious ideologies such as fascism, Marxist-Leninism, Enlightenment radicalism, nihilism, scientism and expertocracy.[62]

[59] Anne Phillips, *Multiculturalism without culture* (Princeton University Press 2007) 53-64.
[60] Will Kymlicka, *Multicultural citizenship: A liberal theory of minority rights* (Clarendon Press 1995) 111.
[61] Tariq Modood, *Multiculturalism: A civic idea* (Polity Press 2007) 23-30, 68-84.
[62] Veit Bader, *Secularism or democracy? Associational governance of religious diversity* (Amsterdam University Press 2007) 94-125.

Perhaps the most wide-ranging, sophisticated and unambiguous restatement of multiculturalism in recognition terms came from Bikhu Parekh, whose earlier work had mainly relied on a 'context of choice' conception of culture.[63] In *A new politics of identity*,[64] Parekh offered a detailed description of the behavioural, attitudinal and political processes triggered by collective identities such as sex, sexuality and culture, before showing their interaction with material inequalities and committing himself to a bidimensional conception of justice as recognition and redistribution. He then went on to examine the nature of national identities, the psychological functions they played for their adherents and their implications for the perception of immigrants as threatening outsiders. He explained how these perceptions translated in subtle and blatant forms of discrimination, which reproduced socioeconomic exclusion and catalysed educational, residential and family segregation. He highlighted the role of the arts, the media and political discourses in reinforcing as well as countering these processes and mobilised this analytical framework to shed light on European anxieties toward Muslims. Finally, he showed how all these trends were embedded in the dynamics of globalisation and the different ways in which it affected rich and poor, democratic and authoritarian countries. Many of his ideas, which linked philosophical concerns to the empirical findings of social psychologists, sociologists and political scientists, will appear in some form during the following sections. The impossibility of developing them all testifies to the magnitude of his contribution to our understanding of the relationship between ethnic recognition and cultural governance.

2.4. Multiculturalism, interculturalism and anti-racism: policy debates

Like most political philosophies, multiculturalism does not only advance a morally grounded diagnosis of social problems but also a series of proposals on how to resolve them. To the extent that the elimination of racism figures among its central concerns, its legislative and administrative recommendations can offer a useful roadmap for the

[63] Bikhu Parekh, *Rethinking multiculturalism: Cultural diversity and political theory* (Macmillan 2000).
[64] Bhikhu Parekh, *A new politics of identity: Political principles for an interdependent world* (Bhikhu Parekh 2008).

establishment of anti-racist human rights standards. However, some of these recommendations have come under criticism precisely for their alleged complicity with racism-enhancing processes. As a result, philosophical debates have moved from the (mainly normative) question whether ethnicity should be recognised to the (more empirical) one of how this should be done. Until satisfying answers are found, racism will retain its current position as a widely acknowleged problem in search of a solution.

The gist of multiculturalist policy recommendations on the treatment of immigration-related minorities is distilled in the Multicultural Policy Index, a research project led by Kymlicka and colleagues at Queen's University in Canada. These are: 1) the constitutional, legislative or parliamentary affirmation of multiculturalism; 2) the adoption of multiculturalism in school curriculum; 3) the inclusion of ethnic representation/sensitivity in the mandate of public media or media licensing; 4) exemptions from dress codes, Sunday-closing legislation etc; 5) allowing dual citizenship; 6) the funding of ethnic organisations to support cultural activities; 7) the funding of bilingual education or mother-tongue instruction; and 8) affirmative action for disadvantaged immigrant groups.[65] As the Index itself specifies, the list is not exhaustive, but it is detailed enough to serve as a springboard for our exploration of the anti-racist criticism levelled at multiculturalist policies.

Perhaps unsurprisingly given the gradual transition from context-of-choice to status perspectives on ethnic identities, much of the criticism has come from multiculturalists themselves, albeit in ways that echoed the objections of their early 'universalist' adversaries.[66] At the most general level, and like all policies of recognition, multiculturalism has been characterised as a driver of essentialising forms of political mobilisation. According to Parekh, for instance, effective identity politics necessarily rely on highlighting the shared experiences and aspirations that bind the members of a given social category and distinguishing them from those of other

[65] Multiculturalism Policy Index, http://www.queensu.ca/mcp/immigrant-minorities/decision-rules accessed 8 May 2017.
[66] Dominique Schnapper, *La relation à l'autre: Au coeur de la pensée sociologique* (Gallimard 1998) 470-481; Pierre-André Taguieff, *Les fins de l'antiracisme* (Éditions Michalon 1995); Emmanuel Todd, *Le destin des immigrés: Assimilation et ségregation dans les démocraties occidentales* (Éditions du Seuil 1994).

minorities as well as the majority. Unfortunately, this process produces a number of undesirable side effects. First of all, it may mask the real differences that exist among them, imposing dominant prototypes and casting those who do not conform to them as less authentic or legitimate representatives. Secondly, it encourages perceptions of deep differences of worldviews and interests among opposing groups, creating or sustaining conflicts and undermining citizens' motivation to agree on common arrangements. Finally, it presents as immutable a variety of traits that were historically acquired, including morally problematic practices arising from structural inequalities and which should be transformed in order to attain genuine equality.[67]

Focusing on the issue of legal exemptions, Phillips showed how minority cultural traditions were regularly cited in court as an explanation and justification for sexist attitudes and practices. Even more worryingly, such arguments seemed to exert greater sway on judges than those that relied on less problematic but also less familiar attitudinal and behavioural patterns. In fact, it is precisely their stereotypical nature that lent them credibility, for they resonated with widespread post-colonial or 'orientalist' worldviews that ranked non-Western cultures at lower levels of moral progress. The effect was to deny the autonomy of ethnic minority members and confer legal authority to stigmatising cultural representations, exactly the opposite of what multiculturalists seek to achieve. Similar issues were likely to arise with attempts to devolve state powers in family or educational matters to religious organisations.[68]

While multiculturalists have become increasingly aware of the practical difficulties posed by the application of their principles, a number of scholars have come to the conclusion that their primary interest in culture as a context of choice rendered them incapable of developing effective tools against racism.[69] In recent years, some

[67] Bhikhu Parekh, *A new politics of identity: Political principles for an interdependent world* (Bhikhu Parekh 2008) 33-37. For a similar synthesis, see Avigail Eisenberg and Will Kymlicka, 'Bringing institutions back in: How public institutions assess identity' in Avigail Eisenberg and Will Kymlicka (eds), *Identity politics in the public realm: Bringing institutions back in* (UBC Press 2011) 5-7.
[68] Anne Phillips, *Multiculturalism without culture* (Princeton University Press 2007) 65-180.
[69] Magali Bessone, '(How) can multiculturalism face racial injustice?' in Peter Balint and Sophie Guérard de Latour (eds), *Liberal multiculturalism and the fair terms of integration* (Palgrave 2013) 177-194; Iris Marion Young, 'Structural injustice and the politics of difference' in Gary Craig, Tania Burchardt and David Gordon (eds), *Social justice and public policy: Seeking fairness in diverse societies* (Policy Press 2008) 77-104.

have responded by proposing a new policy paradigm, labelled 'interculturalism', with the aim of correcting the perceived deficiencies of multiculturalism. Because of its recent emergence and generally pragmatic orientation, it is difficult to tell whether the interculturalist literature will eventually enable the consolidation of new political principles, disqualify those advocated by multiculturalists of merely influence their application in specific contexts.[70] For the purpose of this discussion, however, their writings provide useful insights into potential trade-offs between some multiculturalist policies and anti-racism. Let us briefly discuss three of its main exponents.

Writing from Quebec, where interculturalism was deliberately officialised as a politically palatable alternative to Canadian multiculturalism, Bouchard mainly takes issue with the latter's failure to recognise the preponderance, indeed the existence, of a majority culture. In his view, this oversight may appear inconsequential in the case of large states relying on a hegemonic language like English, but not in smaller ones whose history of external conquest and domination has sharpened the population's awareness of its own cultural vulnerability. In these circumstances, state policies that place majority and minority cultures on an equal footing immediately trigger fears of social fragmentation and feelings of rupture with a long history of resistance. To protect citizens' sense of cultural security, states should actively nurture their collective identity and memory, including through an official language, history and religion classes and the frequent recourse to national (including religious) ceremonies and symbols. In addition, any exemption from common laws and regulations should be clearly framed as an instrument of integration rather than ghettoization.[71]

[70] For critical discussions, see Will Kymlicka, 'Defending diversity in an era of populism: Multiculturalism and interculturalism compared' in Nasan Meer, Tariq Modood and Ricard Zapata-Barrero (eds), *Multiculturalism and interculturalism: Debating the dividing lines* (Edinburgh University Press 2016) 158-177; Daniel Weinstock, 'Interculturalism and multiculturalism in Canada and Quebec: Situating the debate' in Peter Balint and Sophie Guérard de Latour (eds), *Liberal multiculturalism and the fair terms of integration* (Palgrave 2013); Nasar Meer and Tariq Modood, 'How does interculturalism contrast with multiculturalism?' (2012) 33 [2] *Journal of Intercultural Studies* 175-196; Charles Taylor, 'Interculturalism or multiculturalism?' (2012) 38 [4-5] *Philosophy and Social Criticism* 413-423.

[71] Gérard Bouchard, 'Quebec interculturalism and Canadian multiculturalism' in Nasan Meer, Tariq Modood and Ricard Zapata-Barrero (eds), *Multiculturalism and interculturalism: Debating the dividing lines* (Edinburgh University Press 2016) 77-103; Gérard Bouchard, 'Interculturalism: What makes it distinctive?' in Martyn Barrett (ed), *Interculturalism and multiculturalism: Similarities and differences* (CoE Publishing 2013) 93-110.

Influenced by the British debate on Muslim self-segregation and community cohesion, Cantle likewise argues that national-level multiculturalist discourses have heightened rather than allayed popular fears of cultural loss and, in particular, anxieties toward global Islam. However, his main concern is that multiculturalism pays too little attention to the importance of local-level interactions among the members of different cultural communities. In fact, multiculturalist support for the funding of single-ethnicity, single-faith or single-race organisations reinforces the boundaries between them and impedes the formation of the hybridised identities that would be necessary to function in globalised, fluid societies. Instead, policies should seek to tackle residential segregation by acting on its socioeconomic determinants, thus providing opportunities for people to exchange across cultures and break down stereotypes. While this must necessarily be a long-term task, short-term programmes should also be put in place in order to facilitate physical and virtual forms of intergroup contact, especially among youths, including on social networks.[72]

Building on Cantle's preoccupation with local-level belonging and interactions, Zapata-Barrero proposes that an effective anti-racist policy would need to mobilise local authorities as well as national ones. While its results should be monitored through regular surveys and reliable indicators, these should always be designed so as to allow people to identify or not with one or more cultures, religions, nationalities and so on. Media organisations should be encouraged to create specialised departments working on diversity issues. Another key area of intervention should be the composition of schools' teacher and student body, as well as the prevention of discrimination against minority pupils. Finally, targeted efforts should be made to foster and value cultural innovation, mainly by using artistic venues and other public places as sites of cultural exchange. This would enable people to see immigrants and their descendants as a source of

[72] Ted Cantle, 'The case for interculturalism, plural identities and cohesion' in Nasan Meer, Tariq Modood and Ricard Zapata-Barrero (eds), *Multiculturalism and interculturalism: Debating the dividing lines* (Edinburgh University Press 2016) 133-157; Ted Cantle, 'Interculturalism as a new narrative for the era of globalisation and super-diversity' in Martyn Barrett (ed), *Interculturalism and multiculturalism: Similarities and differences* (CoE Publishing 2013) 69-92.

enhanced capability, that is to say, an opportunity to develop and enjoy a wider variety of traditions and experiences.[73]

Despite their differences of emphasis and occasional contradictions, multiculturalist and interculturalist philosophies both open promising avenues for concrete and viable anti-racist reforms of state institutions. In doing so, they clear the path for creative reinterpretations of human rights norms in the light of expanded conceptions of justice that take into account the moral importance of recognition. The next chapters will examine whether they also pass the test of empirical plausibility and, in the affirmative, how they could be used to strengthen, nuance or complement existing standards of international law.

[73] Ricard Zapata-Barrero, 'Theorising intercultural citizenship' in Nasan Meer, Tariq Modood and Ricard Zapata-Barrero (eds), *Multiculturalism and interculturalism: Debating the dividing lines* (Edinburgh University Press 2016) 53-76; Ricard Zapata-Barrero, 'Exploring the foundations of the intercultural policy paradigm: A comprehensive approach' (2016) 23 [2] *Identities* 155-173.

3. Structural determinants of racism

Philosophical disagreements about the empirical link between cultural governance and racism can partly be explained by the conceptual, ideological and methodological difficulties that have plagued its scientific study. From its inception in the middle of the 20th century, racism research has been deeply embedded in a variety of political projects, ranging from the US civil rights movement to the North African struggle against French colonisation, the reconstruction of post-Nazi Germany and the dismantlement of South African Apartheid. This political dimension has obliged it to contend with fierce opposition from the right, among the supporters of established hierarchies, as well as from the left, among those who feared it would undermine working-class unity. Perhaps more importantly, it also means that research questions and methods have often been driven by an eagerness to solve local and pressing issues rather than to develop and refine theoretical approaches that can later be transposed to different contexts. As a result, social scientists have tended to cluster in relatively self-contained theoretical paradigms and pay little attention to their possibilities of cross-fertilisation.

These limitations pose particularly acute challenges when it comes to unpacking the long-term, structural determinants of individual attitudes. Whereas the exploration of individual cognition, emotions and behaviour has traditionally been the province of psychologists and anthropologists, structural analyses have mostly remained in the hands of sociologists, political scientists and lawyers. The disciplinary divide has led to a dearth of empirical studies and theoretical outlooks rigorously integrating macro variables (such as state laws and policies), meso processes (such as media discourses or minority employment) and micro attitudes. A vast majority of the literature thus either examines these different levels in isolation from each other or addresses them in a descriptive way that hampers the differentiation between strong, weak and spurious causal relationships. Even within each level, variables are often defined and operationalised inconsistently, making it difficult to draw sound theoretical conclusions from the results obtained in different studies. For instance, individual racism has alternatively been analysed through semi-structured interviews on respondents' beliefs

about different ethnic groups, pre-set questionnaires with several items which are then aggregated into factors and averaged, single questions in telephone surveys or ethnographic observations on context-bound behaviours and interactions. All these methods shed light on similar phenomena but offer little guarantee that they are related enough to warrant their conflation under a single concept.

Rather than embarking on an exhaustive review of racial theories and concepts, a project that may be doomed to fail and ultimately unhelpful, this chapter makes an epistemological choice. It starts from the social psychological definition of racism as a type of prejudice toward certain combinations of racial and cultural traits and mobilises a limited number of theories, supported by a large amount of quantitative research, which seem to provide the greatest leverage for an anti-racist critique of legal and political institutions in the current Western European context. To illustrate their relevance, it then puts them in relation with sociological trends that can be expected to act as key drivers of racist attitudes. The claim is not that these trends wholly account for racist attitudes among all European societies or, even less plausibly, individuals. What we contend is that they are significant enough to produce racism on a large scale and that ethnic recognition is likely to remain elusive as long as they persist.

Two definitional clarifications are in order before getting to the theories themselves. The first is that our analysis makes no distinction between blatantly racist attitudes, which are explicitly acknowledged and endorsed by the individuals who hold them, and more subtle forms which only manifest themselves when they do not seem to conflict with egalitarian norms.[74] Some authors have argued that collapsing both types of prejudice is morally and empirically problematic: morally, it elides the difference between controlled and uncontrolled attitudinal patterns, whereas empirically, it overlooks the influence of egalitarian norms on people's propensity to act on their prejudices.[75] However, one does not need to dismiss these important points to note that

[74] Thomas Pettigrew and Roel Meertens, 'Subtle and blatant prejudice in western Europe' (1995) 25 *European Journal of Social Psychology* 57-75.
[75] Philip Tetlock and Jennifer Lerner, 'The social contingency model: Identifying empirical and normative boundary conditions on the error-and-bias portrait of human nature' in Shelly Chaiken and Yaacov Trope (eds), *Dual-Process Theories in Social Psychology* (Guildford Press 1999) 571-585.

even subtle (or 'aversive') racism has important impacts on ethnic minorities' opportunities by affecting a wide range of interpersonal judgments and interactions, such as sponteanous helping, employment selection and legal decisions.[76] While its widespread and sometimes unconscious nature may bear on the choice of strategy to combat it (see Chapter 4), its moral relevance for liberal egalitarians is beyond doubt.

Another long-standing definitional controversy concerns the desirability of lumping together racial, biological, phenotypical or 'colour' prejudice with its cultural, ethnic, religious or linguistic variants. Once again, the argument against this conceptual move usually displays a dual, moral and empirical, dimension. Morally, it is objected that race is both immutable and unrelated to individual actions, whereas cultural identities are partly chosen and often manifested in behaviour. As a result, the latter can legitimately be criticised in a way that the former cannot.[77] Empirically, it is said that negative attitudes toward particular religions, nationalities and linguistic groupings do not necessarily correlate with each other and skin colour.[78] The moral objections can be addressed by pointing out that the voluntariness of cultural markers is a matter of degree. Foreign names, surnames and accents cannot be changed easily; ethnic solidarities often provide much-needed social capital for newcomers;[79] and positive ethnic identification helps their children cope with derogatory discourses and discrimination from the wider society.[80] As for the empirical one, it is irrefutable in the abstract but much more difficult to sustain in real-life contexts where the most

[76] Adam Pearson, John Dovidio and Samuel Gartner, 'The nature of contemporary prejudice: Insights from aversive racism' (2009) 3 *Social and Personality Psychology Compass* 1-25; Roel Meertens and Thomas Pettigrew, 'Is subtle prejudice really prejudice?' (1997) 61 *Public Opinion Quarterly* 54-71.
[77] Richard Ford, *Racial culture: A critique* (Princeton University Press 2005) 90-124; Dominique Schnapper, *La relation à l'autre: Au coeur de la pensée sociologique* (Gallimard 1998) 155-182.
[78] Hans Siebers and Marjolein Dennissen, 'Is it cultural racism? Discursive exclusion and oppression of migrants in the Netherlands' (2015) 63 [3] *Current Sociology* 470-489; Rogers Brubaker, 'Categories of analysis and categories of practice: A note on the study of Muslims in European countries of immigration' (2013) 36 [1] *Ethnic and Racial Studies* 1-8; Michael Banton, 'Historical and contemporary modes of racialization' in Karim Murji and John Solomos (eds), *Racialization: Studies in theory and practice* (Oxford University Press 2005) 51-68.
[79] Floris Vermeulen, *The immigrant organising process: Turkish organisations in Amsterdam and Berlin and Surinamese organisations in Amsterdam, 1960-2000* (Amsterdam University Press 2006); José Moya, 'Immigrants and associations: A global and historical perspective' (2005) 31 [5] *Journal of Ethnic and Migration Studies* 833-864.
[80] John Berry, 'Stress perspectives on acculturation' in David Sam and John Berry (eds), *The Cambridge handbook of acculturation psychology* (Cambridge University Press 2006) 43-57; Jean Phinney, Gabriel Horenczyk, Karmela Liebking and Paul Vedder, 'Ethnic identity, immigration, and well-being: An interactional perspective' (2001) 57 [3] *Journal of Social Issues* 493-510.

stigmatised cultural identities do tend to overlap with each other and non-White racial categories. An illustration of this can be found in the various labels attached to European Muslims, alternatively referred to as 'Arabs', 'Turks', 'Pakistanis', 'Maghrebis' and so on.[81] The upshot is that immigrants' race triggers expectations of cultural difference, which in turn are used to rationalise and justify discrimination.[82] A rigorous etiology of racism should therefore be sensitive to the interaction between racial, religious and other cultural stereotypes and to their relationship with broader structural processes.

3.1. Exclusive political identities

A good place to start a theoretical inquiry on ethnic prejudice is the symbolic power of political identities. In fact, ethnicity itself can largely be understood as the product of a perceived difference between a given political identity and the physical or cultural characteristics of its bearers. In other words, ethnicity is a politically relative concept: the mere act of crossing a border often turns a majority or normative trait into a minority or deviant one, which is thereby labelled 'ethnic'. As immigrants know all too well, the consequences of this shift go far beyond the fact of recategorisation. When they enter a new political territory, either as transient visitors or with the aim of settling and making a living, individuals suddenly become hyper-visible, problematised and exposed to an array of assimilative pressures, from speaking a given language to dressing, eating, thinking and reacting in specific ways. In addition, this pressure does not come only or mainly from official laws and institutions but also and chiefly from

[81] Nasan Meer, 'Racialization and religion: Race, culture and difference in the study of antisemitism and islamophobia' (2013) 36 [3] *Ethnic and Racial Studies* 385-398; David Theo Golberg, 'Racial Europeanisation' (2006) 29 [2] *Ethnic and Racial Studies* 331-364.
[82] Ash Amin, 'Land of strangers' (2013) 20 [1] *Identities: Global Studies in Culture and Power* 1-8; John Solomos, 'Strangers, identities and belonging' (2013) 20 [1] *Identities: Global Studies in Culture and Power* 18-23.

the diffuse, decentralised preferences and expectations of the local population.[83] What makes such a momentous change possible?

The basic theoretical framework needed to answer this question was established at the end of the 1970s in the social identity theory of prejudice, which remains one of the most influential approaches to the study of intergroup relations. According to this theory, one of the main drivers of individuals' attitudes toward one another is their tendency to divide the social world into in-groups (to which the perceiver belongs) and out-groups (to which she does not). The distinction matters because people, in their quest to protect and enhance their self-esteem, tend to evaluate in-groups more positively than out-groups. In addition, the very act of categorisation leads perceivers to underestimate intra-group variability and inter-group similarity. As a result, the negative characteristics attributed to the out-group become associated with all its individual members, a process that is now widely known as stereotyping.[84]

Social identity theory helps explain why, as a general rule, foreign political identities (or nationalities) are evaluated less favourably than local ones, and therefore why newcomers are viewed negatively. However, it fails to explain why long-settled immigrants and especially their children still suffer from stigma and discrimination despite the fact that they often explicitly identify with the host society. According to the 'common in-group identity' model or prejudice reduction, the salience of a shared national identity should cancel out or moderate the harmful effects of the in-group/out-group dichotomy.[85] Yet, studies have shown that citizens' national identification often increases rather than decreases their dislike of ethnic minorities.[86]

[83] Marco Antonsich, 'Exploring the demands of assimilation among White ethnic majorities in Western Europe' (2012) 38 [1] *Journal of Ethnic and Migration Studies* 59-76.
[84] Henri Tajfel and John Turner, 'The social identity theory of intergroup behaviour' in William Austin and Stephen Worchel (eds), *Psychology of intergroup relations* (Nelson-Hall Publishers 1986) 7-24.
[85] Samuel Gartner et al., 'The common ingroup identity model: Recategorization and the reduction of intergroup bias' (1993) 4 [1] *European Review of Social Psychology* 1-26; John Dovidio, Samuel Gaertner and Tamar Saguy, 'Another view of "we": Majority and minority group perspectives on a common ingroup identity' (2007) 18 *European Review of Social Psychology* 296-330.
[86] Mikael Hjerm, 'Defending liberal nationalism – at what cost?' (2004) 30 [1] *Journal of Ethnic and Migration Studies* 41-57; Joke Meeus, Bart Duriez, Norbert Vanbeselaere and Filip Boen, 'The role of national identity representation in the relation between in-group identification and out-group derogation: Ethnic versus civic representation' (2010) 49 *The British Psychological Society* 305-320.

The paradox can be dispelled by looking more closely at the content and implications of collective representations, as 'in-group projection' theorists have done.[87] For those who identify with them, nations are not empty concepts waiting to be filled with any possible meaning but a complex array of prototypes and norms on which they draw in order to evaluate their fellow citizens. In contexts where the national identity is salient, those individuals and social categories that closely approximate its prototypes and comply with its norms are viewed and treated more favourably than those that do not. For ethnic minorities, the problem comes from two sources. On the one hand, national representations are disproportionately shaped by the cultural traits of the native population, which automatically turns immigrants into anomalous citizens. On the other hand, national prototypes are not stable and consensual but contested and perceived differently by different people. To the extent that a national identity offers a positive source of pride and self-esteem, individuals display a tendency to invest it with their own characteristics and collective identities, especially those that play a central role in their self-conception. Such 'in-group projection' simultaneously allows them to reconcile or integrate their different sources of social evaluation and to vindicate their right to access the benefits that derive from group membership. However, when extrapolated to majority-minority relations, it entails that those who simultaneously identify with the nation and some ethnic minority tend to perceive the national identity in culturally complex ways, whereas members of the cultural majority have a more homogenous view of it.[88] This leads them to display skepticism toward unassimilated immigrants' claims of national belonging.

While it bodes ill for the social inclusion of international migrants, the descriptive and normative content of national identities also signals the possibility of structural cures for ethnic prejudice. As a considerable body of political science research has shown, all national representations are not equally dominated by a reduced number of traditional cultural traits. Such inter-country variations have been found to

[87] Michael Wenzel, Amélie Mummendey and Sven Waldzus, 'Superordinate identities and intergroup conflict: The ingroup projection model' (2007) 18 *European Review of Social Psychology* 331-372; Amélie Mummendey and Michael Wenzel, 'Social discrimination and tolerance in intergroup relations: Reactions to intergroup difference' (1999) 3 *Personality and Social Psychology Review* 158-174.
[88] Maykel Verkuyten and Borja Martinovic, 'Dual identity, in-group projection, and out-group feelings among ethnic minority groups' (2016) 46 *European Journal of Social Psychology* 1-12.

have a significant impact on racist attitudes. A large-scale study based on data from the 2003 Social Survey Programme examined this relationship by comparing national identification, national definition and anti-immigrant prejudice across 31 countries, including most Western European states.[89] National identification was measured by asking respondents to rate how close they felt to their country and how proud they were of their nationality. National definition was tapped with a question on the importance for nationals to have citizenship, speak the national language and have national ancestry. Anti-immigrant prejudice was computed through a five-point scale indicating agreement with the notions that immigrants increase crime rates, are good for the economy, take jobs away from natives, improve society by bringing in new ideas and culture, and receive too much government money. Respondents also had to indicate whether their numbers should be reduced. Strikingly, the correlation between national identification and prejudice ranged from statistically insignificant (in Portugal and Ireland) to weak (in the United States, Great Britain and Sweden), moderate (in East Germany, the Netherlands, France, Austria and Finland) to very strong (in Spain, Norway, Switzerland, West Germany and Denmark). Moreover, this relationship was much stronger in countries where people, on average, regarded language as more important than legal citizenship for being considered as a national.

Importantly, the identification-prejudice relationship depended on living in a nation where these criteria were generally considered important rather than on personally seeing them as such. This suggests that the inclusiveness of national representations does not depend exclusively on individual perceptions but also on the wider discursive context in which identities are represented. Of course, discourses themselves are plural and often contradictory. For instance, some political parties tend to promote a descent-based conception of the national community, whereas others emphasise its more voluntary aspects and others wholeheartdely embrace its cultural pluralism.[90] As a result, party affiliations may also generate significant discrepancies in

[89] Samuel Pehrson, Vivian Vignoles and Rupert Brown, 'National identification and anti-immigrant prejudice: Individual and contextual effects of national definitions' (2009) 72 *Social Psychological Quarterly* 24-38.
[90] Marc Helbling, 'Framing immigration in Western Europe' (2014) 40 [1] *Journal of Ethnic and Migration Studies* 21-41.

perceptions of national prototypes and norms. Consistent with this, the study found that individuals who endorsed ancestry-based definitions of the nation showed higher levels of prejudice, independently of how much support these definitions received in the wider population. Similarly, an experimental study on US managers found that priming national identity induced liberals to perceive immigrants as more employable but had the opposite effect on those who identified as politically conservative.[91]

The problem of in-group projection is liable to arise in any context where individuals interact while claiming a common overarching identity, be it based on profession, family, school, lifestyle, consumption and so on. However, the social significance of political identities arguably permeates and surpasses all of these because of the chronic way in which they are activated in the course of daily tasks and interactions. For instance, they are likely to come to the fore nearly every time someone opens a newspaper, discusses the merit of a new law or programme, writes down her address, walks past a public building, buys local or imported food, glances at an advertisement, reads a textbook, pays with coins or banknotes, browses on a website and countless other actions.[92] The daily influence of political institutions is even more pervasive for public employees, whose local, regional or national knowledge and belonging provides the very condition of their livelihood. In fact, the chronic salience of political identities is such that they tend to become associated in popular consciousness with a range of unrelated things, such as mountains, rivers, trees, animals, fruit, kitchenware, furniture, dress, artistic styles, languages, climates, cars, religions, celebrations, gestures, sports or historical figures. While all public authorities, whatever their geographical scope, possess and exercise such symbolic power, the sheer amount of financial and human resources controlled by national authorities provides them with an unrivalled capacity to leave their mark on public spaces and discourses.[93] The end

[91] Todd Lucas et al., 'Political affiliation, collective self-esteem and perceived employability of immigrants: Inducing national identity polarizes host-nation employers' (2014) 39 *Intercultural Journal of Intercultural Relations* 136-151.
[92] On the multiple sources of national representations and stereotypes, see Géraldine Galeote (coord), 'Les stéréotypes dans la construction des identités nationales depuis une perspective transnationale' (2016) 10 *Revue d'études ibériques et ibéro-américaines* 1-252.
[93] Tim Edensor, *National identity, popular culture and everyday life* (Berg 2002).

result is the constant and largely unacknowledged recreation of a 'banal nationalism' that relegates ethnic minorities to the status of perpetual outsiders.[94]

3.2. Stratification

The distance between normative national prototypes and the racial or cultural traits displayed by immigrants and their descendents may be the initial process through which they become stigmatised, but it is not the last. Another key factor is the subordinated position they occupy in the national ethnic hierarchy or, to put it differently, their relative powerlessness. This structural subordination is well illustrated by unemployment rates, which offer an indicator of overrepresentation in precarious jobs. In most Western European countries, immigrants of North Western European origin have similar or higher employment rates as natives. Those of Southern or Eastern European origin experience greater difficulties but their children often manage to do nearly as well as natives. Chinese and Indians also have relatively low unemployment rates. For all the other groups of non-European ancestry, however, the situation is starkly different: immigrants themselves as well as their children fare considerably worse than natives as well as all other European groups, with unemployment rates multiplying three to six-fold the national average.[95] According to European statistics, third-country nationals also find themselves much more exposed to poverty and social exclusion than nationals and other European citizens in all Western European countries, although the gap is narrower in Germany and Portugal. In the EU as a whole, their overqualification rate is 24% higher than the average and 16% higher than that of second-country nationals.[96]

[94] Anna Triandafyllidou, *Immigrants and national identity in Europe* (Routledge 2001); Michael Billig, *Banal nationalism* (SAGE 1995).
[95] Anthony Heath, 'Cross-national patterns and processes of ethnic disadvantage' in Anthony Heath and Sin Yi Cheung (eds), *Unequal chances: Ethnic minorities in Western labour markets* (Oxford University Press 2007) 640-64. See also Irena Kogan, 'Labor markets and economic incorporation among recent immigrants in Europe' (2006) 85 [2] *Social Forces* 704-705
[96] Ettore Recchi, 'The citizenship gap in European societies: Conceptualizing, measuring and comparing 'migration neutrality' across the EU' (2016) 54 [6] *International Migration* 181-200.

Consistent with their privileged socioeconomic position, Western (and especially Northern) European immigrants usually receive more favourable evaluations than the rest or simply remain excluded from the stigmatising 'immigrant' category. In a Spanish survey, 12% of respondents declared more sympathy toward Latin American than other immigrants; conversely, 23% said they felt less sympathetic toward Moroccans, 'Moors', Arabs or Muslims and 18%, toward Romanians or Eastern Europeans.[97] In Sweden, Syrians were situated on the lower rungs of the ethnic hierarchy, followed by Somalis, Iranis, Latin Americans and Italians.[98] In the Netherlands, Moroccans arouse more hostility than Turks, Caribbeans, Surinamese and Indonesians.[99]

Various theoretical approaches stressing distinct processes have attempted to account for the causal link between social stratification and prejudice. The most direct empirical evidence on this topic comes from the 'stereotype content model', elaborated through surveys examining the specific stereotypes attributed to various social categories. A key tenet of this model is that many prejudices are not uniformly negative but focus either on the warmth or the competence of their targets. The centrality of these two dimensions is explained in a functional manner by individuals' general motivation to know about the intentions (cooperative or competitive) harboured by those with whom they interact, as well as their capacity to act on them. Whereas social categories that seem to harbour positive intentions are perceived as warm or sympathetic, those whose objectives seem to collide with the self or in-group are seen as cold or hostile. At the same time, and most importantly for the purpose of this section, social categories whose members are overrepresented in positions of power are stereotyped as competent, while the powerless receive evaluations of incompetence. Since the two dimensions are independent from each other, subordinated social categories can either be viewed as incompetent but warm or incompetent and hostile. In the first case, they tend to elicit

[97] Mª Ángeles Cea and Miguel Valles Martínez, *Evolución del racismo, la intolerancia y otras formas conexas de intolerancia en España* (Ministerio de Empleo y Seguridad Social 2014) 269-274.
[98] Alexandra Snellman and Bo Ekehammar, 'Ethnic hierarchies, ethnic prejudice and social dominance orientation' (2005) 15 *Journal of Community & Applied Social Psychology* 88.
[99] Yvette van Osch and Seger Breugelmans, 'Perceived intergroup difference as an organizing principle of intercultural attitudes and acculturation attitudes' (2012) 43 [5] *Journal of Cross-Cultural Psychology* 809.

pity and paternalistic behaviour mixing active help and passive distancing and neglect. In the second, they trigger feelings of contempt and actively as well as passively harmful treatment.[100]

Immigrants as a group tend to be perceived as low in both warmth and competence, and therefore contemptible. However, considerable variation exists among different categories of immigrants distinguished by their legal status (legal/illegal), nationality, language or religion. In particular, specific stereotypes arise through the interaction of the abstract value attributed to these characteristics and the socioeconomic status occupied by immigrants who bear them in the host country. For instance, perceptions of Arab immigrants may be simultaneously influenced by the conflictive geopolitical relationship between Western European and Middle Eastern states and by the concentration of Arab immigrants in precarious, low-status occupations. Consistent with this, a sample of Belgian students rated both Arabs and Muslims as low in warmth and competence. Conversely, in Belgium as in the United States, Asians were seen as more competent than other non-European immigrants but less likeable than European ones, probably reflecting their 'model minority' image and perceptions of economic competition from Asian countries. [101]

The decoupling of warmth and competence stereotypes suggests that immigrants' representation in powerful positions is a necessary but not sufficient condition for them to receive globally positive evaluations (see next section for further details on the role of perceived competition). But why does ethnic stratification lead to stereotypes of incompetence in the first place? The stereotype content model proposes various explanations. The first, labelled 'correspondence bias', is a widespread tendency to attribute people's actions to their internal dispositions rather than their

[100] Amy Cuddy, Susan Fiske and Peter Glick, 'The BIAS map: Behaviors from intergroup affect and stereotypes' (2007) 92 [4] *Journal of Personality and Social Psychology* 631-648; Susan Fiske, Amy Cuddy, Peter Glick and Jun Xu, 'A model of (often mixed) stereotype content: Competence and warmth respectively follow from perceived status and competition' (2002) 82 [6] *Journal of Personality and Social Psychology* 878-902.

[101] Amy Cuddy et al., 'Stereotype content model across cultures: Towards universal similarities and some differences' (2009) 48 *British Journal of Social Psychology* 1-33; Tiane Lee and Susan Fiske, 'Not an ingroup, not yet an outgroup: Immigrants in the Stereotype Content Model' (2006) 30 *International Journal of Intercultural Relations* 751-768.

circumstances.[102] When an ethnic minority clusters in low-skilled occupations, the correspondence bias leads to a perception that they lack qualifications, regardless of other factors that might have come into play, such as employment discrimination or legal impediments to their access to high-status jobs. The second explanation is an equally widespread belief that the world is by and large just.[103] To sustain this belief, people explain existing inequalities in terms that make them seem legitimate, such as the lesser talent of subordinated groups. Finally, incompetence stereotypes can stem from dominants' interest in consolidating their privileged position, regardless of whether it is deserved or not.[104] By stereotyping the out-group, they make its members seem unfit to hold high-skilled positions and therefore placate them in subservient roles.

The second and third hypotheses find additional support in three complementary theories of prejudice labelled 'system justification theory', 'social dominance theory' and 'group position theory'. Their main contribution consists in integrating sociological insights on the structural and institutional mechanisms that shape individual attitudes. System justification theory starts from the empirical observation that, contrary to the predictions of social identity theory (see Section 3.1), members of subordinated social categories sometimes favour the dominant group over their in-group, especially at the level of implicit or unconscious attitudes. Since this cannot be explained in terms of self-interest, the theory posits that even those individuals most oppressed by a social system are often motivated to see it as legitimate. Such a belief serves several functions. To the extent that subordinated social groups are often compelled to collaborate closely with dominant ones in everyday life, it reduces the dissonance between action and thought; in other words, is allows them to act in accordance with their values rather than against them, albeit at the price of molding the latter to the former. In addition, it provides a sense of security and coherence by systematically explaining existing social roles and arrangements. Perhaps most importantly, it rationalises their reluctance to struggle against these arrangements

[102] Daniel Gilbert and Patrick Malone, 'The correspondence bias' (1995) 117 *Psychological Bulletin* 21-38.
[103] Melvin Lerner and Dale Miller, 'Just world research and the attribution process: Looking back and ahead' (1978) 85 *Psychological Bulletin* 1030-1051.
[104] Joseph Berger, Susan Rosenholtz and Morris Zelditch, 'Status organizing processes' (1980) 6 *Annual Review of Sociology* 479-508.

in a way that could further compound their vulnerability. In other words, it protects the relative comfort offered by social stability and dispenses them from adapting to new dynamics and roles.[105]

System justification theory helps understand why subordinated individuals sometimes embrace conservative ideologies that disadvantage them, but it does not delve in the social forces that construct and promote these ideologies. Social dominance theory fills this gap through the concept of 'legitimising myths', defined as consensually shared stereotypes, attributions or other representations that organise and justify social relationships. These myths suggest how people should behave and how social rewards should be distributed. They also share an appearance of obvious truth that makes it difficult for their opponents to be taken seriously.[106] Legitimising myths can be both hierarchy-enhancing, when they justify inequality and the institutional arrangements that perpetuate it, and hierarchy-attenuating, when they criticise these inequalities and institutions. However, hierarchy-enhancing and hierarchy-attenuating myths do not compete on an equal footing for citizens' allegiance, for their capacity to influence thoughts and actions increases as a function of their 'embeddedness', 'certainty' and 'mediational strength'. Embeddedness refers to the extent to which they are anchored in artistic, religious, political or other discourses. Certainty relates to their apparent degree of moral, religious or scientific truth; in other words, to their authority. Mediational strength is their compatibility with individuals' desire to maintain or subvert group-based hierarchies. Since a disproportionate amount of artistic, religious, political, legal and scientific power is normally wielded by dominant group members, who in turn tend to favour hierarchically-enhancing legitimising myths over hierarchically-attenuating ones, the latter tend to exert much greater influence than the former, at least in relatively stable societies.[107]

[105] John Jost and Mahzarin Banaji, 'The role of stereotyping in system-justification and the production of false consciousness' (1994) 33 *British Journal of Social Psychology* 1-27.
[106] Jim Sidanius and Felicia Pratto, 'Social dominance theory' in Paul Van Lange, Arie Kruglanski and Tory Higgins (eds), *Handbook of theories of social psychology* (SAGE Publications 2011) 426.
[107] Jim Sidanius and Felicia Pratto, *Social dominance: An intergroup theory of social hierarchy and oppression* (Cambridge University Press 2001) 31-57, 103-125.

The ideological nature of ethnic stereotypes entails that they often comprise normative as well as descriptive expections on immigrants' appropriate behaviour and place and society. When the latter reject established hierarchies and mobilise to secure access to scarce social goods, such as property, jobs and business, political offices, educational opportunities, recreational spaces and even intimacy, dominant group members therefore feel that their rightful prerogatives are being encroached upon or that subordinates are 'getting out of place'.[108] This 'sense of group position' combines with exclusive political identities to create perceptions of ethnicity as a threat, one of the most immediate and powerful drivers of racism.

3.3. Perceived threat

Attitudes toward various categories of immigrants and their descendants are not static but often vary rapidly as a result of changing social circumstances, such as economic crises, large refugee inflows, party politics, international conflicts or bouts of intergroup violence.[109] What all such events have in common is that, while they do not necessarily have an immediate impact on most people's lives, they tend to receive detailed media coverage and thus shape perceptions of the causes and consequences of social processes, including in the field of ethnic relations. As scholars of nationalism have highlighted, the media have long been among the main catalysts of political identities, in part because their audience usually coincides with administrative boundaries and in part because a significant part of the news they produce directly or indirectly examines the action of public authorities.[110] This political embeddedness means that immigration-related trends and events are usually analysed from the perspective of their implications

[108] Lawrence Bobo, 'Prejudice as group position: Microfoundations of a sociological approach to racism and race relations' (1999) 55 [3] *Journal of Social Issues* 445-472.
[109] Bart Meuleman, Eldad Davidov and Jaak Billiet, 'Changing attitudes toward immigration in Europe, 2002-2007: A dynamic group conflict theory approach' (2009) 38 *Social Science Research* 352-365; Moshe Semyonov, 'The rise of anti-foreigner sentiment in European societies, 1988-2000' (2006) 71 *American Sociological Review* 426-449.
[110] Benedict Anderson, *Imagined communities: Reflections on the origin and spread of nationalism* (revised edn, Verso 2006); Stephen Reicher and Nick Hopkins, *Self and nation: Categorization, contestation and mobilization* (SAGE Publications 2001).

for a given local, regional and especially national community.[111] When immigrants are portrayed in a positive light, all members of the community feel the benefits; when they are negatively stereotyped, all of them feel threatened.[112] Unfortunately, the structural factors outlined in the previous sections usually breed disproportionately negative media framings of immigration.[113]

The importance of threat perceptions in the etiology of racism derives from their capacity to temporarily multiply the pre-existing, moderate forms of prejudice caused by exclusive political identities and ethnic stratification.[114] In this sense, they are best seen as the last link in a long chain of individual and structural sources of anti-immigrant attitudes.[115] When acute social problems or traumatising events are attributed to immigration in general or a particular ethnic minority, pity, envy and contempt transmute into much more intense emotions, such as anxiety, fear, disgust and anger. In turn, these emotions show a greater capacity than mere stereotypes to predict a range of unfavourable actions toward minorities, such as avoidance, distancing, removal or aggression. Because they are experienced at group level, their arousal does not depend on individuals' personal exposure to ethnicity-related threats but merely on their

[111] Matthew Clare and Dalia Abdelhady, 'No longer a waltz between red wine and mint tea: The portrayal of the children of immigrant in French newspapers (2003-2013)' (2016) 50 *International Journal of Intercultural Relations* 13-28; Hannes Weber, 'National and regional proportion of immigrant and perceived threat of immigration: A three-level analysis in Western Europe' (2015) *International Journal of Comparative Sociology* 1-25; Bridget Anderson, *Us and them? The dangerous politics of immigration control* (Oxford University Press 2013).

[112] Linda Bos et al., 'It's the frame that matters: Immigrant integration and media framing effects in the Netherlands' (2016) 55 *International Journal of Intercultural Relations* 97-108; Madeleine Dalsklev and Jonas Ronningsdalen Kunst, 'The effect of disgust-eliciting media portrayals on outgroup dehumanization and support of deportation in a Norwegian sample' (2015) 47 *International Journal of Intercultural Relations* 28-40; Juan-José Igartua, Félix Moral-Toranzo and Itziar Fernández, 'Cognitive, attitudinal, and emotional effects of news frame and group cues, on processing news about immigration' (2011) 23 [4] *Journal of Media Psychology* 174-185.

[113] Géraldine Galeote, 'Los discursos politicos y mediáticos sobre la inmigración irregular en España: Entre mito y realidad' in Dolores Thion Soriano-Mollá, Noémie François and Jean Albresprit (eds), *Fabriques de vérité: communication et imaginaires* (L'Harmattan 2016); Scott Blinder and William Allen, 'Constructing immigrants: Portrayals of migrant groups in British national newspapers, 2010-2012' (2016) 50 [1] *International Migration Review* 3-40; Alexander Caviedes, 'An emerging 'European' news portrayal of immigration?' (2015) 41 [6] *Journal of Ethnic and Migration Studies* 897-917; Teun Van Dijk, 'The role of the press in the reproduction of racism' in Michi Messer, Renée Schroeder and Ruth Wodak (eds), *Migrations: Interdisciplinary perspectives* (Springer 2012) 15-29.

[114] Lauren McLaren, 'Anti-immigrant prejudice in Europe: Contact, threat perception, and preferences for the exclusion of migrants' (2003) 81 [3] *Social Forces* 923-925.

[115] Colleen Ward and Anne-Marie Masgoret, 'An integrative model of attitudes toward immigrants' (2006) 30 *International Journal of Intercultural Relations* 671-682.

identification with the community that is represented as jeopardised.[116] For instance, a person who normally harbours pity toward African refugees may quickly come to see them as undeserving migrants worthy of being deported if her political representatives stress the need to protect national borders and clamp down on people smugglers.

Two independent types of threat have been shown to predict prejudice in general and racism in particular. Interestingly, these types largely overlap with the main concerns of identitarian and stratification-based theories, suggesting that threat perceptions do not arise randomly but as a result of deeper structural processes. A first group of threats, somewhat misleadingly labelled 'realistic', derive from a sense that ethnic minorities compete with the in-group for scarce resources such as money and power. One of its key components is a zero-sum belief that the more resources and opportunities the minority obtains, the less will be available for the in-group (and by extension for the self). Perceptions of realistic threat sometimes, but not always, stem from actual scarcity. Apart from the overall amount of resources, inequalities in their distribution can affect threat perceptions by generating fears of joining the ranks of the have-nots as well as an ideological desire to maintain existing hierarchies.[117] The second group of threats, called 'symbolic', concern the perpetuation of the in-group's worldview, moral values and beliefs.[118] More recently, this category of threats has been expanded to encompass other cultural practices and traditions, such as languages and religion, that people deem central to their way of life.[119] Feelings of both realistic and symbolic threat simultaneously increase and feed on the perceived size of the

[116] Diane Mackie, Eliot Smith and Devin Ray, 'Intergroup emotions and intergroup relations' (2008) 2 [5] *Social and Personality Psychology Compass* 1866-1880.
[117] Victoria Esses, Lynne Jackson and Tamara Armstrong, 'Intergroup competition and attitudes toward immigrants and immigration: An instrumental model of group conflict' (1998) 54 [4] *Journal of Social Issues* 699-724.
[118] Walter Stephan, 'Prejudice toward immigrants to Spain and Israel: An integrated threat theory analysis' (1999) 29 [4] *Journal of Cross-Cultural Psychology* 560-561.
[119] Silke Schneider, 'Anti-immigrant attitudes in Europe: Outgroup size and perceived ethnic threat' (2008) 24 [1] *European Sociological Review* 53-67; Mikael Hjerm and Kikuko Nagayoshi, 'The composition of the minority population as a threat: Can real economic and cultural threats explain xenofobia?' (2011) 26 [6] *International Sociology* 815-843.

problematic population, which explains why most people overestimate the number of immigrants residing in their country.[120]

A wide variety of discourses, reflected in surveys on anti-immigrant attitudes, feed the perception that immigrants jeopardise natives' access to coveted resources. Some politicians and media portray them as a strain on education and health systems, downplaying their fiscal contribution to the public budget, exaggerating the learning difficulties of second-generation pupils and warning about the introduction of foreign diseases. Others emphasise downward pressures on wages in economic sectors with high concentrations of immigrant labour or even the substitution of low-skilled local workers by newcomers. Holders of high-status positions can be described as lacking local skills or commitment to the community. When ethnic minorities are overrepresented among welfare and scholarship recipients, for instance because of immigrants' precarious situation or because of the labour market discrimination faced by their locally educated children, right-wing parties and media regularly depict them as benefit scroungers. Immigrant crime can be cast as undermining public safety and justifying heavy-handed police intervention in multi-ethnic neighbourhoods.

Value-laden symbolic threats are embedded in post-colonial or Orientalist discourses that situate the origins of universal moral principles in Western societies and cast non-Western ones as less civilised or outright barbaric. The specific standards used to criticise African, Asian and Latin American immigrants vary across time and space but frequently include democratic participation, gender equality, individual autonomy, work ethic, support for formal education, peaceful resolution of conflicts, respect for the rule of law, freedom of expression and human rights broady speaking. In contrast with these 'civic' terms, culture-laden symbolic threats mobilise 'ethnic' conceptions of existing political communities as tightly bound, relatively homogenous and stable units

[120] Marc Hooghe and Thomas de Vroome, 'The perception of ethnic diversity and anti-immigrant sentiment: A multilevel analysis of local communities in Belgium' (2015) 38 [1] *Ethnic and Racial Studies* 38-56; Zan Strabac, 'It is the eyes and not the size that matter: The real and the perceived size of immigrant populations and anti-immigrant prejudice in Western Europe' (2011) 13 [4] *European Societies* 559-582; Daniel Herda, 'How many immigrants? Foreign-born population innumeracy in Europe' (2010) 74 [4] *Public Opinion Quarterly* 674-695.

whose origins can be traced back to a distant history.[121] According to recent studies, the psychological power of such representations derives from their capacity to fulfil a widespread and deep-seated motivation to maintain a temporally enduring identity, which acts as a buffer against existential anxiety. In current Western European societies, nations often play such a role by providing their members with the impression that the national dimension of their identity will transcend their own mortality. When political and media discourses pit immigrant languages, religions and other practices against national traditions, those who rely on these traditions to bolster their sense of self-continuity experience fear and develop defence mechanisms such as nostalgia, negative attitudes toward immigrants and opposition to social change.[122] Unlike realistic threats, which elicit a desire to maintain status distinctions between natives and minorities, both value- and culture-oriented symbolic threats generally stimulate calls for greater assimilation or restriction on non-European immigration.[123]

Like other structural determinants of racism, the different types of threat do not bear equally on everyone's attitudes toward all immigrants.[124] In Swiss municipalities, for instance, Muslim immigrants elicit stronger perceptions of cultural threat and weaker perceptions of economic threat than those from the Balkans (irrespective of the partial overlap between these categories).[125] In addition, workers in sectors that employ a large number of immigrants are likely to feel more exposed to realistic threats than those that do not, especially if their own conditions are precarious.[126] Consistent with

[121] For general discussions on the material and cultural 'securitisation' of immigrants, see Ricard Zapata-Barrero, *Fundamentos de los discursos políticos en torno a la inmigración* (Trotta 2009); Ayse Ceyhan and Anastassia Tsoukala, 'The securitization of migration in Western societies: Ambivalent discourses and policies' (2002) 27 *Alternatives: Global, Local, Political* 21-39

[122] Anouk Smeekes and Maykel Verkuyten, 'The presence of the past: Identity continuity and group dynamics' (2015) 26 [1] *European Review of Social Psychology* 162-202; Anouk Smeekes and Maykel Verkuyten, 'When national culture is disrupted: Cultural continuity and resistance to Muslim immigrants' (2014) 17 [1] *Group Processes & Intergroup Relations* 45-66.

[123] Pazit Ben-Nun Bloom, Gizem Arikan and Gallya Lahav, 'The effects of perceived cultural and material threats on ethnic preferences in immigration attitudes' (2015) *Ethnic and Racial Studies* 1-19.

[124] For a general discussion, see Geertje Lucassen and Marcel Lubbers, 'Who fears what? Explaining far-right-wing preference in Europe by distinguishing perceived cultural and economic ethnic threats' (2012) 45 [5] *Comparative Political Studies* 547-574.

[125] Carolin Rapp, 'More diversity, less tolerance? The effect of type of cultural diversity on the erosion of tolerance in Swiss municipalities' (2015) *Ethnic and Racial Studies* 1-19.

[126] Jaak Billiet, Bart Meuleman and Hans de Witte, 'The relationship between ethnic threat and economic insecurity in times of economic crisis: Analysis of European Social Survey data' (2014) 2 [2] *Migration Studies* 135-161.

this, a large-scale German study found that respondents who had either been recently laid off or become unemployed (for whatever reason) were more likely to be concerned about immigration.[127] Similarly, value-laden discourses of symbolic threat can be expected to resonate especially strongly among liberals, since they build on rather than violate their egalitarian convictions. Conversely, culturally inflected discourses of symbolic threat may fail to impress the globally minded but catch the ear of conservatives who strongly identify with an ethnically defined nation. For instance, a survey on 3000 natives from France, Germany, Belgium, the Netherlands and Austria showed that liberals tended to be much more open than practising Christians to Muslims as a group but strongly opposed the headscarf as a symbol of illiberal values.[128]

A longitudinal analysis of Spanish attitudes toward immigrants between 1993 and 2012 illustrates their susceptibility to threat perceptions and their link to political identities, ethnic stratification and public discourses. In 1993, when legally residing foreigners made up little more than 1% of the population but Moroccans regularly landed on Spanish coasts in small boats, 45% of survey respondents saw their number as excessive. Attitudes improved sharply during the following three years, which coincided with a fall in unemployment and a benign political context marked by the United Nations Year against Intolerance, Racism and Xenophobia (1995) and the European Year against Racism (1997). From 2000 onwards, an immigration surge of some 500 000 new arrivals per year coincided with a new rise in xenophobia. In line with social dominance and group position theories, a large proportion of respondents agreed that natives should have preferential access to employment, education and healthcare and resisted positive action programmes. Temporal peaks in anti-immigrant attitudes coincided with highly mediatised political 'crises'. In 2006, immigration overtook unemployment as citizens' top concern, at a time when newspapers talked about hundreds of thousands of Senegaleses awaiting their chance to 'flood' the Canary Islands. Other bouts of racism followed news of armed robberies by Eastern European bands and French urban riots. Mistrust of Muslims increased with the 9/11 attacks as

[127] Bram Lancee and Sergi Pardos-Prado, 'Group conflict theory in a longitudinal perspective: Analyzing the dynamic side of ethnic competition' (2013) 47 [1] *International Migration Review* 106-131.
[128] Marc Helbling, 'Opposing Muslims and the Muslim headscarf in Western Europe' (2014) 30 *European Sociological Review* 242-257.

well as terrorist bombings in Madrid and London, catalysing beliefs in their unwillingness to integrate and resistance to cultural diversity. Islamophobia and support for assimilation reached new highs in 2010, in the wake of pre-electoral political debates and intense media coverage on the burqa, headscarves, the building of mosques, ablation and arranged marriages. Around the same time, a deep recession and swelling unemployment boosted support for the notion that immigrants take away natives' jobs, push their wages down, cost the public purse more than they contribute and should be expelled when they become long-term unemployed. A shift in media and political attention to the emigration of high-skilled Spanish youth, coupled with a gradual return to economic growth, subsequently enabled a modest decline in racist attitudes.[129]

3.4. Segregation

Since the beginning of empirical prejudice research in the mid-20th century, social psychologists' main prescription against racism has consisted in creating opportunities for personal interaction among antagonistic social categories. In Allport's original formulation of contact theory, these interactions were posited to improve attitudes if they complied with four conditions: equality of status or power in the context where contact takes place, active pursuit of shared goals, cooperation (rather than competition) in the pursuit of these goals and institutionally enforced norms in favour of contact.[130] A meta-analysis on 515 studies conducted between 1940 and 2000 confirmed that these conditions, and especially institutional support, optimised the positive effects of contact on intergroup attitudes but were not essential for these effects to occur. At the same time, high levels of anxiety about the nature of contact appeared like an important obstacle to its favourable outcomes.[131]

[129] Mª Ángeles Cea D'Ancona, 'Immigration as a threat: Explaining the changing pattern of xenophobia in Spain' (2016) 17 *Journal of International Migration & Integration* 569-591.
[130] Gordon Allport, *The nature of prejudice* (25th anniversary edn, Addison-Wesley 1979) 261-284.
[131] Thomas Pettigrew and Linda Tropp, 'A meta-analytic test of intergroup contact theory' (2006) 90 [5] *Journal of Personality and Social Psychology* 766-767.

Recent advances have shed light on the specific ways in which contact reduces prejudice, some of which amount to a reversal of the processes reviewed in Sections 3.1 to 3.3. Most importantly, it tends to reduce anxiety and increase empathy toward out-group members, especially when it results in the formation of close frienships and the sharing of personal information among participants. In the context of inter-ethnic relations, a particularly relevant type of such information has to do with the out-group's culture, which may come to be perceived in a less ethnocentrically biased and thus threatening way. Contact can also change attitudes by motivating people to adjust them in a way that validates their behaviour. This counter-intuitive effect occurs because of a universal need to minimise 'cognitive dissonance' (or incoherences) between one's thoughts and action. Other prejudice-reducing processes include the perception that the in-group condones rather than censures intergroup contact and that different social categories are not mutually exclusive but overlap in complex ways, which makes them internally heterogeneous and interdependent.[132] This last effect, labelled 'social identity complexity', appears particularly promising as a way of reducing racism toward a range of out-groups beyond those involved in the interaction.[133]

While the prejudice-reducing properties of cooperative contact are now well established, much less is known about how to make it happen on a large scale. This is because of an intrinsic paradox in contact theory: the exclusive identities, ethnic stratifications and threat perceptions that catalyse racism, and thus create the need for positive interactions, simultaneously activate segregation processes that foreclose such interactions. When immigrants and their children cluster in low-skilled jobs shunned by native workers, the latter are less likely to get acquainted with them. Even if they do collaborate on a given task, natives will typically find themselves in a position of superior status that reduces their incentives to heed and process counter-stereotypical information.[134] Workplace segregation and associated differences in socioeconomic

[132] Thomas Pettigrew and Linda Tropp, *When groups meet: The dynamics of intergroup contact* (Psychology Press 2011) 77-96.
[133] Marilynn Brewer, 'Deprovincialization: Social identity complexity and outgroup acceptance' in Ulrich Wagner et al. (eds), *Improving intergroup relations: Building on the legacy of Thomas F. Pettigrew* (Blackwell 2008) 160-176.
[134] Stephanie Goodwin et al., 'Power can bias impression processes: Stereotyping subordinates by default and by design' (2000) 3 [3] *Group Processes & Intergroup Relations* 227-256.

status in turn spill over into a residential cleavage between multi-ethnic and White neighbourhoods, which further reduces casual encounters in public spaces and produces a parallel cleavage between multi-ethnic and White schools.[135] In a recent survey on 7256 respondents from Belgium, France, Germany, the Netherlands, Switzerland and the UK, neighbourhood diversity stood out among the strongest predictors of natives having Muslim acquaintances and the other way around.[136] Another large-scale sample including 21 European countries plus Israel showed that both the objective regional share of immigrants and the perceived diversity of one's local area increased opportunities for interethnic contact at work and friendship.[137] In the same vein, multivariate German and Belgian studies found that immigrant adults' friendships with natives were correlated with educational attainment and socioeconomic status, whereas children's were linked to school demographics.[138]

The complexity of the processes behind ethnic segregation should not be underestimated. Apart from the direct and indirect effects of labour market stratification, institutional and individual discrimination often hampers minorities' access to White neighbourhoods and schools. When this does not suffice to keep them at arm's length, middle-class Whites can buy their way out of multi-ethnic areas as well as avoid moving in (see Sections 4 and 5.2). Alternatively, minorities can actively seek the company of their co-ethnics as a source of social capital and cultural amenities or a way to avoid out-group harassment. This sometimes reverses the direction of causality: instead of neighbourhoods determining school preferences, multi-ethnic schools become

[135] Jean-Louis Pan Ké Shon, *Quarante ans de ségrégation… et d'incorporation des immigrés en France, 1968-2007* (PUCA/ACSé 2013); Sako Musterd and Wim Ostendorf, 'Residential segregation and integration in the Netherlands' (2009) 35 [9] *Journal of Ethnic and Migration Studies* 1515-1532.
[136] Alyt Damstra and Jean Tillie, 'How crosscutting ties are established – The case of Muslims in Europe' (2016) 42 [2] *Journal of Ethnic and Migration Studies* 237-260.
[137] Michael Savelkoul, Jochem Tolsma and Peer Scheepers, 'Explaining natives' interethnic friendship and contact with colleagues in European regions' (2015) 41 [5] *Journal of Ethnic and Migration Studies* 683-709.
[138] Pascale van Zantvliet, Matthijs Kalmijn and Ellen Verbakel, 'Early partner choices of immigrants: The effect of preferences, opportunities and parents on dating a native' (2015) 41 [5] *Journal of Ethnic and Migration Studies* 772-794; Peter Titzmann, Alaina Brenick and Rainer Silbereisen, 'Friendships fighting prejudice: A longitudinal perspective on adolescents' cross-group friendships with immigrants' (2015) 44 *Journal of Youth and Adolescence* 1318-1331; Bram Vanhoute and Mac Hooghe, 'Do diverse geographical contexts lead to diverse friendship networks? A multilevel analysis of Belgian survey data' (2012) 36 *International Journal of Intercultural Relations* 343-352; Elmar Schlueter, 'The inter-ethnic friendships of immigrants with host-society members: Revisiting the role of ethnic residential segregation' (2012) 38 [1] *Journal of Ethnic and Migration Studies* 77-91.

the source of residential choices, which in turn may affect employment decisions. For instance, immigrants' clustering in specific enclaves facilitate their recruitment by ethnic businesses, which rely on the trust and networks created by geographical proximity and kin relations.[139]

Immigrant settlement patterns in Southern European cities since the 1990s reveal the interplay between all these dynamics. In 2001, 16,2% of EU-15 nationals in Lisboa resided in over-crowded housing, but this proportion rose to 51,6% for Brazilians and over 60% for Cape Verdeans, Angolans, Indians, Pakistanis and Chinese. Chinese and Pakistanis were the most overrepresented non-Western group in the business area of the inner city, a hub for ethnic businesses. In Madrid, 84,7% of Spanish nationals but only 23,1% of foreigners owned their property. In Barcelona, the gentrification of central areas had priced low-income immigrants out to the periphery, with the exception of the mainly female Filippinos, who undertook domestic work in upper-class households. In Milan, the city centre included both middle-income Argentinians and Salvadorean domestic workers; Egyptian entrepreneurs and low-waged Moroccans occupied different neighbourhoods on the outskirts. In most cities, new immigrants were lured to already ethnicised areas by the combination of low rents and kinship ties. However, Eastern European and Latin American immigrants generally displayed lower levels of concentration, due in part to their perceived socio-cultural proximity and lesser exposure to discrimination.[140]

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[139] Susanne Soholt and Britt Lynnebakke, 'Do immigrants' preferences for neighbourhood qualities contribute to segregation? The case of Oslo' (2015) 41 [14] *Journal of Ethnic and Migration Studies* 2314-2335; John Iceland, *Residential segregation: A transatlantic analysis* (Migration Policy Institute 2014); Anya Glikman and Moshe Semyonov, 'Ethnic origin and residential attainment of immigrants in European countries' (2012) 11 [2] *City & Community* 198-219; Deborah Phillips, 'Minority ethnic segregation, integration and citizenship: A European perspective' (2010) 36 [2] *Journal of Ethnic and Migration Studies* 209-225; Gideon Bolt and Ronald van Kempen, 'Ethnic segregation and residential mobility: Relocations of minority ethnic groups in the Netherlands' (2010) 36 [2] *Journal of Ethnic and Migration Studies* 333-354; Edmond Préteceille, 'La ségrégation ethno-raciale a-t-elle augmenté dans la métropole parisienne?' (2009) 50 [3] *Revue française de sociologie* 489-519; Wai-ki Luk, 'Chinese ethnic settlements in Britain: Spatial meanings of an orderly distribution' (2009) 35 [4] *Journal of Ethnic and Migration Studies* 575-599; John Stillwell and Deborah Phillips, 'Diversity and change: Understanding the ethnic geographies of Leeds' (2006) 32 [7] *Journal of Ethnic and Migration Studies* 1131-1152.

[140] Sonia Arbaci and Jorge Malheiros, 'Desegregation, peripheralisation and the social exclusion of immigrants: Southern European cities in the 1990s' (2010) 36 [2] *Journal of Ethnic and Migration Studies* 227-255.

If mutually reinforcing processes of workplace, school and residential segregation generally feed racism by foreclosing opportunities for intergroup contact, desegregation does not automatically lead to improved attitudes, especially when it takes place involuntarily. This is because proximity does not, by itself, guarantee interaction, let alone cooperative interaction. Indeed, research shows that even the residents of diverse neighbourhoods often have few out-group friends and see specific minorities as a threat for their safety, cultural identity and economic assets.[141] To the extent that reduced anxiety is an essential condition for positive contact, it should come as no surprise that some actually display more negative attitudes toward immigrants than the well-off dwellers of homogenous areas.[142] The mutual reinforcement of perceived threat and reduced contact creates yet another feedback effect contributing to a racist equilibrium.

The structural embeddedness of racism shows that it can be neither conceived as rooted exclusively in personal dispositions and values nor combated effectively through individual or localised interventions. To break its vicious cycles, the strategic and concerted intervention of public authorities and other powerful actors is indispensable. As we will see, anti-racist interpretations of human rights law could go a long way in bringing this about.

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[141] Tobias Stark, 'Understanding the selction bias: Social network processes and the effect of prejudice on the avoidance of outgroup friends' (2015) 78 [2] *Social Psychological Quarterly* 127-150; Kaat Van Acker et al., 'Do "they" threaten "us" or do "we" disrespect "them": Majority perceptions of intergroup relations and everyday contacts with immigrant minorities' (2014) 17 [5] *Group Processes & Intergroup Relations* 617-628; Lars Meier, 'Everyone knew everyone: Diversity, community memory and a new established-outsider figuration' (2013) 20 [4] *Identities: Global Studies in Culture and Power* 455-470; Sabine Gruner, '"The others don't want…" Small-scale segregation: Hegemonic public discourses and racial boundaries in German neighbourhoods' (2010) 36 [2] *Journal of Ethnic and Migration Studies* 275-292; Talja Blokland and Gwen van Eijk, 'Do people who like diversity practice diversity in neighbourhood life? Neighbourhood use and the social networks of "diversity-seekers" in a mixed neighbourhood in the Netherlands' (2010) 36 [2] *Journal of Ethnic and Migration Studies* 313-332.

[142]James Laurence, 'Reconciling the contact and threat hypotheses: Does ethnic diversity strengthen or weaken community inter-ethnic relations?' (2014) 37 [8] *Ethnic and Racial Studies* 1328-1349; Jasper Van Assche et al., 'Diversity and out-group attitudes in the Netherlands: The role of authoritarianism and social threat in the neighbourhood' (2014) 40 [9] *Journal of Ethnic and Migration Studies* 1414-1430; Esther Havekes, Marcel Coenders and Karien Dekker, 'Interethnic attitudes in urban neighbourhoods: The impact of neighbourhood disorder and decline' (2014) 51 [12] *Urban Studies* 2665-2684; Ruud Koopmans and Susanne Veit, 'Ethnic diversity, trust, and the mediating role of positive and negative interethnic contact: A priming experiment' (2014) 47 *Social Science Research* 91-107; Ulrich Wagner et al., 'Prejudice and minority proportion: Contact instead of threat effects' (2006) 69 [4] *Social Psychological Quarterly* 380-390

4. Ethnic recognition and non-discrimination

Ethnic discrimination, in the sociological sense of less favourable treatment flowing from prejudice, is as widespread as multifarious. Many of its manifestations take place in the course of informal daily activities, such as commuting, sports and other games, nightlife, religious rituals, shopping or family and neighbourhood relations.[143] Others unfold during minorities' relations with state authorities, hampering their access to public services and making them vulnerable to excessive coercion or inadequate protection by law enforcement officials.[144] On the housing market, ethnicity interacts with gender, place of residence and socioeconomic status to shape the preferences of landlords, real estate agents and flat mates.[145] Most directly and pervasively related to the structural determinants of racism examined in Chapter 3 is workplace discrimination. At the hiring stage, field experiments have shown that employers disproportionately reject applicants with ethnically marked names, accents, phenotypes, addresses or attire. Those who are selected frequently toil in precarious conditions

[143] Laurie McIntosh, 'Impossible presence: race, nation and the cultural politics of being Norwegian' (2015) 38 [2] *Ethnic and Racial Studies* 309-325; Orla Lynch and Angela Veale, 'Being Muslim and being Irish after 9/11: self-conceptions of place in Irish society' (2015) 38 [11] *Ethnic and Racial Studies* 2003-2018; François Bonnet, 'How to perform non-racism? Colour-blind speech norms and race-conscious policies among French security personnel' (2014) 40 [8] *Journal of Ethnic and Migration Studies* 1275-1294; Ferruccio Pastore, *Concordia Discors. Understanding conflict and integration policies in selected quarters of Five European Cities* (2013) 23-31; Ali Ahmed, 'Co-ethnic preferences in a cooking game: a study based on come dine with me in Sweden' (2013) 36 [12] *Ethnic and Racial Studies* 2220-2236.

[144] Lena Karamanidou, 'Violence against migrants in Greece: Beyond the Golden Dawn' (2016) 39 [11] *Ethnic and Racial Studies* 2002-2021; Barzoo Eliassi, 'Constructing cultural otherness within the Swedish welfare state: The cases of social workers in Sweden' (2015) 14 [4] *Qualitative Social Work* 554-571; François Bonnet and Clotilde Caillault, 'The invader, the enemy and they-who-must-not-be-named: How police talk about minorities in Italy, the Netherlands and France' (2015) 38 [7] *Ethnic and Racial Studies* 1185-1201; Sophie Body-Gendrot and Catherine Wihtol de Wenden, *Policing the inner city in France, Britain, and the US* (Palgrave 2014) 74-94; Maurizio Ambrosini, 'We are against a multi-ethnic society: Policies of exclusion at the urban level in Italy' (2013) 36 [1] *Ethnic and Racial Studies* 136-144.

[145] François Bonnet, Étienne Lalé, Mirna Safi and Étienne Wasmer, 'Better residential than ethnic discrimination! Reconciling audit and interview findings in the Parisian housing market' (2016) 53 [13] *Urban Studies* 2815-2833; Koen Van der Bracht, Ad Coenen and Bart Van de Putte, 'The not-in-my-property syndrome: The occurrence of ethnic discrimination in the rental housing market in Belgium' (2015) 41 [1] *Journal of Ethnic and Migration Studies* 158-175; Magus Carlsson and Stefan Eriksson, 'Ethnic discrimination in the London market for shared housing' (2015) 41 [8] *Journal of Ethnic and Migration Studies* 1276-1301; Mariano Bosch, Mª Ángeles Carnero and Lídia Farré, 'Information and discrimination in the rental housing market: Evidence from a field experiment' (2010) 40 *Regional Science and Urban Economics* 11-19; Ali Ahmed and Marts Hammarstedt, 'Discrimination in the rental housing market: A field experiment on the Internet' (2008) 64 *Journal of Urban Economics* 362-372.

characterised by short-term contracts, low wages, atypical hours and limited training.[146] Colleague and customer rejection likewise takes a heavy toll on their wellbeing and retention, especially when managers turn a blind eye on it. [147]

Economists have traditionally assumed that market forces would phase out employment discrimination, which they saw an inefficient violation of meritocracy.[148] However, it is increasingly recognised that while individual prejudices are largely irrational, the discrimination they cause is often a strategic choice of decision-makers. This 'structural', as opposed to attitudinal, differential treatment may take various forms. Sometimes it helps employers enhance the status of their organisation in the eyes of customers and other collaborators or prevent intergroup conflict among employees (societal discrimination). At other times, especially when a large number of candidates apply for a position and ethnicity correlates with traits that relevantly affect job performance, it speeds up hiring procedures (statistical discrimination). One of these traits is minority workers' lower bargaining power stemming from discrimination at the hands of other economic agents, which can be exploited in order to cut back their benefits (opportunistic discrimination).[149] Strategic considerations become particularly prominent when it comes to choosing leaders mandated to embody and shape collective

[146] Angela Nilsson and John Wrench, 'Ethnic inequality and discrimination in the labour market' in Karen Kraal, Judith Roosblad and John Wrench (eds), *Equal opportunities and ethnic inequality in European labour markets: Discrimination, gender and policies of diversity* (Amsterdam University Press 2009) 23-46.

[147] Roland Verwiebe, Lena Seewann, Margarita Wolf and Melek Hacioglu, 'I have to be very good in what I do. Marginalisation and discrimination in the career-entry phase – experiences and coping strategies among university graduates with a migrant background in Austria' (2016) 42 [15] *Journal of Ethnic and Migration Studies* 2468-2490; Paula Mulinari, 'Exploring the experiences of women and migrant medical professionals in Swedish hospitals: Visible and hidden forms of resistance' (2015) 34 [8] *Equality, Diversity and Inclusion: An International Journal* 666-677; Jonna Louvrier, *Diversity, difference and diversity management: A contextual and interview study of managers and ethnic minority employees in Finland and France* (PhD thesis, Hankel School of Economics, 2013); Martin Stevens, Shereen Hussein and Jill Manthorpe, 'Experiences of racism and discrimination among migrant care workers in England: Findings from a mixed-methods research project' (2012) 35 [2] *Ethnic and Racial Studies* 259-280; Katrine Fangen and Erlend Paasche, 'Young adults of ethnic minority background on the Norwegian labour market: The interactional co-construction of exclusion by employers and customers' (2012) 13 [5] *Ethnicities* 607-624; Etlyn Kenny and Rob Briner, 'Exploring ethnicity in organizations' (2010) 29 [4] *Equality, Diversity and Inclusion: An International Journal* 348-363.

[148] An illustration of this view is Becker's definition of discrimination as a cost that employers, employees and consumers are willing to pay in order to be associated with some persons rather than others. See Gary Becker, *The economics of discrimination* (2nd edn, University of Chicago Press 1971) 14.

[149] John Wrench, *Diversity management and discrimination: Immigrants and ethnic minorities in the EU* (Ashgate 2007) 116-120.

identities, such as political representatives and artists. For these professionals, ethnic stigma often entails lesser attractivess, influence and overall performance.[150] Aware of this, political parties usually shy away from placing more than token numbers of minority candidates in winnable seats or investing them with executive responsibilities.[151] In the same vein, cultural gatekeepers tend to relegate migrant-origin artists to secondary circuits or oblige them to adopt national or European aesthetics.[152]

Importantly, the different forms of discrimination are not independent but feed into each other, creating a self-perpetuating system. For instance, the concentration of ethnic minorities in the more precarious segments of the labour market, partly driven by opportunistic discrimination, contributes to their stigma of incompetence (see Section 3.3). In turn, these stereotypes reduce their credibility in high-status roles, motivating employers to engage in societal discrimination. In the same way, the societal or statistical exclusion of minority workers from specific organisations creates homogeneous workforces that catalyse the harassment or avoidance of those who do not conform to the norm. The scarcity of minority leaders, partly caused by exclusive political identities, also entrenches these identities by impoverishing public representations of the community.[153]

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[150] Alexander Haslam, Stephen Reicher and Michael Platow, *The new psychology of leadership: Identity, influence and power* (Psychology Press 2011) 77-108.

[151] Flora Burchianti and Ricard Zapata-Barrero, 'From participation to confinement: Challenges for immigrants' incorporation in political parties in Spain' (2017) 40 [5] *Ethnic and Racial Studies* 830-850; Sieglinde Rosenberger and Iris Stöckl, 'The politics of categorization – political representatives with immigrant background between "the other" and "standing for"' (2016) *Politics, Groups, and Identities* 1-20; Mona Lena Krook and Mary K Nugent, 'Intersectional institutions: Representing women and ethnic minorities in the British Labour Party' (2016) *Party Politics* 1-11; Irene Bloemraad, 'Accessing the corridors of power: Puzzles and pathways to understanding minority representation' (2013) 36 [3] *West European Politics* 652-670; Bryan Fanning, Kevin Howard and Neil O'Boyle, 'Immigrant candidates and politics in the Republic of Ireland: Racialization, ethnic nepotism, or localism?' (2010) 16 [3-4] *Nationalism and Ethnic Politics* 420-442.

[152] Ricard Zapata-Barrero, 'The limits to shaping diversity as public culture: Permanent festivities in Barcelona' (2014) 37 *Cities* 66-72; Wiebke Sievers, 'A contested terrain: Immigrants and their descendants in Viennese culture' (2014) 21 [1] *Identities: Global Studies in Culture and Power* 26-41; Christine Delhaye, 'Immigrants' artistic practices in Amsterdam, 1970-2007: A political issue of inclusion and exclusion' (2008) 34 [8] *Journal of Ethnic and Migration Studies* 1301-1321; Wiebke Sievers, 'Writing politics: The emergence of immigrant writing in West Germany and Austria' (2008) 34 [8] *Journal of Ethnic and Migration Studies* 1217-1235; Mariagiulia Grassili, 'Migrant cinema: Transnational and guerrilla practices of film production and representation' (2008) 34 [8] *Journal of Ethnic and Migration Studies* 1237-1255.

[153] For detailed descriptions of these processes, see Barbara Reskin, 'The race discrimination system' (2012) 38 *Annual Review of Sociology* 17-35; Nancy DiTomaso, Corinne Post and Rochelle Parks-Yancy,

Non-discrimination may seem like a natural place to start an analysis on the link between human rights and ethnic recognition, if only because of the importance of tackling prejudice in order to prevent the discriminatory actions it causes. Surprisingly, few scholars have systematically explored the actual and potential contribution of the right to equality to the prevention of racism.[154] This chapter intends to fill the gap by showing how legal measures against employment discrimination could set off a virtuous cycle of improved attitudes toward and better treatment of ethnic minorities.[155]

In international law, equality operates both as a general principle underpinning all human rights and a specific right not to be discriminated against on a list of prohibited grounds. Neither Article 14 ECHR nor Article 2.2 CCPR and CESCR explicitly include ethnicity among these, but they refer to most of its common markers, such as race, colour, language, religion and national origin. Article 1 ICERD adds ethnic origin and descent alongside race, colour and national origin. It also provides an authoritative definition of discrimination, reproduced in CEDAW and CRPD, as 'any distinction, exclusion, restriction or preference based on a prohibited ground, which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life'.

Because of its global scope and recent adoption, CERD General recommendation No. 34 on racial discrimination against people of African descent provides a useful illustration of current state obligations flowing from the right to equality. Among these is the duty to identify communities of African descent living in their territory and analyse their social conditions, especially through the collection of disaggregated demographic data.[156] States must also enact and fully implement

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'Workforce diversity and inequality: Power, status and numbers' (2007) 33 *Annual Review of Sociology* 473-501; Charles Tilly, *Durable inequality* (University of California Press 1998).

[154] For a rare exception, see Sandra Fredman, 'Combating racism with human rights: the right to equality' in Sandra Fredman (ed), *Discrimination and human rights: The case of racism* (Oxford University Press 2001) 9-44. As we will see in Section 4.1.2, this topic has recently aroused considerable interest in American socio-legal scholarship.

[155] The focus on employment discrimination is justified by the key role it plays in ethnic relations and equality law. Other types of discrimination taking place in the educational sphere will be addressed in Chapter 5.

[156] Para 9, 16.

legislation to protect them from discrimination,[157] as well as develop national strategies and programmes to improve their situation.[158] In particular, they must develop and implement special measures aimed, inter alia, at promoting their employment in the public and private sectors[159] and securing their representation in all branches of government.[160] To make this possible, citizenship legislation should pay attention to possible barriers to naturalization and their contribution to social and economic disadvantages.[161] Knowledge on African history and culture should be preserved in museums and other forums, including through the publication of books and the broadcasting of television and radio programmes.[162] All policies should take into account the right of people of African descent to maintain their mode of life and forms of organisation, culture, languages and religious expressions.[163]

Such an interpretation reflects a conception of equality that does not only censure the less favourable treatment of ethnic minorities (direct discrimination) but also identical treatment that significantly reinforces their subordination (indirect discrimination).[164] This morally and sociologically grounded approach, usually referred to as 'substantive' equality,[165] has recently been espoused by the ECtHR, breaking with its long-standing adherence to a 'formal' principle that prohibits all differential treatment.[166] In matters of race and ethnicity, expansive interpretations have mostly

[157] Para 10, 12.
[158] Para 11.
[159] Para 21.
[160] Para 43, 45.
[161] Para 47, 49.
[162] Para 66.
[163] Para 4b).
[164] See also ComESCR GC No. 20. The distinction between direct and indirect discrimination is well established in EU and domestic law. Both are breaches of the right to equality but the latter allows for a more open-ended balancing of this right with the legitimate aims pursued by the impugned measure. See eg Nicholas Bamforth, Maleiha Malik and Colm O'Cinneide, *Discrimination law: Theory and context* (Sweet & Maxwell 2008) 313-130; Sandra Fredman, *Discrimination law* (Oxford University Press 2011) 183-196; Christina Tobler, *Limits and potential of the concept of indirect discrimination* (Office for Official Publications of the European Communities 2008).
[165] Fernando Rey, 'El principio de igualdad en el contexto de la crisis del Estado social: diez problemas actuales' in Miguel Ángel Presno Linera (coord), *La metamorphosis del Estado y del Derecho* (Junta General del Principado de Asturias 2014) 289-312; María José Añón, 'Principio antidiscriminatorio y determinación de la desventaja' (2013) 39 *Isonomía* 127-157; Mª Isabel Garrido Gómez, 'Los planos de vigencia de la igualdad material en el contexto de una comprensión compleja de la igualdad' (2009) 20 *Derechos y Libertades* 57-78; María José Añón, *Igualdad, diferencias y desigualdades* (Fontamara 2001).
[166] Lourdes Peroni and Alexandra Timmer, 'Vulnerable groups: The promise of an emerging concept in the European Human Rights Convention law' (2013) 11 [4] *International Journal of Constitutional Law* 1056-1085.

been applied to cases concerning the Roma. While this specific group falls outside the concept of ethnic minority elaborated in Chapters 1 and 2, the stigma and disadvantage cited by the Court in order to justify their protection under Article 14 ECHR can readily be extrapolated to several categories of immigrants and their descendents. Among other standards, the Court has held that states had a duty to investigate and sanction ethnic biases in the use of force by police officers. It has also ruled that a power-sharing arrangement that systematically excluded small minorities from political institutions was in breach of Article 14, even if it was aimed at promoting reconciliation and cooperation among other antagonistic groups. In the field of education, it has repeatedly condemned states for allowing the segregation of Roma children in inferior schools (see also Chapter 5).[167] Unlike CERD, however, the Court has so far abstained from establishing any obligation to accommodate minorities' cultural or religious practices.[168] As a result, it has upheld all bans on the display of religious symbols, as long as they did not explicitly target any particular faith.[169]

By shedding critical light on the long-term effects of public policies on the social position of ethnic minorities, the substantive equality approach espoused by ICERD and, to a lesser extent, the ECtHR offers a promising basis on which to construct an anti-racist interpretation of the right to non-discrimination. In this process, however, several dilemmas will need to be resolved, ranging from the most fundamental (who should be counted as belonging to an ethnic minority?) to the highly specific (when and how should organisations be encouraged or obliged to implement special measures in its favour?). Since the answers provided to the fundamental questions set the analytical framework for more specific issues, the following sections are organised in decreasing order of generality. Section 4.1 thus examines the basic enforcement apparatus that should be established in order to ensure the efficacy of anti-discrimination provisions in the field of labour relations. The rest of the chapter sets out

[167] Sandra Fredman, 'Emerging from the shadows: Substantive equality and Article 14 of the European Convention on Human Rights' (2016) 16 *Human Rights Law Review* 273-301.
[168] Except in cases of conscientious objection to military service. ECtHR, *Guide sur l'article 9: Liberté de pensée, de conscience et de religion* (CoE 2015) para 52-61, 64.
[169] Melanie Adrian, *Religious freedom at risk: The EU, French schools, and why the veil was banned* (Springer 2016) 45-77; Ángeles Solanes Corella, 'Límites a los derechos en el espacio público: mujeres, velos y convivencia' (2015) 31 *Cuadernos Electrónicos de Filosofía del Derecho* 62-91.

ways for states to harness this apparatus and spur different forms of positive action and cultural accommodation. Section 4.2 proposes that positive action should aim to foster the proportional representation of ethnic minorities in all organisations and professions, especially those with the greatest influence on public attitudes. This goal should be pursued through systematic and calibrated incentives. Section 4.3 argues that accommodation should be conceived as a way of enhancing the visibility of cultural minorities in the public sphere. To maximise this function and avoid negative side effects, priority should be given to the protection of symbolic identification, while all other practices that may conflict with organisational rules and processes should be treated in good faith.

4.1. Structural prevention of employment discrimination

Since the turn of the millennium, the EU Racial Equality Directive[170] has set the trends of Western European anti-discrimination policy, establishing legally binding standards backed by European Commission monitoring and training. By prohibiting direct as well as indirect discrimination based on racial or ethnic origin (Article 2), the Directive opens the door to transformative, forward-looking measures reflecting international human rights law's substantive conception of equality. This is reinforced by its broad personal and material scope, encompassing public and private bodies in the fields of employment, vocational training, social security, healthcare, education and the delivery of other goods and services available to the public (Article 3.1).

A closer look at its different provisions, however, reveals important limitations. Unlike ICERD, the Directive does not oblige states to collect ethnic statistics. In addition, it makes no distinction between institutionally driven discrimination and more diffuse actions caused by individual prejudices. A similar ambiguity surrounds the concept of indirect discrimination, which excludes practices that can be objectively

[170] 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.

justified as appropriate and necessary for the achievement of a legitimate aim. In this sense, a particular cause of worry is that the Directive explicitly leaves out nationality-based distinctions (Article 3.2). While it encourages states to develop stronger safeguards (Article 6), recent reports suggest that very few of them have done so.

As of 2012, only two states (Ireland and the United Kingdom) collected data on migration-related ethnicity in their censuses or official registers. Several others, mainly in the northern part of the continent, relied on proxies such as parents' country of birth, language spoken at home or religious affiliation. The rest only registered citizenship status and sometimes country of birth.[171] Even more problematically, data protection laws often make it impossible for public and private organisations to collect ethnic data on their workforce, despite EU regulations explicitly allowing such monitoring provided it is based on respondents' free consent, generally upholds their anonymity and serves a legitimate aim. Partly motivated by a desire to avoid the state-sponsored racism that has marred the 20th century, these prohibitions nonetheless impede the identification of discriminatory patterns.[172] Relatedly, they may go some way in explaining victims' lack of faith in the success of judicial litigation, regularly cited as a key reason for low rates of reporting and denunciation.[173]

Another reason for the limited efficacy of anti-discrimination laws is the failure of policymakers and courts to draw an acceptably clear line between illegal, tolerable and justified forms of differential treatment. Given the pervasiveness of discrimination and the politically sensitive nature of its sanction, this leads to cautious approaches reflected in high evidentiary standards (which can rarely be met in the absence of ethnic

[171] Patrick Simon, 'Collecting ethnic statistics in Europe: A review' (2012) 35 [8] *Ethnic and Racial Studies* 1366-1391; Patrick Simon, *'Ethnic' statistics and data protection in the Council of Europe countries. Study Report* (CoE 2007).
[172] John Wrench, 'Data on discrimination in EU countries: Statistics, research and the drive for comparability' (2011) 34 [10] *Ethnic and Racial Studies* 1715-1730; Timo Makkonen, *Measuring discrimination: Data collection and EU equality law* (Office for Official Publications of the European Communities 2007); Patrick Simon, 'Le rôle des statistiques dans la transformation du système de discrimination' (2003-2004) 48 *Confluences Méditerranée* 25-38: Jo Goodey, 'Racist violence in Europe: Challenges for official data collection' (2007) 30 [4] *Ethnic and Racial Studies* 570-589.
[173] European Commission, Joint Report on the application of Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin ('Racial Equality Directive') and of Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation ('Employment Equality Directive'), COM(2014) 2 final, 17 January 2014, 5-6.

statistics) and less than dissuasive penalties.[174] In the Swedish Labour Court, for instance, litigants won a dismal 4.3% of ethnic discrimination cases adjudicated between 1999 and 2009. Many courts have been reluctant to apply Article 8 of the Racial Equality Directive and shift the burden of proof on defendants once *prima facie* evidence of discrimination has been produced in civil cases, spurring the European Commission to provide specific training to legal practitioners.[175] While the Directive defines direct discrimination as treating one person less favourably than another 'is, has been or would be treated' in a comparable situation, its transposition in France, Ireland and Spain does not mention past or hypothetical comparators.[176] Standards of interpretation vary even more wildly in indirect discrimination cases. As of 2014, some jurisdictions had yet to establish any case law in this area[177] and the concept's implications for the legal status of third country nationals remained virtually unexplored.[178]

All these deficiencies in the implementation of anti-discrimination provisions have allowed structural employment discrimination to continue unabated. As we will see, greater compliance with international standards on the right to equality could do much to solve them, especially if such standards are developed and refined based on

[174] Katrin Wladasch, *The sanctions regime in discrimination cases and its effects* (Equinet 2015); Romanita Iordache and Iustina Ionescu, 'Discrimination and its sanctions – Symbolic vs. effective remedies in European anti-discrimination law' (2014) 19 *European Anti-Discrimination Law Review* 11-24; Milieu, *Comparative study on access to justice in gender equality and anti-discrimination law. Synthesis report* (European Commission Directorate General Justice 2011) 38-44.
[175] Lilla Farkas and Orlagh O'Farrell, *Reversing the burden of proof: Practical dilemmas at the European and national level* (Publications Office of the European Union 2015) 70-71, 74-76, 82-85; European Commission, Joint Report on the application of Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin ('Racial Equality Directive') and of Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation ('Employment Equality Directive'), COM(2014) 2 final, 17 January 2014, 9.
[176] Isabelle Chopin and Catharina Germaine, *Developing anti-discrimination law in Europe: The 28 EU member states, the Former Yugoslav Republic of Macedonia, Iceland, Liechtenstein, Norway and Turkey compared* (Publications Office of the European Union 2015) 46.
[177] Christa Tobler, *Limits and potential of the concept of indirect discrimination* (European Commission 2008); European Commission, Joint Report on the application of Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin ('Racial Equality Directive') and of Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation ('Employment Equality Directive'), COM(2014) 2 final, 17 January 2014, 8.
[178] Equinet, *Report on the implementation of the race and general framework directives* (2013) 13-14.

sociological and philosophical insights into the nature and morality of contemporary discrimination.

4.1.1. Ethnic monitoring

As mentioned above, authoritative interpretations of the right to equality impose an obligation on states to collect data on the social position of discriminated social categories, including ethnic minorities.[179] This entails the development of valid and ethical instruments to capture the stigmatised identities that are widely targeted as a basis for discrimination. While apparently simple, such a task has run into important difficulties, which remain to be fully acknowledged in international law and may explain its limited resonance in Western European jurisdictions.

At the empirical level, the theories of racism reviewed in Chapter 3 show that public attitudes towards various categories of immigrants and their descendants are the product of multiple, interrelated factors that vary in degree and kind across time, space and social sphere. Highly stigmatised ethnic markers (say, an Arab name) may increase in salience as a result of geopolitical dynamics, whereas others (a Native American phenotype) may carry colonial connotations in some countries and not in others. In a manufacturing hub, the workers that have been laid off as a result of outsourcing processes may develop an acute hostility toward the Asian shopkeepers selling the cheaper products.[180] To make things even messier, a given individual may evince different attitudes and behaviours in different contexts, depending on the identities and normative expectations that they bring to the fore.[181] Moreover, some ethnic markers

[179] Timo Makkonen, *Measuring discrimination: Data collection and EU equality law* (Office for Official Publications of the European Communities 2007) 21-25. See also Advisory Committee on the FCNM, Commentary ACFC/31DOC(2008)001 on the effective participation of persons belonging to national minorities in cultural, social and economic life and in public affairs, adopted on 27 February 2008, para 30-31.

[180] For an illustration of such dynamics at play in the looting of Chinese property in a Spanish manufacturing town, see Lorenzo Cachón Rodríguez, *Bases sociales de los sucesos de Elche de septiembre de 2004: Crisis industrial, inmigración y xenofobia* (Ministerio de Trabajo y Asuntos Sociales 2005).

[181] Alice Eagly and Amanda Diekman, 'What is the problem? Prejudice as an attitude-in-context', en John Dovidio, Peter Glick and Laurie Rudman (eds), *On the nature of prejudice: Fifty years after Allport*

(especially dress, but also mother tongue, place of residence or country of birth) can be alternatively manifested and hidden, altering their bearers' exposure to discriminatory treatment.[182] How, then, should decision-makers determine which ethnic markers to keep track of?

So far, European monitoring efforts have mainly come in the form of decennial censuses and residency registers, periodically complemented with smaller-scale thematic surveys.[183] In light of the above, this is clearly insufficient. Monitoring should be done in a decentralised way by all public and private organisations that share a legal responsibility for upholding the right to non-discrimination, including employers of sufficient size and administrative capacity (see Section 4.1.2). This would allow them to target the specific markers that structure perceptions and behaviour in their own institutional sphere, notwithstanding the simultaneous recourse to broader census categories.[184] Moreover, it should be conducted on a regular basis, with a view to detect any conjunctural change in intergroup dynamics. Of course, data collection methods should also be sufficiently efficient to avoid endless operations of ethnic identification. In the employment context, for instance, these could be limited to hiring and promotion procedures rather than repeated every time an employer reports on its workforce.

Having provisionally neutralised the challenge of validity, monitoring authorities would need to confront an even greater one: the ethical issues involved in the production of official statistics, and thus influential knowledge, which enhance the

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(Blackwell Publishing 2010) 19-35; Adam Pearson, John Dovidio and Samuel Gaertner, 'The nature of contemporary prejudice: Insights from aversive racism' (2009) 3 *Social and Personality Psychology Compass* 1-25; John Turner, Penelope Oakes, Alexander Haslam and Craig McGarty, 'Self and collective: Cognition and social context' (1994) *Journal of Personality and Social Psychology* 454-463.

[182] Melanie Eijberts and Conny Roggeband, 'Stuck with the stigma? How migrant Muslim women in the Netherlands deal –individually and collectively– with negative stereotypes' (2016) 16 [1] *Ethnicities* 130-153; Rusi Jaspal, 'The construction of ethnic identity: Insights from identity process theory' (2012) 12 [5] *Ethnicities* 503-530.

[183] For illuminating overviews, see Heinz Fassman, Ursula Reeger and Wiebke Sievers (eds), *Statistics and reality: Concepts and measurements of migration in Europe* (Amsterdam University Press 2009); Joan Font and Mónica Méndez (eds), *Surveying ethnic minorities and immigrant populations: Methodological challenges and research strategies* (Amsterdam University Press 2013).

[184] On the dialectics between nation-wide and institution-specific ethnic monitoring, as well as the analytical challenges they pose, see Laurence Brown, 'Vertical and horizontal approaches to the making of racial statistics in Britain' (2016) 39 [10] *Ethnic and Racial Studies* 1812-1830; Pablo Mateos, Alex Singleton and Paul Longley, 'Uncertainty in the analysis of ethnicity classifications: Issues of extent and aggregation of ethnic groups' (2009) 35 [9] *Journal of Ethnic and Migration Studies* 1437-1460

social salience of stigmatised identities. Historical and contemporary case studies have shown how the analytical categories mobilised by administrative agencies inevitably end up trickling into political, academic and media discourses, thus shaping public perceptions of social problems and appropriate responses.[185] Even without brandishing the scarecrow of ethnic cleansing, a somewhat far-fetched prospect in consolidated democracies, one may still worry about the risk of spreading the use of despective labels or promoting racial profiling by law enforcement officials.[186]

In human rights law, this particular issue has by now been largely settled through an established principle according to which identities should always be self-ascribed, unless a convincing justification is provided for external ascription.[187] This means that the ethnic categories included in censuses and other monitoring procedures should be those that minorities themselves see as sufficiently attractive to identify with them, despite the fact that they often carry negative connotations in the wider society. Such a safeguard ensures that openly derogatory labels ('Niggers' and 'Terrorists', as opposed to 'Blacks' or 'Africans' and 'Arabs' or 'Muslims') are kept out of official statistics and discourse. In the preparation of national censuses, ethnic input is usually sought through exploratory analyses on self-identification patterns and focus groups with a range of minority representatives. Another interesting approach, adopted in Canada, is to select and order census categories based on the self-identities declared in the previous census, including those that had not yet been listed.[188]

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[185] David Kertzer and Dominique Arel (eds), *Census and identity: The politics of race, ethnicity and language in national censuses* (Cambridge University Press 2001). See also Jennifer Elrick and Farah Schwartzman, 'From statistical category to social category: organized politics and official categorizations of persons with a migration background in Germany' (2015) 38 [9] *Ethnic and Racial Studies* 1539-1556; Frank de Zwart, 'Pitfalls of top-down identity designation: Ethno-statistics in the Netherlands' (2012) 10 [3] *Comparative European Politics* 301-318; Dirk Jacobs and Andrea Rea, 'Construction et importation des classements ethniques: Allochtones et immigrés aux Pays-Bas et en Belgique' (2005) 21 [2] *Revue Européenne des Migrations Internationales* 35-59.

[186] Laurence Brown, 'Vertical and horizontal approaches to the making of racial statistics in Britain' (2016) 39 [10] *Ethnic and Racial Studies* 1820; Costanza Hermanin, 'Counts in the Italian nomad camps: An incautious ethnic census of Roma' (2011) 34 [10] *Ethnic and Racial Studies* 1731-1750.

[187] Julie Ringelheim, 'Ethnic categories and European human rights law' (2011) 34 [10] *Ethnic and Racial Studies* 1686-1688.

[188] On the political and technical considrations that underlies the inclusion of ethnic categories in the census, see Peter Ratcliffe, 'Ethnic group, the state and the politics of representation' (2013) 34 [4] *Journal of Intercultural Studies* 308-313; Randa Kayyali, 'US census classifications an Arab Americans: Contestations and definitions of identity markers' (2013) 39 [8] *Journal of Ethnic and Migration Studies* 1299-1318; Peter Aspinall, 'Do the Asian categories in the British censuses adequately capture the Indian

Unfortunately, the ethical benefits of self-identification come at the cost of several new threats for scientific validity.[189] The first and most obvious is the lack of correspondence between the categories used by discriminators and discriminatees.[190] This typically happens when social discourses emphasise racial labels, often euphemised through broad geographical or cultural terms (Sub-Saharan, Asian, Caribbean, Latino), whereas minorities identify with particular nations, languages and/or religions. The second is concealment. Where an identity is strongly stigmatised, its bearers may doubt the benign aims of data collection and try to protect themselves by passing as members of the dominant group. In less conflictive contexts, refusal to acknowledge a visible ethnic background may stem from a subjective distanciation from the subordinated group.[191] The third is selectivity. Markers of ethnicity interact in complex ways with each other and a range of other characteristics, such as socio-economic status, sex or age, to influence self-perceptions.[192] However, there are only so many questions people can be asked to answer (and data users to process) in a given questionnaire.[193] The fourth is conceptual ambiguity. Most respondents understandably have no specific expertise in the field of ethnic relations, and experts themselves often

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sub-continent diaspora population?' (2013) 5 [2] *South Asian Diaspora* 179-195; Debra Thompson, 'Making (mixed-)race: census politics and the emergence of multirracial multiculturalism in the United States, Great Britain and Canada' (2012) 35 [8] *Ethnic and Racial Studies* 1409-1426; Rebecca Chiyoko King-O'Riain, 'Counting on the Celtic Tiger: Adding ethnic census categories in the Republic of Ireland' (2007) 7 [4] *Ethnicities* 516-542.

[189] See Patrick Simon, 'Collecting ethnic statistics in Europe: A review' (2012) 35 [8] *Ethnic and Racial Studies* 1366-1391; Peter Ratcliffe, 'Ethnic group and the population census in Great Britain: Mission impossible?' (2008) 1-2 *Ethnicity Studies* 64-84; Alain Blum and France Guérin-Pace, 'From measuring integration to fighting discrimination: The illusion of ethnic statistics' (2008) 26 [1] *French Politics, Culture and Society* 45-61.

[190] Peter Ratcliffe, 'Ethnic group, the state and the politics of representation' (2013) 34 [4] *Journal of Intercultural Studies* 308-313; Aliya Saperstein, 'Capturing complexity in the United States: Which aspects of race matter and when?' (2012) 35 [8] *Ethnic and Racial Studies* 1484-1502.

[191] Interestingly, US and British research suggests that lower socioeconomic status tends to correlate with less declaration of ethnicity. See Christel Kesler and Luisa Farah Schwartzman, 'From multicultural subjects to multicultural citizens: Social stratification and ethnic and racial classification among children of immigrants in the United Kingdom' (2015) 49 [3] *International Migration Review* 790-836; Ann Morning, 'The racial self-identification of South Asians in the United States' (2001) 27 [1] *Journal of Ethnic and Migration Studies* 71.

[192] Richard Crisp and Miles Hewstone, 'Multiple social categorization: Context, process, and social consequences' in Richard Crisp and Miles Hewstone (eds), *Multiple social categorization: Processes, models and applications* (Psychology Press 2006) 3-22.

[193] Debra Thompson, 'Making (mixed-)race: census politics and the emergence of multirracial multiculturalism in the United States, Great Britain and Canada' (2012) 35 [8] *Ethnic and Racial Studies* 1409-1426; Peter Aspinall, 'The future of ethnicity classifications' (2009) 35 [9] *Journal of Ethnic and Migration Studies* 1417-1435; Peter Aspinall, 'The conceptualisation and categorisation of mixed race/ethnicity in Britain and North America: Identity options and the role of the state' (2003) 27 *International Journal of Intercultural Relations* 269-296.

disagree on the meaning of concepts such as 'ethnicity', 'ancestry' or 'race'.[194] The fifth is fraudulent self-identification. When minority identities create rights to targeted benefits and can be chosen with complete freedom, opportunistic declarations may undermine the overall reliability of ethnic data as well as the purpose for which it was collected.[195]

No existing monitoring method simultaneously and completely addresses all of these problems, and it is doubtful whether one can be found. However, demographers have come up with a number of strategies to mitigate them.[196] To solve the lack of correspondence between ascribed (racial) and declared (ethnic) identities, they have primed respondents by offering 'White', 'Caucasian' or 'European' as a default choice, thus implicitly racialising the subsequent list of national, regional or linguistic labels. Alternatively, they have started by asking about affiliation to a 'visible minority' before inquiring about specific origins. At the analytical stage, they have aggregated fine-grained categories to make them correspond to the cruder ones perceived by potential discriminators. To tackle concealment, they have examined the factors behind identity choices and used them to correct for systematic biases. To reduce conceptual ambiguity, they have listed the most widespread ethnic identities, while simultaneously offering the possibility of writing in new or infrequent ones. To capture complexity, they have introduced mixed identity options, allowed multiple choices and asked separate questions about language, religion, sex and other personal characteristics. Some innovative approaches, such as those based on naming patterns, may eventually kill several birds with one stone.[197]

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[194] Mary Hickman, 'Census ethnic categories and second-generation identities: A study of the Irish in England and Wales' (2011) 37 [1] *Journal of Ethnic and Migration Studies* 79-97; Dirk Jacobs et al, 'The challenge of measuring immigrant origin and immigration-related ethnicity in Europe' (2009) 10 *International Journal of Migration and Integration* 67-88; Peter Aspinall, 'Approaches to developing an improved cross-national understanding of concepts and terms relating to ethnicity and race' (2007) 22 [1] *International Sociology* 41-70; Peter Aspinall, 'Collective terminology to describe the minority population: The persistence of confusion and ambiguity in usage' (2002) 36 [4] *Sociology* 803-816.

[195] Andrea Krizsán, 'Group self-determination, individual rights or social inclusion? Competing frames for ethnic counting in Hungary' (2012) 35 [8] *Ethnic and Racial Studies* 1403.

[196] For a compilation of problems and possible solutions, see Jonathan Burton, Alita Nandi and Lucinda Platt, 'Measuring ethnicity: Challenges and opportunities for survey research' (2010) 33 [8] *Ethnic and Racial Studies* 1332-1349.

[197] Pablo Mateos, *Names, ethnicity and populations: Tracing identity in space* (Springer 2014).

The adequacy of a given approach inevitably depends on the specific ethical and technical challenges faced by the organisation in charge of data collection and processing, including the protection of respondents' anonymity.[198] In some cases, especially when a stigmatised group is made up of relatively recent or phenotypically recognisable immigrants, objective indicators such as nationality, parents' birthplace or language spoken at home may be an effective way of capturing the grounds of discrimination.[199] Religion can also be registered as a proxy for ethnicity, a free-standing source of stigma or a way of differentiating between socially salient categories falling under a broader label (e.g. Muslim and Hindu Indians). This being said, such indicators are incapable of capturing the highly assimilated but racialised underclasses that have started to form in older countries of immigration. Attempts by Dutch agencies to track them through grand-parents' birth country, ominously reminiscent of the 'one-drop rule' that has long governed US race relations, provide a stark reminder of the risks involved in maintaining methods of ethnic monitoring which have oulived their scientific and political usefulness.[200]

At the end of the day, contextual variations in the operationalisation of ethnicity should not be seen as a proof of its scientific sterility but rather as a by-product of its dynamic and dual (internally and externally ascribed) character. Since a degree of conceptual ambiguity and measurement error is an intrinsic feature of any statistical enterprise, legal requirements to undertake ethnic monitoring should focus on the data's overall capacity to reveal important patterns of discrimination, leaving sufficient leeway for organisations to tailor methods to their specific means, function and surrounding environment.

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[198] On the adaptation of monitoring procedures to institutional objectives and constraints, see Sylvie Gravel, Annick Germain and Heidi Hoernig, 'Scientific, political, ethical or pragmatic issues in the collection of ethnic statistics: an exploratory survey in public institutions in Montreal' (2009) 10 *International Journal of Migration and Integration* 197-208.

[199] Sandrine Bertaux, 'Towards the unmaking of the French mainstream: The empirical turn in immigrant assimilation and the making of Frenchness' (2016) 42 [9] *Journal of Ethnic and Migration Studies* 1496-1512; Meenakshi Parameshwaran and Per Engzell, 'Ethnicity in England: What parents' country of birth can and can't tell us about their children's ethnic identification' (2015) 41 [3] *Journal of Ethnic and Migration Studies* 399-424; Christel Kesler and Luisa Farah Schwartzman, 'From multicultural subjects to multicultural citizens: Social stratification and ethnic and racial classification among children of immigrants in the United Kingdom' (2015) 49 [3] *International Migration Review* 790-836.

[200] Bowen Paulle and Barak Kalir, 'The integration matrix reloaded: From ethnic fixations to established versus outsider dynamics in the Netherlands' (2014) 40 [9] *Journal of Ethnic and Migration Studies* 1354-1374.

4.1.2. Administrative enforcement

The greatest contribution of ethnic monitoring to anti-discrimination law would be the possibility for courts to distinguish anecdotal, individualised discriminations from generalised patterns ingrained in the rules and practices of a whole organisation. This, in turn, would help solve a normative puzzle that has long bedevilled legal philosophers: what makes discrimination so wrong as to justify the limitations on long-standing associational and contractual freedoms imposed by equality laws?[201] Since the denial of a specific job, service or commodity cannot plausibly be construed as sufficient grounds for sanctions in a market economy, a number of additional principles have been read into anti-discrimination provisions, including dignity (or self-esteem), autonomy (or the capacity to choose among valuable life options), equality (or the elimination of prejudices and stigma), redistribution (or access to material goods), social inclusion (or active participation in society) and anti-subordination broadly speaking.[202] Beyond the normative, conceptual and empirical differences between these accounts, the most interesting aspect may be their universal agreement on the idea that it is usually the cumulative effect of multiple discriminations, not the harm caused by a single one, that makes them relevant from a moral and legal perspective. Consequently, what the law

[201] Bruno de Witte, 'The crumbling public/private divide: Horizontality in European anti-discrimination law' (2009) 13 [5] *Citizenship Studies* 515-525; Hugh Collins, 'The vanishing freedom to choose a contractual partner' (2013) 76 [2] *Law and Contemporary Problems* 71-88.

[202] Various combinations of these arguments can be found in Tarunabh Khaitan, *A Theory of Discrimination Law* (Oxford University Press 2015) 117-142; Benjamin Eidelson, *Discrimination and Disrespect* (Oxford University Press 2015); Kasper Lippert-Rasmussen, *Born Free and Equal? A Philosophical Inquiry into the Nature of Discrimination* (Oxford University Press 2014) 103-192; Tarunabh Khaitan, 'Dignity as an expressive norm: Neither vacuous nor a panacea' (2012) 32 [1] *Oxford Journal of Legal Studies* 1-19; Deborah Hellman, *When is Discrimination Wrong?* (Harvard University Press 2011); Colleen Sheppard, *Inclusive Equality: The relational dimensions of systemic discrimination in Canada* (McGill-Queen's University Press 2010); Sophia Moreau, 'What is discrimination?' (2010) 38 [2] *Philosophy and Public Affairs* 143-179; Oran Doyle, 'Direct discrimination, indirect discrimination and autonomy' (2007) 27 [3] *Oxford Journal of Legal Studies* 537-553; Hugh Collins, 'Discrimination, equality and social inclusion' (2003) 66 [1] *The Modern Law Review* 16-43; Cass Sunstein, 'The anticaste principle' (1994) 92 [8] *Michigan Law Review* 2410-2455; Larry Alexander, 'What makes wrongful discrimination wrong? Biases, preferences, stereotypes, and proxies' (1992) 141 *University of Pennsylvania Law Review* 194-199; John Gardner, 'Liberals and unlawful discrimination' (1989) 9 [1] *Oxford Journal of Legal Studies* 1-22; Owen Fiss, 'Groups and the equal protection clause' (1976) 5[2] *Philosophy and Public Affairs* 107-177; Paul Brest, 'Foreword: In defense of the antidiscrimination principle' (1976) 90 [1] *Harvard Law Review* 1-54.

should –and, to a certain extent, does– focus on is not the isolated action but the background structures that provide incentives for its systematic reproduction.[203]

From a descriptive standpoint, a number of socio-legal scholars have analysed the ways in which organisations may enable the entrenchment of discrimination despite the virtual disappearance of formal rules mandating the less favourable treatment of an ethnic minority. To avoid drawing the attention of law enforcement agencies, supervisors can simply transmit oral and covert instructions to their subordinates. A step down the ladder of institutionalisation, they may also discriminate in their own hiring and promotion decisions. To reiterate, such practices are not only rooted in conscious prejudices but also in automatic cognitive processes and strategic choices to satisfy the preferences of an organisation's employees, customers, beneficiaries or service providers. Finally, managers may refrain from discriminating themselves but fail to tackle discriminatory behaviour, sometimes amounting to harassment, among their employees.[204] If they are unaware of the situation, such passivity can be seen as a form of negligence.[205] When they refuse to take measures after receiving complaints from victims, however, it would be better characterised as intentional complicity.[206]

Building on all these insights, various proposals have been formulated in order to make anti-discrimination law more effective at preventing the structural entrenchment of biases in the workplace. One of the most suggestive would consist in

[203] For an early account of the centrality of organisational norms in discrimination law, see Christopher McCrudden, 'Institutional discrimination' (1982) 2 [3] *Oxford Journal of Legal Studies* 303-367. More recently, power-sensitive approaches to anti-discrimination have been defended in Fabrice Dhume, 'Du racisme institutionnel à la discrimination systémique? Reformuler l'approche critique' (2016) 28 [163] *Migrations Société* 51-64.

[204] Robert Nelson, Ellen Berrey and Laura Beth Nielson, 'Divergent parths: Conflicting conceptions of employment discrimination in law and the social sciences' (2008) 4 *Annual Review of Law and Social Science* 103-122; Ronald Craig, *Systemic discrimination in employment and the promotion of ethnic equality* (Martinus Nijhoff 2007) 91-124; Tristin Green, 'A structural approach as antidiscrimination mandate: Locating employer wrong' (2007) 60 [3] *Vanderbilt Law Review* 849-904; Christine Jolls, 'The law of implicit bias' (2006) 94 *California Law Review* 969-996; Tristin Green, 'Discrimination in workplace dynamics: Toward a structural account of disparate treatment theory' (2003) 38 *Harvard Civil Rights – Civil Liberties Law Review* 91-157; Linda Hamilton Krieger, 'The content of our categories: A cognitive bias approach to discrimination and equal employment opportunity' (1995) 47 *Stanford Law Review* 1161-1248; Cass Sunstein, 'Why markets don't stop discrimination' (1991) 8 [2] *Social Philosophy & Policy* 22-37.

[205] David Oppenheimer, 'Negligent discrimination' (1993) 141 *University of Pennsylvania Law Review* 899-972.

[206] Denise Réaume, 'Harm and fault in discrimination law: The transition from intentional to adverse effect discrimination' (2001) 2 *Theoretical Inquiries in Law* 349-385.

complementing the prevailing complaints-led approach, often difficult to reconcile with the low level of harm inflicted to any single victim, with a forward-looking one relying on the enforcement power of administrative agencies. Rather than a tort, most discrimination would thus be treated as a problem of distributive justice or, to put it differently, as a form of continuous 'social pollution'.[207] Under this model, the role of the state would focus on identifying the worst 'polluters' and prodding them to find their own solutions to employment inequality. This would be achieved by using the threat of sanctions as an incentive for all organisations to uphold minimal anti-discrimination requirements. Instead of setting a host of detailed, across-the-board rules, legislators would leave employers sufficient leeway to design context-sensitive mechanisms adapted to their specific structure and mission. At the same time, the enforcement process would create an opportunity for dialogue and mutual learning among managers, regulators and courts. Along the way, various institutions would accumulate systematic knowledge on the effectiveness of different remedies to discrimination, paving the way for the refinement and consolidation of legal standards. Employers would be encouraged to harness the expertise of various intermediaries with an interest in equality issues, such as trade unions, insurance companies, consultants, researchers and professional associations. Lawyers would retain a key role in signalling the risks of sanction generated by discriminatory patterns but would collaborate with the other actors to translate legal norms into specific organisational practices.[208]

As any transformative policy, the structural approach to anti-discrimination would need to address the risk of being turned by vested interests into a merely cosmetic exercise. Various studies have shown that ambiguous procedural duties create incentives for organisations to manifest an outward commitment to equality norms by conducting diversity training, adopting codes of pratice and setting up grievance

[207] Elizabeth Sarine, 'Regulating the social pollution of systemic discrimination caused by implicit bias' (2012) 100 *California Law Review* 1359-1400; Julie Chi-hye Suk, 'Antidiscrimination law in the administrative state' (2006) 2 *University of Illinois Law Review* 405-474.

[208] Frank Dobbin and Alexandra Kalev, 'The architecture of inclusion: Evidence from corporate diversity programs' (2007) 30 *Harvard Journal of Law & Gender* 280-301; Susan Sturm, 'The architecture of inclusion: Advancing workplace equity in higher education'(2006) 29 *Harvard Journal of Law & Gender* 247-334; Sandra Fredman, 'Changing the norm: Positive duties in equal treatment legislation' (2005) 12 [4] *Maastricht Journal of European & Comparative Law* 369-397; Susan Sturm, 'Second generation employment discrimination: A structural approach' (2001) 101 *Columbia Law Review* 458-568.

mechanisms, despite inconclusive proof of their effectiveness.[209] At the same time, they are encouraged to avoid collecting statistics or producing any document that may be used in a lawsuit and even to exclude minority workers altogether so as to prevent discrimination complaints upon dismissal.[210] This virtually guarantees the long-term maintenance of exclusive organisational norms.[211]

To sidestep such pitfalls, a number of minimal substantive duties should be imposed on employers. As explained in Section 4.1.1, they should be required to collect valid data on the ethnic composition of their staff, disaggregated by professional status and level of responsibility. The categories of self-identification should mirror those used in national censuses or other large-scale surveys closely enough to enable systematic comparisons between organisational and broader social patterns. Secondly, they should use this information in order to identify barriers to ethnic inclusion and draw up an equality plan to remove them. This plan should specify the responsibilities of different staff, including senior managers, and hold them accountable for the attainment of its objectives. It should also set numerical diversity goals to be reached or maintained within a given time frame. Finally, all measures should be subjected to periodical monitoring and adjustment.[212]

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[209] Elizabeth Levy Paluck and Donald Green, 'Prejudice reduction: what works? A review and assessment of research and practice' (2009) 60 *Annual Review of Psychology* 339-367; Alexandra Kalev, Erin Kelly and Frank Dobbin, 'Best practices or best guesses? Assessing the efficacy of corporate affirmative action and diversity policies' (2006) 71 [4] *American Sociological Review* 589-617; Clark Freshman, 'Prevention perspectives on "different" kinds of discrimination: From attacking different "isms" to promoting acceptance in critical race theory, law and economics, and empirical research' (2003) 55 [6] *Stanford Law Review* 2317-2325; Kimberly Krawiec, 'Cosmetic compliance and the failure of negotiated governance' (2003) 81 *Washington University Law Review* 487-544; Susan Bisom-Rapp, 'An ounce of prevention is a poor substitute for a pound of cure: Confronting the developing jurisprudence of education and prevention in employment discrimination law' (2001) 22 [1] *Berkeley Journal of Employment & Labor Law* 1-48; Lauren Edelman, 'Legal ambiguity and symbolic structures: Organizational mediation of civil rights law' (1992) 97 [6] *American Journal of Sociology* 1531-1576.

[210] Paul Oyer and Scott Schaefer, 'The unintended consequences of the '91 Civil Rights Act' (2003) *Regulation* 42-47; Susan Sturm, 'Second generation employment discrimination: A structural approach' (2001) 101 *Columbia Law Review* 521, 552; Susan Bisom-Rapp, 'Bulletproofing the workplace: Symbol and substance in employment discrimination law practice' (1999) 26 *Florida State University Law Review* 959-1047.

[211] Tristin Green and Alexandra Kalev, 'Discrimination-reducing measures at the relational level' (2008) 59 *Hastings Law Journal* 1435-1461.

[212] Sandra Fredman, 'Making a difference: The promises and perils of positive duties in the equality field' (2008) 6-7 *European Anti-Discrimination Law Review* 49-50; Ronald Craig, *Systemic discrimination in employment and the promotion of ethnic equality* (Martinus Nijhoff 2007) 248-269; Bob Hepple, Mary Coussey and Tufyal Choudhury, *Equality: A new Framework. Report of the independent review of the enforcement of UK anti-discrimination legislation* (Hart Publishing 2000) 65-72.

The administrative enforcement of these duties should follow an iterative process characterised by a gradual increase in coercive pressure. Before taking any action against an employer, enforcement agencies should develop user-friendly guidelines explaining the meaning of the legal duty and the ways of discharging it. These should be made available on the Internet and strategically disseminated in the form of handbooks, information kits or codes of practice targeted at different types of organisations. The next step would consist in reviewing their equality plans and reports and conducting on-site inspections in organisations displaying signs of inadequate compliance. If the diagnosis is confirmed, the agency would negotiate with the employer and extract a written commitment on the remedies to be implemented. Subsequent reviews would verify that these promises have been duly followed through. Only in cases of employer failure to take appropriate action would the agency call on courts to impose a dissuasive sanction, such as a fine, a public condemnation, licence suspension, or debarment from state subventions and tenders.[213]

Since external pressures to avoid acting on stereotypes tend to increase their availability among individuals who lack a strong commitment to fair treatment, heavy-handed enforcement may inadvertently increase intergroup anxiety and hostility.[214] Consistent with the principle of judicial restraint, sanctions should therefore be calibrated so as to take into account the level of support for anti-discrimination norms among employers and the larger population. This would avoid the disproportionate attribution of responsibility for deeply rooted social problems to specific organisations.[215] As a general rule, legal duties should be proportionate to their bearers' size and financial resources. Temporary imbalances in workforce composition should trigger administrative scrutiny, but only their longer-term entrenchment should give rise to a sanction.

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[213] Sandra Fredman, 'Making a difference: The promises and perils of positive duties in the equality field' (2008) 6-7 *European Anti-Discrimination Law Review* 50-51; Ronald Craig, *Systemic discrimination in employment and the promotion of ethnic equality* (Martinus Nijhoff 2007) 273-290; Bob Hepple, Mary Coussey and Tufyal Choudhury, *Equality: A new Framework. Report of the independent review of the enforcement of UK anti-discrimination legislation* (Hart Publishing 2000) 56-59.

[214] Katharine Bartlett, 'Making good on good intentions: The critical role of motivation in reducing implicit workplace discrimination' (2009) 95 [8] *Virginia Law Review* 1893-1972.

[215] Nicholas Mark Smith, *Basic equality and discrimination: Reconciling theory and law* (Ashgate 2011) 148-157; Samuel Bagenstos, 'The structural turn and the limits of antidiscrimination law' (2006) 94 [1] *California Law Review* 1-47;

This approach, largely developed in the Anglo-Saxon context, would dovetail with the cross-national institutional developments triggered by Article 13.2 of the Racial Equality Directive. This ambitious but somewhat imprecise provision obliges all member states to designate an equality body for the promotion of equal treatment, with competencies to provide legal assistance to victims of discrimination, conduct surveys and publish reports and recommendations. Before its adoption, only the United Kingdom, the Netherlands, Sweden, Belgium and Ireland had set up administrative agencies with a mandate in this field. The Directive stimulated a Europe-wide experiment whose results have been shaped by domestic legal and institutional traditions as well as varying degrees of political opposition to its implementation. While some of the agencies quickly gained a high profile by conducting high-quality research, disseminating their results and mobilising legal actors, insufficient resources or independence has forced others to rely on the capacities of civil society and pre-existing public authorities. To improve their effectiveness, the European Commission has funded a number of comparative studies and set up a network to exchange good practice.[216]

Thanks to the expertise and data they accumulate in the course of their activities, equality bodies find themselves in an ideal position to enforce employers' duty to correct policies or practices with discriminatory effects.[217] As it stands, however, the EU Directive offers an insufficient legal basis for such interventions. To effectively protect ethnic minorities' right to be free from discrimination in employment, courts should oblige states to strengthen their enforcement apparatus. In particular, they should make sure that parliaments rather than executives appoint most of equality bodies' board members and provide them with adequate and predictable

[216] European Commission, *Developing anti-discrimination law in Europe: The 28 EU member states, the Former Yugoslav Republic of Macedonia, Iceland, Liechtenstein, Norway and Turkey compared* (Publications Office of the European Union 2015) 114-127; Bruno de Witte, 'New institutions for promoting equality in Europe: Legal transfers, national bricolage and European governance' (2012) 60 *American Journal of Comparative Law* 49-74; Margit Ammer et. al., *Study on equality bodies set up under Directives 2000/43/EC, 2004/113/EC and 2006/54/EC. Synthesis report* (Human European Consultancy/Ludwig Boltzmann Institute of Human Rights 2010); Rikki Holtmaat, *Catalysts for change? Equality bodies according to Directive 2000/43/EC – Existence, Independence and effectiveness* (Office for Official Publications of the European Communities 2007).

[217] Equinet, *Joint responsibility for equal treatment: How equality bodies work with duty bearers* (2013); Equinet, *The bigger picture: Equality bodies as part of the national institutional architecture for equality* (2014); Niall Crowley, *Making Europe more equal: A legal duty?* (Equinet 2016).

funding, with a view to guarantee their genuine independence. More substantively, anti-discrimination agencies should be empowered to launch investigations and request organisations to produce necessary evidence. Finally, they should have standing to take judicial action against non-complying employers, an essential condition for their counselling and negotiations to deliver tangible results.[218]

Focusing the enforcement of employment equality on structures rather than discrete actions would solve several of the problems that have plagued the tort-based approach in a single stroke.[219] Underreporting would be sharply reduced, since complaints would be brought by independent actors rather than employees risking retaliation. Proof would become much easier with employers' obligation to produce statistics on ethnic representation, segregation and stratification. Any doubt about fault would also be dispelled if they fail to collaborate with regulators or implement agreed remedies.

A structural approach would also help elucidate two interpretive problems that will be further explored in the following sections. The first is the legitimacy of reverse discrimination or positive action, which becomes less surprising once it is explicitly acknowledged that the isolated denial of a position or benefit usually does not justify the imposition of an administrative sanction or the award of damages. The second is the conceptual link between direct and indirect discrimination, and the reasons for the greater scrutiny usually applied to the former. A structural perspective makes us aware that both explicitly discriminatory rules and formally neutral ones can generate discriminatory behaviour, and that employers are often aware of this fact. Therefore, the normative difference between them does not reside in agents' intentionality so much as in the fact that explicitly discriminatory rules necessarily affect all minority members

[218] ECRI, General policy recommendation No. 7 on national legislation to combat racism and racial discrimination, 13 December 2002, para 24-28; CoE, Opinion of the Commissioner for Human Rights on national structures for promoting equality, CommDH(2011)2, Strasbourg, 21 March 2011; Equinet, *Developing standards for equality bodies* (2016); Janet Cormack and Jan Niessen, 'The independence of equality bodies' (2005) 1 *European Anti-Discrimination Law Review* 23-28.

[219] For systematic analyses of these problems, see Vincent-Arnaud Chappe, *L'égalité en procès. Sociologie politique du recours au droit contre les discriminations au travail* (PhD thesis, École Normale Supérieure de Cachan, 2013); Sandra Fredman, *Discrimination law* (Oxford University Press 2011) 280-295; Ronald Craig, *Systemic discrimination in employment and the promotion of ethnic equality* (Martinus Nijhoff 2007) 125-160.

(rather than a disproportionate number of them) and convey a clear stigmatising message, which in turn increases their harmfulness. Harm considerations further explain why courts can legitimately allow individual conduct amounting to direct discrimination while simultaneously sanctioning institutionalised practices that, while avoiding any ethnic classification, encourage the multiplication of such actions.[220]

4.1.3. Mitigation of nationality discrimination

A structural approach to the prevention of employment discrimination should not confine itself to the monitoring of organisational practices but extend to the legal framework that provides incentives for their adoption, maintenance and modification. In particular, the labour market position of ethnic minorities should be understood as partly determined by the labour rights attributed to foreign nationals. In the Western European context, these rights are embedded in a crucial distinction between EU citizens, whose legal status closely mirrors that of local workers, and third-country nationals, who fall under a different and less protective regime. Given that the EU/non-EU cleavage partly maps onto White/non-White identities, this situation has far-reaching implications for processes of ethnic segregation and stratification. Until now, however, nationality-based distinctions in the enjoyment of labour rights have largely remained under the radar of anti-discrimination law.

At least four cross-national features of current citizenship regimes seem to deserve racial equality scrutiny. At the most precarious end of the employment spectrum, irregular migrants are often impeded from exercising basic social rights such as those of joining a union, forming an association or receiving legal aid. When they come into contact with public authorities, they are also exposed to identification,

[220] For similar arguments, see Frej Klem Thomsen, 'Stealing bread and sleeping beneath bridges – Indirect discrimination as disadvantageous equal treatment' (2015) 2 [2] *Moral Philosophy and Politics* 299-327; Ryan Cook, 'Discrimination revised: Reviewing the relationship between social groups, disparate treatment, and disparate impact' (2015) 2 [2] *Moral Philosophy and Politics* 219-244.

detention and deportation.[221] The ensuing vulnerability and isolation makes them unlikely to denounce abusive employment conditions, compounded by uneven workplace inspections and sanctions.[222] While somewhat better protected, temporary migrants also enjoy limited access to social benefits and often depend on a specific job, employer or economic sector for the maintenance or renewal of their residence permits. This pushes them into the less attractive occupations rejected by the local population and, not infrequently, (back) into irregularity.[223] Thanks to EU rules on the status of long-term residents,[224] those whose legal stay extends over five years can escape such acute problems under certain conditions.[225] Nevertheless, they are still kept out of many prestigious and stable public sector jobs set aside for EU citizens and their family

[221] Ángeles Solanes Corella and María Belén Cardona, *Protección de datos personales y derechos de los extranjeros inmigrantes* (Tirant lo Blanch 2005).

[222] FRA, *Severe labour exploitation: Workers moving within or into the European Union. States' obligations and victims' rights* (Publications Office of the European Union 2015); European Commission, Communication from the Commission to the European Parliament and the Council on the application of Directive 2009/52/EC of 18 June 2009 providing for minimum standards on sanctions and measures against employers of illegally staying third country nationals, COM(2014) 286 final, Brussels, 22 May 2014; 178-181; Michael Bommes and Giuseppe Sciortino, 'In lieu of a conclusion: Steps towards a conceptual framework for the study of irregular migration' in Michael Bommes and Giuseppe Sciortino (eds), *Foggy social structures: Irregular migration, European labour markets and the welfare state* (Amsterdam University Press 2011) 213-228; Thanos Maroukis, Krystyna Iglicka and Katarzyna Gmaj, 'Irregular migration and informal economy in Southern and Central-Eastern Europe: Breaking the vicious cycle?' 49 [5] *International Migration* 129-156; Franck Düvell, 'Undocumented migration in Europe: A comparative perspective' in Franck Düvell (ed), *Illegal immigration in Europe: Beyond control?* (Palgrave Macmillan 2006) 171-196.

[223] Domenica Urzi, 'Global citizenship: The need for dignity and respect for migrants' in Louise Waite et al. (eds), *Vulnerability, exploitation and migrants: Insecure work in a globalised economy* (Palgrave Macmillan 2015) 215-229; Bridget Anderson, 'Migration, immigration controls and the fashioning of precarious workers' (2010) 24 [2] *Employment and Society* 300-317; Martin Ruhs and Bridget Anderson, *Who needs migrant workers? Labour shortages, immigration and public policy* (Oxford University Press 2010); Lorenzo Cachón Rodríguez, *La 'España inmigrante': marco discriminatorio, mercado de trabajo y políticas de integración* (Anthropos 2009); Ivana Fellini, Anna Ferro and Giovanna Fullin, 'Recruitment processes and labour mobility: The construction industry in Europe' (2007) 21 [2] *Work, Employment and Society* 277-298; Stephen Castles, 'Guestworkers in Europe: A resurrection?' (2006) 40 [4] *International Migration Review* 741-766; Martin Ruhs, 'The potential of temporary migration programmes in future international migration policy' (2006) 145 [1-2] *International Labour Review* 7-36; Kitty Calavita, 'Immigrants at the margins: Law, race and excusion in Southern Europe' (Cambridge University Press 2005) 22-74; Ángeles Solanes Corella, 'La irregularidad que 'genera' la Ley de Extranjería: Un factor a tener en cuenta en una futura reforma' (2003) 4 *Revista de Derecho Migratorio y Extranjería* 125-139.

[224] Council Directive 2003/109/EC of 25 November 2003 concerning the status of third-country nationals who are long-term residents [2004] OJ L 16/44.

[225] Depending on the member state, these may include a minimal income, language proficiency, knowledge about the receiving society, lack of criminal record and fees. See European Commission, Report for the Commission to the European Parliament and the Council on the application of Directive 2003/109/EC concerning the status of third-country nationals who are long-term residents, COM(2011) 582 final, Brussels, 28 September 2011, 2-4

members.[226] Since naturalisation requisites sometimes include over 10 years of legal residence, prohibitive fees, loss of the previous nationality and stringent or discretionary cultural tests, such a situation can last for a significant part of their working lives.[227] Another difficulty, which foreign nationals share with naturalised citizens, is the non-recognition of foreign academic and professional credentials.[228] The fact that related international agreements are often reached through bilateral or regional negotiations often subordinates migrant opportunities for professional advancement to the vicissitudes of geopolitical alliances.[229]

While these legal hurdles go a long way in explaining the employment segregation of migrants and their descendants, they may sometimes be justified by the aims of safeguarding the quality of professional services or, more controversially, balancing labour supply and demand. Indeed, one way of understanding migrants' precarious status is through the long-standing tension between the functions of worker protection and labour supply regulation that underlie labour law. Whereas the former function has tended to increase in relative importance, the regulation of migrant rights remains highly influenced by the perceived interests of national workers as well employers, consumers and taxpayers.[230] In other words, it is fine-tuned to ensure that their presence yields major economic benefits for receiving societies, for instance by preventing labour-intensive industries from going offshore, maximising tax revenue, cutting public expenses or constraining inflation. From a global perspective, their less favourable conditions may also be justified as a precondition for opening up the labour markets of high-income countries, consequently boosting migrant income and remittance flows.[231]

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[226] Thomas Huddleston, Özge Bilgili, Anne-Linde Joki and Zvezda Vankova, *Migrant integration policy index 2015* (CIDOB/MPG 2015) 13-22.
[227] Thomas Huddleston, Özge Bilgili, Anne-Linde Joki and Zvezda Vankova, *Migrant integration policy index 2015* (CIDOB/MPG 2015) 57-62.
[228] IOM, *Recognition of qualifications and competences of migrants* (2013).
[229] Eva Hartmann, 'The role of qualifications in the global migration regime' (2008) *GARNET Working Paper 39/08*.
[230] Mark Freedland and Cathryn Costello, 'Migrants at work and the division of labour law' in Cathryn Costello and Mark Freedland (eds), *Migrants at work: Immigration and vulnerability in labour law* (Oxford University Press 2014) 1-28.
[231] Martin Ruhs, *The price of rights: Regulating international labor migration* (Princeton University Press 2013).

However, courts should avoid uncritically taking for granted the magnitude, sustainability and legitimacy of such benefits. For one thing, they should be weighed against the considerable long-term costs of ethnic stigmatisation driven by employment segregation and stratification. In this sense, the sustained ethnicisation of low-wage sectors or occupations such as agriculture, food processing, cleaning or domestic work would need to be viewed with particular suspicion. Court should also heed the tendency of ethnic stratification not only to reflect but also widen the gap between stable, prestigious and well-paid jobs and short-term, devalued and underpaid ones. By diminishing the bargaining power of low-skilled local workers, the employment of underprotected migrants puts downward pressure on everyone's conditions,[232] further increasing perceptions of economic threat and exacerbating racism. Even when businesses rely on international recruitment as an alternative to offshoring in order to remain globally competitive, it appears morally problematic to impede their displacement to developing countries by importing cheap labour from these same countries. As the rise of Asian manufacturing hubs suggests, world inequalities may be better tackled by promoting exports in labour-rich countries[233] than by relying on the uncertain and contingent 'multiplier' effects of emigrant remittances.[234] Finally, it is doubtful whether nationality requirements for employment in the public service and the recognition of qualifications actually stem from any preoccupation with professional competence. If this were the case, it would be hard to explain why migrant workers who benefit from faster naturalisation procedures (either because they have married a national citizen or because of the historical relationship with their country of origin) automatically become entitled to access various professions. Without denying that requirements for quick naturalisation may sometimes correlate with job-related skills, the absence of rigorous studies showing such a link should be interpreted as an indication that other considerations, including national prejudices, have shaped labour regulations.

[232] Georg Menz, 'Employers and migrant legality: Liberalization of service provision, transnational posting and the bifurcation of the European labour market' in Cathryn Costello and Mark Freedland (eds)., *Migrants at work: Immigration and vulnerability in labour law* (Oxford University Press 2014) 44-59.
[233] United Nations Conference on Trade and Development, *World Investment Report 2013: Global Value Chains: Investment and Trade for Development* (2013);
[234] Hein de Haas, 'Migration and development: A theoretical perspective' (2010) 44 [1] *International Migration Review* 227-264.

As is often the case in human rights interpretation, drawing the line between legitimate restrictions on migrants' labour rights and indirect racial discrimination will often involve complex empirical and normative assessments. Given European states' reluctance to ratify ICRMW and the explicit exemption of immigration and citizenship policy from the scope of ICERD (Articles 1.2 and 1.3) and the EU Racial Equality Directive, it may therefore be some time before courts take ambitious steps to restrict states' currently broad discretion in this area. In the short term, they may nevertheless rely on international soft law to impose effective measures against the main sources of migrant precariousness.[235] Once an employment relationship has started, all migrant workers should enjoy core social rights on a par with national citizens, including freedom of association and assembly, collective bargaining, access to legal aid, minimum remuneration, days of rest and social benefits. In order to empower those in an irregular situation, providers of public services should be prohibited from sharing their data with immigration enforcement agencies. Victims of severe labour exploitation should be encouraged to denounce their employers by offering them the possibility of regularising their status if the latter are found guilty of the alleged offences.[236] As stipulated in the EU Employer Sanctions Directive[237], administrative enforcement should be effectively extended to all industries, including domestic work in private households. Inspectors should meet with workers, resorting to interpreters when necessary, and receive specialised training to detect the symptoms of exploitation. All violations of migrant labour rights should give rise to compensatory and punitive sanctions, including criminal penalties for the most serious abuses.[238]

[235] For a legal argument that nationality exemptions should be interpreted narrowly and allow judicial scrutiny of the link between nationality and indirect racial discrimination, see Marjolein Busstra, *The implications of the racial equality directive for minority protection within the European Union* (Eleven International Publishing 2011) 42-45. CERD has espoused such an approach in its GC XXX on discrimination against non-citizens (2005).

[236] In a recent survey of 253 professionals working with victims of labour exploitation in Europe, being able to stay and make a living in a EU country was identified as their single most important concern. See FRA, *Severe labour exploitation: Workers moving within or into the European Union. States' obligations and victims' rights* (Publications Office of the European Union 2015) 74-75.

[237] Directive 2009/52/EC of the European Parliament and of the Council of 18 June 2009 providing for minimum standards on sanctions and measures against employers of illegally staying third-country nationals [2009] L 168/24.

[238] CMW GC No. 2 on the rights of migrant workers in an irregular situation and members of their families, CMW/C/GC/2, 28 August 2013, para 15, 16, 60, 62-65, 67, 70; CMW GC No. 1 on migrant domestic workers, CMW/C/GC/1, 23 February 2011, 38, 41, 42, 45, 46, 50, 52; UN Special Rapporteur on the human rights of migrants, Report A/HRC/26/35, para 71, 79, 83, 87, 88, 93, 96, 97, 100, 101, 102,

In the medium term, states should review all seasonal or temporary visa schemes and eliminate those that entrench the massive recourse to migrant workers in particular occupations, such as agriculture, domestic work and labour-intensive manufacturing. Likewise, they should modify any regulation that exposes migrants to lapse into irregularity due to economic circumstances beyond their control. This would probably include many sponsorship programmes that tie workers to a particular employer, sectoral limitations on the job opportunities of temporary visa holders and employment requirements for the renewal of temporary visas or the concession of permanent residency.[239] Courts should also scrutinise the rationality and proportionality of nationality requirements in public sector recruitment, academic validation procedures and professional licensing. When these are not observably and significantly related to job-relevant knowledge and skills, or when they could be replaced by other methods of evaluation, they should be characterised as indirect ethnic discrimination.[240]

4.2. Positive action

As we have seen, preventing ethnic discrimination in employment often requires paying specific attention to the situation of minorities and devising targeted measures to increase their recruitment or promotion opportunities. In recent years, the European Commission has taken an active role in promoting these efforts, including by setting up a platform where the signatories of national 'diversity charters' share their experiences and develop common solutions. In 2014, over 7000 firms, public bodies and NGOs employing over 13 million workers belonged to the network.[241] Their policies included reaching out to minority communities in recruitment campaigns, counting ethnic

103, 104, 106; ILO, *Multilateral framework on labour migration: Non-binding principles and guidelines for a rights-based approach* (International Labour Office 2006) 15-20.

[239] CMW GC No. 1 on migrant domestic workers, CMW/C/GC/1, 23 February 2011, para 53; UN Special Rapporteur on the human rights of migrants, Report A/HRC/26/35, para 90, 91, 92.

[240] For similar proposals on the interpretation of indirect discrimination in the recruitment context, see Sandra Fredman, 'Addressing disparate impact: Indirect discrimination and the public sector equality duty' (2014) 43 [3] *Industrial Law Journal* 349-363; Sandra Fredman, 'The reason why: Unravelling indirect discrimination' (2016) 45 [2] *Industrial Law Journal* 231-243.

[241] European Commission Directorate-General for Justice, *Overview of diversity management implementation and impact amongst Diversity Charter signatories in the European Union* (2014).

identities, networks, knowledge or language skills as a professional merit (notably in relation to political candidates), offering training and mentoring to minority employees and actively consulting their representatives.[242]

Such initiatives, usually referred to as 'temporary special measures' in international human rights law, 'positive action' in domestic statutes and 'diversity management' in corporate discourse, are explicitly allowed but not imposed by the EU Racial Equality Directive (Article 5). Despite the aforementioned advances, this permissive approach has perpetuated a widespread reluctance to develop ambitious programmes as well as formal rules prohibiting the use of ethnic criteria in public service recruitment.[243] Even more problematically, some courts have adopted an oppositional stance toward positive action and paralysed modest steps in this direction. In 2013, the Norwegian Equality and Anti-discrimination Ombud thus blocked a trainee programme for eight non-Western employees in a state directorate, aiming to raise their proportion to 5% of staff.[244] In Sweden, the Supreme Court awarded damages of 8000€ to two law school applicants who had been rejected due to an admission rule that set aside 10% of places for students whose parents were foreign-born.[245] While seemingly

[242] Yamina Meziani, 'From "reversed quota" to "invisible quota" in the recruitment of the descendants of immigrants for public service jobs. A comparative analysis of the local implementation of "diversity politics" in Ponac (France) and in New East Amsterdam (The Netherlands)' (2013) 4 [2] *Journal of Comparative Research in Anthropology and Sociology* 227-242; Maria Sobolewska, 'Party strategies and the descriptive representation of ethnic minorities: The 2010 British general election' (2013) 36 [3] *West European Politics* 615-633; Alexander Kirchberger, *Becoming a party of choice: A tool for mainstreaming* (Migration Policy Group 2011); PAMECUS, *Positive action measures in the European Union, Canada, United States and South Africa* (2009); Colm O'Cinneide, 'Comparative study on positive action in law and practice' in Yuwen Li and Jenny Goldschmidt (eds), *Taking employment discrimination seriously: Chinese and European perspectives* (Martinus Nijhoff 2009) 279-288; Alain Klarsfeld, 'The diffusion of diversity management: The case of France' (2009) 25 *Scandinavian Journal of Management* 363-373; Stefan Süss and Markus Kleiner, 'Dissemination of diversity management in Germany: A new institutionalist approach' (2008) 26 *European Management Journal* 35-47.

[243] European Commission, *International perspectives on positive action measures: A comparative analysis in the European Union, Canada, the United States and South Africa* (Office for Official Publications of the European Communities 2009) 22-42; Virginie Guiraudon, 'Equality in the making: implementing European non-discrimination law' (2009) 13 [5] *Citizenship Studies* 527-549; Catarina Reis Oliveira and Isabel Estrada Carvalhais, 'Immigrants' political claims in Portugal: Confronting the political opportunity structure with perceptions and discourses' (2017) 40 [5] *Ethnic and Racial Studies* 787-808; Peter Szlovak, 'Exploring the reasons for migrant under-representation in Irish electoral politics: The role of Irish political parties' (2017) 40 [5] *Ethnic and Racial Studies* 851-870.

[244] Isabelle Chopin and Catharina Germaine, *Developing anti-discrimination law in Europe: The 28 EU member states, the Former Yugoslav Republic of Macedonia, Iceland, Liechtenstein, Norway and Turkey compared* (Publications Office of the European Union 2015) 80.

[245] Christopher McCrudden and Sacha Prechar, *The concepts of equality and non-discrimination in Europe: A practical approach* (European Commission 2009) 40.

isolated, such decisions are likely to produce a 'chilling effect' on other employers seeking ways to increase the diversity of their workforce.[246]

Where decision-makers have tried to develop positive action schemes, a number of practical problems have arisen. Several studies have shown that they can accentuate zero-sum perceptions of job-related benefits and generate strong opposition from incumbent employees. Usually couched in the language of meritocracy, professional competence or general fairness, this resistance can hamper the implementation of proposed changes and trigger protracted conflicts. In addition, some forms of positive action actually increase rather than reduce segregation and stratification. This happens especially with market-led strategies that pigeonhole minority employees in stereotypical roles where their ethnicity may function as a job-relevant asset. For instance, minority salespersons, communication officers, consultants or product developers may be recruited to serve customers with a similar background; minority political candidates can be assigned to high-immigration districts and/or put in charge of integration issues. Because of prevailing role stereotypes and power imbalances, these positions are usually found at the bottom of the organisational hierarchy, in less prestigious positions offering limited opportunities for networking and advancement. Nevertheless, minority employees sometimes lend their support to such arrangements (and to the stereotypical premises that underpin them) as a second-best alternative to complete exclusion.[247]

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[246] Colm O'Cinneide, 'Positive action and the limits of existing law' (2006) 13 *Maastricht Journal of European and Comparative Law* 357-358.

[247] Lea Markard and Iris Dähnke, 'Contested discourses on diversity and practices of diversity incorporation in political parties in Germany' (2017) *Ethnic and Racial Studies* 1-21; Flora Burchianti and Ricard Zapata-Barrero, 'From participation to confinement: Challenges for immigrants' incorporation in political parties in Spain' (2017) 40 [5] *Ethnic and Racial Studies* 830-850; Lotte Holck, 'Putting diversity to work' (2016) 35 [4] *Equality, Diversity and Inclusion: An International Journal* 296-307; Silvia Razzani, 'Understanding approaches to managing diversity in the workplace' (2016) 35 [2] *Equality, Diversity and Inclusion: An International Journal* 154-168; David Knights Vedran Omanovic, '(Mis)managing diversity: exploring the dangers of diversity management orthodoxy' (2016) 35 [1] *Equality, Diversity and Inclusion: An International Journal* 5-16; Maddy Janssens and Patrizia Zanoni, 'Alternative diversity management: Organizational practices fostering ethnic equality at work' (2014) 30 *Scandinavian Journal of Management* 317-331; Lani Russell, 'Whiteness in Scotland: Shame, belonging and diversity management in a Glasgow workplace' (2014) 37 [8] *Ethnic and Racial Studies* 1371-1390; Renate Ortlieb and Barbara Sieben, 'The making of inclusion as structuration: empirical evidence of a multinational company' (2014) 33 [3] *Equality, Diversity and Inclusion: An International Journal* 235-248; Karen Celis, Silvia Erzeel, Liza Mügge and Alyt Damstra, 'Quotas and intersectionality: Ethnicity and gender in candidate selection' (2014) 35 [1] *International Political Science Review* 41-54; Dorte

These findings suggest that merely allowing positive action does not guarantee that the opportunity will be taken up, let alone that it will be done in a way that creates inclusive workplaces. For this to happen, public authorities need to take the lead and create incentives for well-designed measures. Their key objectives should be to garner and maintain broad support among workers, eliminate ethnic segregation and stratification, and maximise the contribution of workplace diversity to the improvement of interethnic attitudes in the wider society.

4.2.1. Public management and contractual incentives

Despite much official rhetoric on the 'business case' for diversity,[248] there is no necessary complementariness between the construction of egalitarian workplaces and the fulfilment of an organisation's other goals, be they assessed in terms of profitability or other forms of means-end efficiency.[249] This simple fact goes a long way in explaining why diversification efforts are often half-hearted and tokenistic, geared at mere compliance with anti-discrimination law rather than deeper changes in practices and dynamics. It also creates a collective action problem whereby organisations are encouraged to maintain discriminatory structures that would be unnecessary if others modified theirs. Given the exorbitant cost of enforcing equality laws on thousands of recalcitrant employers, any realistic attempt to generalise positive action measures would therefore need to complement legal sanctions against the worst offenders with financial incentives built into the management and contracting practices of public administrations.

Boesby Dahl, '"Making up" workers in an inclusive organisation: Inclusion and diversity in Danish parking patrol' (2014) 33 [3] *Equality, Diversity and Inclusion: An International Journal* 249-260; Martina Avanza, 'Qui représentent les élus de la "diversité"? Croyances partisances et points de vue de "divers"' (2010) 60 [4] *Revue Française de Science Politique* 745-767; Maddy Janssens and Patrizia Zanoni, 'Many diversities for many services: Theorizing diversity (management) in service companies' (2005) 58 [3] *Human Relations* 311-340.

[248] See eg European Commission, *Managing diversity at work: Realising the business benefits with European diversity charters* (Publications Office of the European Union 2012); European Commission, *Continuing the diversity journey: Business practices, perspectives and benefits* (Office for Official Publications of the European Communities 2008).

[249] Mike Noon, 'The fatal flaws of diversity and the business case for ethnic minorities' (2007) 21 [4] *Work, Employment and Society* 773-784.

In the significant part of the labour market that is directly controlled by national, regional and local authorities, managers' performance should partly be assessed on their capacity to reach the diversity targets set in their organisation's equality plan (see Section 4.1.2).[250] This criterion should then be given independent and significant weight in the payment of bonuses as well as retention and promotion decisions. This means that any organisational cost stemming from positive action –such as the appointment of a diversity officer to resolve related conflicts or the lesser satisfaction of prejudiced service users– could systematically be offset by the positive value attributed to the recruitment and retention of minority employees. The content of such rules and the specific personnel to which they apply should be transparently laid out in the organisation's equality plan and their effective implementation monitored by independent equality agencies or other institutions with inspection functions. Failure to adopt or follow them should be sanctioned as an instance of indirect discrimination, independently of the workforce composition obtaining at a specific point in time. Among other advantages, this would prevent manager negligence from undermining past efforts and reintroducing discriminatory patterns in an egalitarian organisation.

In most European countries, the basic legal framework for such an approach has already been set in the form of proactive duties for all public authorities to 'mainstream' or 'have regard to' equality issues, which obliges them to proactively modify practices that are likely to harm subordinated social categories. Most of these provisions focus on gender, but some also encompass ethnic minorities. Apart from the elaboration and monitoring of equality plans, which can be regarded as an element of anti-discrimination compliance, this has mainly been done by systematically conducting and publishing impact assessments of planned measures in collaboration with relevant stakeholders. The rationale for such requirements is to increase the influence of social groups whose perspectives and interests decision-makers tend to neglect, as well as hold the latter accountable through greater transparency. When a measure is adopted without adequate regard being paid to its impact, specialised equality agencies or individuals

[250] UN Independent expert on minority issues, Report A/HRC/13/23 of 7 January 2010, para 80; Advisory Committee on the FCNM, Commentary ACFC/31DOC(2008)001 on the effective participation of persons belonging to national minorities in cultural, social and economic life and in public affairs, adopted on 27 February 2008, para 41, 120-127.

may initiate a procedure of judicial review. If the court confirms the finding, it can issue a compliance notice and eventually impose a sanction.[251]

While potentially more transformative and forward-looking than minimal anti-discrimination requirements, the duty to have regard has been criticised for its vague and purely procedural nature, which raises the usual risks of cosmetic compliance. For instance, it does not clearly specify the steps that should be taken in order to ensure meaningful input of minority groups, which may be especially difficult where civil society is relatively amorphous or leaders do not represent all relevant interests.[252] As a result, impact assessments can be turned into a form-filling exercise that provides little information on prevailing realities and may even mask or legitimate persisting inequalities.[253] To circumvent this problem, some authorities have started to create a number of more specific duties.[254] Regarding gender, these may take the form of an obligation to favour the underrepresented sex when two job applicants are equally qualified, to invite equal numbers of women and men to an interview, to achieve rough parity on electoral lists or to appoint gender-balanced boards and consultative committees.[255] Given these precedents, it would only be a small step for courts to order the inclusion of ethnic diversity considerations in the activities of public managers.

At this point, it may be tempting to ask whether the same proactive obligations should be imposed on private businesses as part of their obligation to structurally prevent discrimination. However, there are prudential reasons for resisting such a move. These can be apprehended through the prism of the 'regulatory trilemma' that characterises legislative attempts to steer organisational practices. First of all, regulators must make sure that their intervention will not be ignored altogether. At the same time,

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[251] Sandra Fredman, *Making equality effective: The role of proactive measur*es (European Commission 2009).
[252] Sandra Fredman, 'Changing the norm: Positive duties in equal treatment legislation' (2005) 12 *Maastricht Journal of European & Comparative Law* 369-397.
[253] Sara Ahmed, '"You end up doing the document rather than doing the doing: Diversity, race equality and the politics of documentation' (2007) 30 [4] *Ethnic and Racial Studies* 590-609.
[254] Sandra Fredman, 'The public sector equality duty' (2011) 40 [4] *Industrial Law Journal* 405-427; Barbara Cohen, 'Duty in the United Kingdom to have due regard to equality' (2014) 18 *European Anti-Discrimination Law Review* 11-24.
[255] Sandra Fredman, *Making equality effective: The role of proactive measures* (European Commission 2009) 39-42.

they must avoid undermining the target's capacity to perform its specific functions. Closely linked to these two aims, they must protect regulations from perceptions of ambiguity, ineffectiveness and illegitimacy.[256] Regulating pay incentives would oblige equality bodies to make difficult judgements on the attribution of responsibility for anti-discrimination to specific managers. While this seems achievable for relatively stable and transparent public authorities, the variety, dynamism and privacy of corporate management renders it ill suited to heavy-handed supervision. The limited resources of equality bodies would thus be better spent by focusing on end results, namely workforce diversity, and leaving open the design of internal accountability mechanisms. Of course, this public/private distinction should not license authorities to off-load their equality obligations by contracting out the delivery of public services. To forestall this outcome, the managers in charge of such contracts should face the same incentives as public servants.

More flexible measures should also prod private employers to go beyond their minimal legal obligations. As part of their duty to promote equality, public contractors should seek to reward the most inclusive tenderers.[257] This could be done at several stages of the tendering procedure. For instance, suppliers who have infringed their equality obligations could be debarred for a fixed period of time or until they come into compliance. Awarding criteria could give an edge to applicants who have reached a diversity threshold, perhaps through voluntary adherence to diversity charters or labels. In a more ad hoc spirit, tenderers could be authorised to add a diversity-friendly variant to their standard offer. This would allow authorities to choose either the most cost-effective option or the one that gives greater weight to equity considerations, when it comes at a reasonable price.[258] Similar measures could be extended to state grants, subsidies, licensing and franchising.[259]

[256] Sandra Fredman, 'Breaking the mold: Equality as a proactive duty' (2012) 60 *American Journal of Comparative Law* 275.
[257] This is explicity allowed by Article 56.1 of Directive 2014/24/EU of the European Parliament and the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC [2004] L 94/65. On Scottish and Welsh regulations setting out such an approach, see Doug Pyper, *The public sector equality duty and equality impact assessments* (House of Commons Library 2015) 17-18.
[258] Thien Uyen Do, 'In the face of diversity: public procurement to promote social objectives' (2013) 16 *European Anti-Discrimination Law Review* 11-23; European Commission, *Buying social: A guide to*

Whatever the specific form positive action takes, it should by now be clear that its institutionalisation will often entail the broadening of prevailing notions of professional merit, which have figured prominently in debates on their legality and legitimacy.[260] In other words, it can only be justified under several normative and sociological premises: 1) merit partly depends on an individual's past or potential contribution to social justice; 2) ethnic recognition is an important component of social justice; 3) ethnic recognition will remain elusive as long as workplace segregation and stratification persist; and 4) segregation and stratification can only be countered through deliberate efforts to recruit and promote minority workers.[261] Premise 1 is a definitional issue that may be solved straightforwardly by highlighting how morality already suffuses merit principles.[262] Premise 2 has been tackled in Section 2.2 and premise 3 in Sections 3.2 and 3.3. Premise 4 is the focus of this chapter. Building on these foundations, the next sections will lay down the minimal substantive conditions that positive action should meet in order to serve its legitimate aims.

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taking account of social considerations in public procurement (Publications Office of the European Union 2010).

[259] Bob Hepple, Mary Coussey and Tufyal Choudhury, *Equality: A new Framework. Report of the independent review of the enforcement of UK anti-discrimination legislation* (Hart Publishing 2000) 85.

[260] Christopher McCrudden, 'Buying equality' (2009) 8 *European Anti-Discrimination Law Review* 17-26; María Ángeles Barrere Unzueta, 'Problemas del derecho antidiscriminatorio: Subordinación versus discriminación y acción positiva versus igualdad de oportunidades' (2001) 60 *Revista Vasa de Administración Pública. Herri-Arduralaritzako Euskal Aldizkaria* 145-166; Ronald Dworkin, *Sovereign virtue: The theory and practice of equality* (Harvard University Press 2000) 386-426; David Miller, *Principles of social justice* (Harvard University Press 1999) 156-202; David Giménez Gluck, *Una manifestación polémica del principio de igualdad: Acciones positivas moderadas y medidas de discriminación inversa* (Tirant lo Blanch 1999); John Edwards, *The morality of racial preference in Britain and America* (Routledge 1995).

[261] An analogous reasoning underlies the consequentalist defences of affirmative action set out in Elizabeth Anderson, *The imperative of integration* (Princeton University Press 2010) and Daniel Sabbagh, *Equality and transparency: A strategic perspective on affirmative action in American law* (Palgrave Macmillan 2007).

[262] Jesús García Cívico, 'El principio de mérito a la luz de los hechos sociales' (2014) *Anuario de Filosofía de Derecho* 191-216; Christopher McCrudden, 'Merit principles' (1998) 18 *Oxford Journal of Legal Studies* 543-579; David Miller, 'Deserving jobs' (1992) 42 [167] *The Philosophical Quarterly* 161-181.

4.2.2. Proportional representation

Having accepted the principled argument in favour of mandatory positive action in public management and contracting, one would still face the challenge of preventing its corruption into an instrument of ethnic segregation and stratification. This entails identifying the factual elements that should distinguish *prima facie* legitimate measures from direct discrimination.

A fruitful starting point for the inquiry is the concept of 'temporary special measures' by which positive action is usually referred to in the UN context. This formulation constitutes something of a puzzle once it is recognised that structural patterns of discrimination normally cannot be transformed so quickly as to make targeted support unnecessary in the short run. As a matter of fact, positive action schemes have displayed a remarkable propensity to increase in scope rather than wither away over time.[263] Admittedly, the degree and kind of stigma born by ethnic minorities is bound to vary as part of broader structural changes, which should be reflected in monitoring procedures and equality plans (see Section 4.1.1). However, these contingent processes hardly explain ICERD's insistence on discontinuing special measures when 'the objectives for which they were taken have been achieved' (Article 1.4). How, then, should we understand the nature of these objectives?

A more satisfying interpretation would locate them at the level of particular organisations rather than society as a whole. On this reading, the question whether racism as such will exist in the foreseeable future is already settled. For policymakers and courts, what must therefore be examined is the empirical link between specific measures and racist attitudes, a link that can only be discovered by looking at their predictable consequences within the organisation that implements them. If ethnic segregation and stratification are key drivers of racism in the employment context, it

[263] Thomas Sowell, *Affirmative action around the world: An empirical study* (Yale University Press 2004).

follows that their reduction should be the main measuring rod of positive action's effectiveness, legitimacy and legality.[264]

Several rules of thumb can be deduced from this. First of all, beneficiaries should belong to ethnic categories that are underrepresented in the organisation at the time when the measure is adopted. The list of categories should be based on the results of periodical workforce monitoring and updated accordingly. In addition, it should disaggregate all identities that are widely used as cues for evaluation and discrimination. For instance, where Peruvians and Argentinians elicit significantly different stereotypes, they should not be lumped together under an all-encompassing 'Hispanic' label. If adequately applied, this rule would forestall attempts to make up for the underrepresentation of a strongly stigmatised category by enlisting a similar but higher-status one. Since ethnic stereotypes are often strongly gendered, the categories should themselves be disaggregated by sex and possibly other relevant characteristics.

Implicit in the notion of representation is a comparison between the proportion of minority members in a given organisation and some larger unit. This raises two important methodological questions: how to delimit the relevant unit and how to measure its ethnic component. To the extent that prejudice reduction is seen as the core purpose of positive action, the answer to both questions will ultimately hinge on theories of ethnic relations and more normative judgements on the relative weight of ethnic recognition and conflicting principles, including utilitarian ones.

At the theoretical level, we have already seen that many of the processes leading to ethnic prejudice are national in scope, partly because of the wide-ranging prerogatives of national authorities and partly because of the influence exerted by the national media. This suggests that positive action would be most effective if it were geared at the inclusion of all nationally stigmatised minorities in all workplaces. In

[264] This approach resonates with the US Supreme Court doctrine, largely developed in the educational context, that characterises 'diversity' as a compelling state interest which dispenses differential treatment from the strict scrutiny test. See Elizabeth Anderson, 'Racial integration as a compelling interest' (2004) 21 [1] *Constitutional Commentary* 15-40. The Canadian Supreme Court also justified positive action as a way of breaking down (gender) role stereotypes in Action travail des femmes v Canadian national railway co (1987) i SCR 1114, 40 DLR (4) 193.

practice, however, the concentration of immigrants and their offspring in a limited number or large and mid-sized cities poses a formidable obstacle to the diversification of organisations established in other areas.[265] While the latter provide a fertile ground for racism,[266] their dearth of minority job seekers considerably complicate the task of recruiters in charge of diversification. On top of the need to cast their net over an extensive territory, the unfavourable context created by inexperienced local authorities and native hostility can be expected to take its toll on the long-term retention of these workers.[267]

In the United States, where race statistics are readily available, anti-discrimination law has often resolved the tension between nation-wide diversification and organisational efficiency by privileging the latter. As a result, the statistical pool is drawn from an organisation's surrounding region rather than the national population.[268] Since the exercise aims to unveil whether an employer should be sanctioned for illegally contributing to discriminatory patterns, this prudent approach arguably offers an acceptable way of distributing the costs of social transformation among a variety of public and private actors (see Section 4.1.2). However, there is no reason to import such considerations to the validation of positive action measures. As a matter of principle, no discernable problem arises from bringing the organisational representation of a nationally stigmatised minority above its demographic weight in a local community where its numbers are low. On the contrary, this could set off a virtuous circle of minority settlement in hitherto White areas, greater opportunities for nation-wide intercultural learning and better reception of subsequent newcomers.[269] Therefore, the

[265] OECD, *Trends in international migration* (2004) 89-113.
[266] Hannes Weber, 'National and regional proportion of immigrants and perceived threat of immigration: A three-level analysis in Western Europe' (2015) *International Journal of Comparative Sociology* 1-25.
[267] Birgit Jentsch and Myriam Simard, 'Conclusion: Comparative perspectives on rural immigrants' integration' in Birgit Jentsch and Myriam Simard (eds), *International migration and rural areas: Cross-national comparative perspectives* (Ashgate 2009) 179-196.
[268] In the classical indirect discrimination case of Griggs v. Duke Power Co. 401 U.S. 424 (1971), the Supreme Court cited high school completion rates for Blacks and Whites in North Carolina. The Court did not provide any explicit reason for this particular geographical choice.
[269] The importance of learning processes in the development of inclusive local policies is highlighted in Michael Alexander, *Cities and labour immigration: Comparing policy responses in Amsterdam, Paris, Rome and Tel Aviv* (Ashgate 2007). See also Rinus Penninx and Marco Martiniello, 'Integration processes and policies: State of the art and lessons' in Rinus Penninx, Karen Kraal, Marco Martiniello and Steven Vertovec (eds), *Citizenship in European Cities: Immigrants, local politics and integration policies* (Ashgate 2004) 152-157.

demographic weight of a given minority should be calculated at the national rather than the metropolitan or regional scale.

A similar reasoning may be applied to the quandary of counting all or only qualified minority members.[270] On a utilitarian view, it would be unfair for equality agencies and courts to disregard inter-ethnic differences in educational ambitions and credentials, as it would require employers either to hire inadequately qualified minority workers or invest disproportionate resources in their recruitment and training.[271] Once again, these arguments may legitimately bear upon a judicial decision to allow or sanction imbalances in workforce composition, but they do nothing to reveal whether a given measure will alleviate racism and should thus count as positive action.

In the case of practices that do not entail any modification of skill requirements, such as targeted recruitment, training, mentoring and consultation, the sociology of intergroup relations suggests that severe ethnic underskilling generally makes them more rather than less necessary. This is because minority members partly base their career choices on their perceived chances of succeeding in different professional fields, which in turn depend on the presence of their co-ethnics in the existing workforce. The upshot is that the most exclusive professions also tend to be those for which minorities are least likely to seek training. Using this lack of training as a pretext for limiting positive action would put law at the service of segregation and stratification. Conversely, giving an extra hand to minority workers who have chosen an atypical profession would boost others' perceived competence and eventually even out disparities in related qualifications. [272]

[270] See Hugh Collins, 'Discrimination, equality and social inclusion' (2003) 66 *The Modern Law Review* 32-33.
[271] Kasper Lippert-Rasmussen, *Born free and equal? A philosophical inquiry into the nature of discrimination* (Oxford University Press 2014) 193-216; Nicholas Mark Smith, *Basic equality and discrimination: Reconciling theory and law* (Ashgate 2011) 143-154; John Edwards, 'On what "ought" to be: The flaw in employment practice for minorities' (1997) 23 [2] *Journal of Ethnic and Migration Studies* 233-248; Morris Abram, 'Affirmative action: Fair shakers and social engineers' (1986) 99 *Harvard Law Review* 1319-1320.
[272] Nilanjana Dasgupta, 'Ingroup experts and peers as social vaccines who inoculate the self-concept: The stereotype inoculation model' (2011) 22 [4] *Psychological Inquiry: An international Journal for the Advancement of Psychological Theory* 231-246.

Problems may arise when positive action takes the form of introducing social justice criteria in evaluation procedures. Since this inevitably reduces the relative weight attributed to other merits, critics have drawn attention to the risk of inadvertently perpetuating stereotypes of ethnic incompetence. In principle, this could happen not only if the beneficiaries of positive action in fact do worse than their colleagues on a range of tasks, but also if they are incorrectly perceived as doing so by virtue of the way in which they were hired or promoted.[273]

Two flaws enfeeble the stigmatisation-through-positive-action argument to the point of making it appear disingenuous or trivial, at least in the context of consolidated democracies. The first is theoretical. Even if its proponents could prove that minority employees endure more stigma in organisations that implement positive action than in those that do not, it is highly implausible that this effect would offset the long-term attitudinal benefits of workplace diversity, especially given the foreseeable decoupling of ethnicity and qualifications. The second flaw is empirical and closely linked to the kind of incentives described in the previous section. However significant, such incentives are unlikely to lead managers to hire incompetent workers at the cost of overall organisational performance. Even at their most ambitious, merit redefinitions would merely qualify rather than displace prevailing standards. Since these standards commonly make room for a range of moral or subjective considerations that are loosely or not at all related to job tasks, any loss in means-end efficiency would predictably be limited in nature.

In order to foreclose any possibility of ethnic pigeonholing, proportional representation in the sense just described should be sought within each professional category created by an organisation. However, the disaggregation of all socially salient ethnic (and other) identities would make it difficult to achieve any fine-grained reflection of national demographics, especially in the case of smaller employers or leadership positions filled by very few workers. Research suggests that those who hold

[273] Carl Cohen and James Sterba, *Affirmative action and racial preference: A debate* (Oxford University Press 2003) 109-129; Morris Abram, 'Affirmative action: Fair shakers and social engineers' (1986) 99 *Harvard Law Review* 1322; Thomas Nagel, 'Equal treatment and compensatory discrimination' (1973) 2 [4] *Philosophy & Public Affairs* 248-363.

these positions decisively shape organisational norms and prototypes,[274] which in turn affect the inclusion of minority workers (see Section 4.3.2). Yet, they risk being left out of diversity reviews due to the arithmetical impossibility of assessing their ethnic representativeness. One way to overcome this problem would consist in adopting a longitudinal perspective and tracing the evolution of representation patterns over time. Positive action would thus channel minority employees toward the occupations where their identities have been least visible during the previous years.

The least intuitive implications of casting positive action as a buffer against segregation and stratification concern the admissibility of segregation-enhancing forms of support for minorities and segregation-reducing measures in favour of Whites. Whereas a classical, socioeconomic conception of social justice would legitimise the former and discredit the latter, an anti-racist one would seem to do exactly the opposite. This being said, the causal relationship between economic precarity and racism should guard us from drawing too sharp a contrast between these perspectives. The question of when minorities' working conditions should be improved at the cost of greater segregation, or when reducing segregation should take priority over the alleviation of ethnic underemployment and poverty, cannot be answered in the abstract. Only by looking at all the consequences of ambiguous measures in a specific context can courts decide if they should be encouraged as manifestions of substantive equality or submitted to the strict scrutiny direct discrimination deserves.[275]

4.2.3. Symbolic elites

The foregoing conception of positive action has drawn on a passive or descriptive theory of representation, where mere desegregation is the key mediator of ethnic

[274] Michael Hogg and Scott Reid, 'Social identity, self-categorization, and the communication of group norms' (2006) 16 *Communication theory* 7-30; Jennifer Richeson and Nalini Ambady, 'Effects of situational power on automatic racial prejudice' (2003) 39 [2] *Journal of Experimental Social Psychology* 177-183.
[275] Sandra Fredman, 'Substantive equality revisited' (2015) 14 [3] *International Journal of Constitutional Law* 712-738.

recognition. However, additional and qualitatively different processes come into play when its beneficiaries are 'symbolic elites' who disproportionately influence public discourses and perceptions of the social world.[276] Since minority members generally hold more positive and differentiated views of their co-ethnics than the rest of the population,[277] they find themselves in an ideal position to contest and transform prevailing stereotypes – in other words, to engage in active or substantive representation.[278] In this case, the effects of positive action can therefore be expected to go far beyond the prejudice-reducing properties of cooperative contact and equal access to high-status positions. Much more significant is its potential contribution to the construction of inclusive collective identities and the reduction of ethnicity-related feelings of insecurity.

Politicians, artists, teachers, scientists, journalists, activists, top athletes, religious leaders and judges all exercise higher-than-average cultural or symbolic power. Because of their relatively high influence and responsiveness to state support, politicians and artists will be the main focus of this section (teachers are addressed in Chapter 5). Apart from their special public role, they distinguish themselves from other beneficiaries of positive action by the fact that they generally benefit from subsidies and grants rather than commercial contracts.

In the field of gender equality, so-called 'quotas' in the recruitment of political candidates offer a striking exception to widespread positive action skepticism. Over the past two decades, legislative reforms in France (2000), Belgium (2002), Italy (2004), Portugal (2006) and Spain (2007) have imposed an obligation for parties to present gender-balanced lists of candidates in at least some elections. The minimal representation of either sex ranges from a third (Italy and Portugal) to half (France and Belgium) of all candidates, Spain falling somewhere in between (40%). Except in Italy,

[276] Teun van Dijk, *Elite discourse and racism* (Sage Publications 1993).
[277] Louk Hagendoorn, 'Intergroup biases in multiple group systems: The perception of ethnic hierarchies' (1995) 6 [1] *European Review of Social Psychology* 199-228.
[278] Marco Martiniello, 'Immigrants, ethnicized minorities and the arts: A relatively neglected research area' (2015) 38 [8] *Ethnic and Racial Studies* 1229-1235; Stuart Hall, 'New ethnicities' in David Morley and Kuan-Hsing Chen (eds), *Stuart Hall: Critical dialogues in cultural studies* (Routledge 1996) 442-451.

infringements lead to financial sanctions or outright rejection of the list. The adoption of these laws required constitutional amendments in all states except Spain, which shows the broad-based support their proponents have managed to garner.[279]

In 2010, by contrast, Belgium was the only Western European country in having implemented an ethnic quota, which applied exclusively to historical languages. A similar pattern emerged in some thirty countries around the world with legal quotas, which mainly focused on long-settled national, indigenous, linguistic or religious groups. Together with their adoption within power-sharing agreements among antagonistic factions, this suggests that anti-discrimination concerns have yet to leave a significant mark in the area of political representation.[280]

Ethnic minorities' disproportionate exclusion from legislative and executive positions calls for wide-ranging reforms. To redress their situation, electoral laws should incorporate incentives for parties to field a proportional number of ethnic minority candidates, calculated either on the composition of the general population or, less ambitiously, voting citizens. In keeping with the voluntary logic of positive action, these incentives should not take the form of court-ordered sanctions but rather progressive adjustments to state subsidies. They should also apply to all governing bodies at the local, regional, national and international level. To forestall the confinement of minority candidates at the bottom of party lists or in unwinnable districts, subsidies should be sensitive to their rate of electoral success. In addition, they should reflect the relative power of non-White executives in parties that integrate governing coalitions. [281]

[279] Jocelyne Praud, 'Introduction: Gender parity and quotas in European politics' (2012) 35 [2] *West European Politics* 286-300.
[280] Mona Lena Krook and Diana O'Brien, 'The politics of group representation: Quotas for women and minorities worldwide' (2010) 42 [3] *Comparative Politics* 253-272.
[281] UN Independent expert on minority issues, Report A/HRC/13/23 of 7 January 2010, para 34, 61, 63, 68, 71, 75; Advisory Committee on the FCNM, Commentary ACFC/31DOC(2008)001 on the effective participation of persons belonging to national minorities in cultural, social and economic life and in public affairs, adopted on 27 February 2008, para 78, 81, 84, 85, 128. For similar proposals in the philosophical literature on the political representation of women and ethnic minorities, see Karen Celis, 'On substantive representation, diversity, and responsiveness' (2012) 8 *Politics & Gender* 524-529; Miki Caul Kittilson, 'In support of gender quotas: Setting new standards, bringing visible gains' (2005) 1[4] *Politics & Gender* 638-645; Mark Jones, 'The desirability of gender quotas: Considering context and

A possible criticism of such an arrangement is that it may undermine the link between passive and active representation, in part because candidates would be elected by the general population and not only or mainly by their co-ethnics, and in part because they would remain under the control of party leaders. Similar schemes in other parts of the world have indeed tended to breed relatively subservient, majority-supporting representatives.[282] Given this structural weakness, some have proposed that reserving special seats for ethnic constituencies or otherwise promoting the formation and executive influence of ethnic parties may better serve the aim of discursive pluralism.[283]

The limited success so far enjoyed by immigrant parties in Western Europe makes it difficult to predict the eventual impact of such a policy.[284] However, prudential considerations should make us wary of embracing it too quickly, let alone enshrining it in human rights law. Political scientists and philosophers alike have long warned about the risks of ethnic competition in the political sphere, which may lead to zero-sum perceptions of cultural group interests, exclusive identities and inflammatory rhetoric – exactly the opposite of what positive action seeks to achieve.[285] A recent comparative

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design' (2005) 1 [4] *Politics & Gender* 645-652; Jane Mansbridge, 'Should Blacks represent Blacks and women represent women? A contingent "yes"' (1999) 61 [3] *The Journal of Politics* 628-657; Anne Phillips, *The politics of presence* (Oxford University Press 1995). To the extent that the proposed measures would offer legal incentives for party diversification rather than mandatory quotas, they would range range mid-way on Mansbridge's continuum of institutional fluidity (she favours maximal fluidity).

[282] Karen Bird, 'Ethnic quotas and ethnic representation worldwide' (2014) 35 [1] *International Political Science Review* 12-26. The weak correlation between passive and active representation has also been highlighted in the case of minority legislators elected without quotas as well as women. See Karen Bird, 'Toward an integrated perspective of minority representation: Views from Canada' (2012) 8 *Politics & Gender* 529-535; Anne Phillips, 'Representation and inclusion' (2012) 8 [4] *Politics & Gender* 512-518; Melissa Williams, *Voice, trust, and memory: Marginalized groups and the failings of liberal representation* (Princeton University Press 1998).

[283] UN Independent expert on minority issues, Report A/HRC/13/23 of 7 January 2010, para 54, 66, 70, 72, 73, 77, 78, 79; Advisory Committee on the FCNM, Commentary ACFC/31DOC(2008)001 on the effective participation of persons belonging to national minorities in cultural, social and economic life and in public affairs, adopted on 27 February 2008, para 72, 75, 78, 82, 91, 92, 93, 98.

[284] Oliver Strijbis, *From native to immigrant minorities: Ethnic mobilisation in Western Europe since World War I* (University of St. Gallen, PhD thesis, 2012).

[285] Cera Murtagh, 'Reaching across: Institutional barriers to cross-ethnic parties in post-conflict societies and the case of Northern Ireland' (2015) 21 [3] *Nations and Nationalism* 544-565; Daniel Bochsler and Edina Szöcsik, 'Building inter-ethnic bridges or promoting ethno-territorial demarcation lines? Hungarian minority parties in competition' (2013) 41 [5] *Nationalities Papers* 761-779; John Coakley, 'Ethnic competition and the logic of party system transformation' (2008) 47 *European Journal of Political Research* 766-793; Jane Mansbridge, 'Quota problems: Combating the dangers of essentialism' (2005) 1 [4] *Politics & Gender* 622-638; Ramón Máiz, 'Politics and the nation: nationalist mobilisation of ethnic differences' (2003) 9 [2] *Nations and Nationalism* 195-212; John Hargreaves, 'Ethno-nationalist movements in Europe: A debate' (1998) 4 [4] *Nations and Nationalism* 569-577.

study on ex-communist countries, where nationalist parties are more numerous than in Western Europe, even found that their electoral success and participation in government tended to boost far-right support.[286] These downsides may sometimes be the price to pay for peace, stability and deliberative justice, especially in the case of long-established minorities enjoying or seeking a degree of self-government,[287] but their implications in terms of intergroup hostility should not be underestimated. Conversely, women's incorporation into political parties has mainly spurred the formation of internal committees advocating gender-sensitive policies, including the recruitment of more female candidates. Formulated at the organisational level, these claims rarely give rise to acrimonious political confrontations.[288]

Applying the proportionality rule to cultural institutions and organisations poses a different set of problems. As recent soft law and reports make clear, the participation of ethnic minorities in cultural life as well as in the formulation of related policies is now seen as a basic non-discrimination requirement.[289] Measures in this area include the diversification of management, staff and programming in public cultural organisations, the negotiation of performance agreements with private ones and the offer of fellowships, mentoring and training to foreign-origin creators.[290] Controversies

[286] Lenka Bustikova, 'Revenge of the radical right' (2014) 47 [12] *Comparative Political Studies* 1738-1765.
[287] UN Independent expert on minority issues, Report A/HRC/13/23 of 7 January 2010, para 47; John Nagle and Mary-Alice Clancy, 'Constructing a shared public identity in ethno nationally divided societies: Comparing consociational and transformationist perspectives' (2012) 18 [1] *Nations and Nationalism* 78-97; Matthias Basedau, 'Parties in chains: Do ethnic party bans in Africa promote peace?' (2011) 17 [2] *Party Politics* 205-222; John Ishiyama, 'Do ethnic parties promote minority ethnic conflict?' (2009) 15 [1] *Nationalism and Ethnic Politics* 56-83; Johanna Kristin Birnir, *Ethnicity and electoral politics* (Cambridge University Press 2007); Kanchan Chandra, 'Ethnic parties and democratic stability' (2005) 3 [2] *Perspectives on Politics* 235-252.
[288] Mala Htun, 'Is gender like ethnicity? The political representation of identity groups' (2004) 2 [3] *Perspectives on Politics* 439-458.
[289] UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions (2005), Art. 7; CCPR GC No. 23(50) (art. 27), para 6.2; CESCR GC No. 21 Right of everyone to take part in cultural life, para 21-24, 32-33, 52, 55 a), c), e); United Cities and Local Governments, *Agenda 21 for culture* (2004), para 17, 18, 22, 24; United Cities and Local Governments, *Culture 21: Actions. Commitments on the role of culture in sustainable cities* (2015) 28; Eurocities, *Guidelines for cities on the role of culture in the integration of refugees, migrants and asylum seekers* (2016); UNESCO/UNFPA/UNDP, *Post-2015 dialogues on culture and development* (2015) 71-81; UNESCO, *A new cultural policy agenda for development and mutual understanding: Key arguments for a strong commitment to cultural diversity and intercultural dialogue* (2011) 16, 19; EU, *Report on the role of public arts and cultural institutions in the promotion of cultural diversity and intercultural dialogue* (2014) 96.
[290] Danielle Cliche, 'Cultural policy, programmes and initiatives for intercultural dialogue: New concepts on the governance of diversity' in CoE, *Intercultural dialogue as a basis for peace and sustainable*

arise when positive action initiatives do not limit themselves to reforming mainstream organisations but support those that mainly employ or showcase minority artists. This is usually done through specific institutions and programmes dealing with minorities, often in collaboration with migrant associations and/or foreign governments.[291] While human rights standards recognise minorities' right to enjoy, develop and transmit their own traditions, ethnic organisations have been criticised for segregating artists in niche circuits that cut them off from the general public.[292] Unlike in the political sphere, this rarely promotes adversarial rhetoric, but these organisations can reasonably be expected to draw less diverse audiences than mainstream ones, reducing opportunities for cross-cultural communication and understanding.[293]

In practice, however, reliable ways of monitoring arts audiences are many years away,[294] and some ethnically branded artistic venues, groups and events do manage to reach out to the wider population.[295] Moreover, niche circuits offer an accessible space for minority artists to develop and gain visibility before making the leap to the mass market.[296] For these reasons, the proportional representation rule should be suspended in the case of non-White cultural organisations. This being said, the rule should still apply at the aggregate level of all cultural policies, in order to ensure that artists who identify with a stigmatised ethnicity have a fair opportunity to

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development in Europe and its neighbouring regions (2010) 51-52; EU, *Report on the role of public arts and cultural institutions in the promotion of cultural diversity and intercultural dialogue* (2014).

[291] Pier-Luc Dupont, 'The inclusion of non-Western artistic traditions in cultural policy: Contrasting social justice and public diplomacy approaches' (2017) *Crossings: Journal of Migration & Culture* (in press); Ricard Zapata-Barrero, 'The limits to shaping diversity as public culture: Permanent festivities in Barcelona' (2014) 37 *Cities* 66-72; Wiebke Sievers, 'A contested terrain: Immigrants and their descendants in Viennese culture' (2014) 21 [1] *Identities: Global Studies in Culture and Power* 26-41; EU, *Report on the role of public arts and cultural institutions in the promotion of cultural diversity and intercultural dialogue* (2014) 21-23.

[292] Munira Mirza, *The politics of culture: The case for universalism* (Palgrave 2012).

[293] Paul DiMaggio and Patricia Fernández-Kelly, 'Immigration and the arts: A theoretical inquiry' (2015) 38 [8] *Ethnic and Racial Studies* 1238.

[294] Helmut Anheier, 'Towards a monitoring framework' in UNESCO, *Reshaping cultural policies: A decade promoting the diversity of cultural expressions for development* (2015) 31-44.

[295] EU, *Report on the role of public arts and cultural institutions in the promotion of cultural diversity and intercultural dialogue* (2014) 55-56, 61, 70-74; Joseph Costanzo and Fatima Zibouh, 'Mobilisation strategies of individual and institutional actors in Brussels' artistic and cultural scences' (2014) 21 [1] *Identities: Global Studies in Culture and Power* 42-59; Christine Delhaye and Victor van de Ven, '"A commitment to cultural pluralism". Diversity practices in two Amsterdam venues: Paradiso and De Meervaart' (2014) 21 [1] *Identities: Global Studies in Culture and Power* 75-91.

[296] Paul DiMaggio and Patricia Fernández-Kelly, 'Immigration and the arts: A theoretical inquiry' (2015) 38 [8] *Ethnic and Racial Studies* 1239-1240.

secure subsidies from any public authority. Provided they are governed by similar dynamics, ethnic organisations in other cultural fields such as journalism and the social sciences should also be exempt from the proportional representation rule.

4.3. Cultural accommodation

Until now, the discussion has proceeded on the assumption that desegregating workplaces would automatically undermine racist attitudes through intergroup cooperation and power equalisation. This conclusion may be premature, for it overlooks an important mediating factor between such processes and ethnic recognition: the visibility of minority employees' stigmatised identity. According to recent refinements of contact theory, failure to make it salient during interactions might sometimes facilitate the formation of interpersonal bonds, but any ensuing trust is likely to remain circumscribed at the individual level and leave collective stereotypes untouched.[297] In the same way, prejudice-reduction strategies that rely on the elimination of status hierarchies or the complexification of political identities take for granted that minority individuals will be identifiable by the general population. From the standpoint of a purely biological conception of racism, this is unproblematic, since stigmatised phenotypes are normally difficult to conceal. Once it is accepted that biological and cultural stereotypes are inextricably bound up with each other, however, the conflation of minority presence and visibility becomes unsatisfactory. To play an effective role as anti-racist agents, minority workers must not only be perceived as physically but also culturally (and sometimes religiously) different. This means that employers must find ways of reconciling everyday processes and duties with a variety of cultural practices.[298]

[297] Rupert Brown and Miles Hewstone, 'An integrative theory of intergroup contact' (2005) 37 *Advances in Experimental Social Psychology* 255.

[298] For a sophisticated discussion on the importance of cultural retention for the promotion of ethnic equality at work, see Maddy Janssens and Patrizia Zanoni, 'Alternative diversity management: Organizational practices fostering ethnic equality at work' (2014) 30 *Scandinavian Journal of Management* 317-331.

This condition cannot be taken for granted, for cultural assimilation is often the price to pay for minorities to receive the protection of anti-discrimination law and take advantage of positive action programmes. Sociological research and court cases suggest that Muslims, in particular, have struggled to obtain prayer time and space, adapted schedules and menus and flexible dress codes. Many employers and other stakeholders regard these demands as incompatible with principles of secularism or neutrality that must be upheld in the public sphere. More pragmatic concerns also come into play, such as financial costs, worker coordination, health and safety issues and the continuity of service provision. As for religious symbols, they are regularly rejected for colliding with customer preferences when worn by front-desk employees. Of course, such resistence is not universal, and some employers have proved willing to accommodate minority cultural and religious practices on a case-by-case basis.[299]

In a handful of cases, courts have also found that failure to do so may amount to indirect discrimination on the grounds of religion.[300] As a general rule, however, it has remained fairly easy for employers to maintain regulations interfering with ethnic

[299] Ilke Adam and Andrea Rea, 'Les pratiques d'accommodements raisonnables sur les lieux du travail en Belgique' in Emmanuelle Bribosia and Isabelle Rorive (dirs), *L'accommodement de la diversité religieuse: Regards croisés – Canada, Europe, Belgique* (Peter Lang 2015) 313-342; Lisbet Christoffersen and Niels Valdemar Vinding, 'Challenged pragmatism: Conflicts of religion and law in the Danish labour market' (2013) 13 [2-3] *International Journal of Discrimination and the Law* 148; Nadia Fadil, 'Performing the *salat* [Islamic prayers] at work: Secular and pious Muslims negotiating the contours of the public in Belgium' (2013) 13 [6] *Ethnicities* 729-750; Franck Frégosi and Deniz Kosulu, 'Religion and religious accommodation in the French workplace: Increasing tensions, heated debates, perceptions of labour unionists and pragmatic best practices' (2013) 13 [2-3] *International Journal of Discrimination and the Law* 194-213; Prakash Shah, 'Asking about reasonable accommodation in England' (2013) 13 [2-3] *International Journal of Discrimination and the Law* 83-112; Floris Vermeulen and Rabia El Morabet Belhaj, 'Accommodating religious claims in the Dutch workplace: Unacknowledged Sabbaths, objecting marriage registrars and pressured faith-based organizations' (2013) 13 [2-3] *International Journal of Discrimination and the Law* 113-139; Rudy Richardson, Tessa op den Buijs and Karen van der Zee, 'Changes in multicultural, Muslim and acculturation attitudes in the Netherlands armed forces' (2011) 35 *International Journal of Intercultural Relations* 580-591.

[300] Frédérique Ast, 'European legal frameworks responding to diversity and the need for institutional change. Indirect discrimination as a means of protecting pluralism: Challenges and limits' in CoE, *Institutional accommodation and the citizen: Legal and political interaction in a pluralist society* (2009) 99-100; for an overview of Dutch jurisprudence, see Katayoun Alidadi, 'Muslim women made redundant: Unintended signals in Belgian and Dutch case law on religious dress in private sector employment and unemployment' in Katayoun Alidadi, Marie-Claire Foblets and Jogchum Vrielink (eds), *A test of faith? Religious diversity and accommodation in the European workplace* (Ashgate 2012) 263-267. Among the cases compiled as part of the EU-funded RELIGARE project (www.religareproject.eu), see Ramadan, decision n. U.2008.1028Ø of 14 January 2008 (Eastern High Court of Denmark); BAG Urteil, decision 2 AZR 636/09 of 24 February 2011 (German Federal Labour Court); Decision n. 000/02 of 26 March 2002 (Court of Rome); Opinion 2006-202 of 5 October 2006 (Dutch Equal Treatment Commission).

practices,[301] as long as they did not patently reflect invidious attitudes.[302] The European Court of Justice ratified this state of affairs in a 2017 decision validating the dismissal of an employee who had flouted a prohibition on visible signs of political, philosophical or religious beliefs, justified by the employer's willingness to project a neutral image.[303]

Paradoxically in light of public authorities' special human rights obligations, opportunities for cultural accommodation are often scarcer in the public than the private sector. In France, Belgium and Germany, far-reaching laws requiring civil servants to refrain from manifesting their religious beliefs have also made the situation worse. A number of high-profile judicial decisions regarding educational policy have brought this development into relief. Until the 1990s, all three countries followed a hands-off approach and let schools set their own pragmatic policies. When teachers and students started to request exemptions from veil prohibitions, several courts ruled that restrictions to their religious freedom had to be prescribed by law or otherwise justified in light of the concrete facts of the case. Taking up the invitation, parliaments enshrined the bans in national and regional legislation, casting them as instruments of state neutrality or secularism.[304] Consistent with previous jurisprudence, domestic and

[301] Emmanuelle Bribosia and Isabelle Rorive, 'Les droits fondamentaux, gardiens et garde-fous de la diversité religieuse en Europe' in Emmanuelle Bribosia and Isabelle Rorive (dirs), *L'accommodement de la diversité religieuse: Regards croisés – Canada, Europe, Belgique* (Peter Lang 2015) 171-183; Katayoun Alidadi, 'Reasonable accommodations for religion and belief: Adding value to Article 9 ECHR and the European Union's anti-discrimination approach to employment?' (2012) 37 [6] *European Law Review* 693-715; Gabrielle Caceres, 'Reasonable accommodation as a tool to manage religious diversity in the workplace: What about the "transposability" of an American concept into the French secular context?' in Katayoun Alidadi, Marie-Claire Foblets and Jogchum Vrielink (eds), *A test of faith? Religious diversity and accommodation in the European workplace* (Ashgate 2012) 299-314; Saïla Ouald Chaib, 'Religious accommodation in the workplace: Improving the legal reasoning of the European Court of Human Rights' in Katayoun Alidadi, Marie-Claire Foblets and Jogchum Vrielink (eds), *A test of faith? Religious diversity and accommodation in the European workplace* (Ashgate 2012) 33-49; Pierre Bosset and Marie-Claire Foblets, 'Accommodating diversity in Quebec and Europe: Different legal concepts, similar results?' in CoE, *Institutional accommodation and the citizen: Legal and political interaction in a pluralist society* (2009) 37-66.

[302] In the Case C-188/15 Bougnaoui and Association de défense des droits de l'homme (ADDH) v Micropole Univers, decision of 14 March 2017 (European Court of Justice), a customer's complaint about being served by a headscarf-wearing worker was rejected as a justification for her dismissal. In Eweida and others v United Kingdom (App no 48420/10) ECtHR 15 January 2013, a prohibition on Christian crosses was found to be in violation with religious freedom in a company that allowed Muslim headscarves and Sikh turbans.

[303] Case C-157/15 Achbita, Centrum voor Gelijkheid van kansen en voor racismebestrijding v G4S Secure Solutions, decision of 14 March 2017 (European Court of Justice).

[304] Corinne Torrekens, 'Islam in Belgium: From formal recognition to public contestation' in Marian Burchardt and Ines Michalowski (eds), *After integration: Islam, conviviality and contentious politics in Europe* (Springer 2015) 163-165; Christian Joppke, *Veil: Mirror of identity* (Polity Press 2009) 27-80;

international courts subsequently upheld those that formally applied to all religious (and sometimes philosophical) beliefs.[305] However, the reasoning used in a 2015 decision by the German Constitutional Court to invalidate a regional ban on non-Christian religious symbols worn by teachers in public schools suggests that neutrality may not suffice to justify blanket prohibitions in the future.[306] The Belgian Court of Cassation also adopted a cautious stance in 2014, deciding it had no competence to cancel a circular against philosophical signs issued by the Board of Flemish Community Schools but annulling its local transposition where it did not prove necessary.[307]

Underlying courts' reluctance to impose cultural (and especially religious) accommodations on employers is an awareness of their capacity to draw considerable media and political attention,[308] as the multiplication of high-profile consultative commissions in this area testifies.[309] A recurring concern in such controversies is that minority cultures may collide with liberal values, notably gender equality, and that accommodations play into the hands of fundamentalists.[310] Not infrequently, these

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John Bowen, *Why the French don't like headscarves: Islam, the state, and public space* (Princeton University Press 2007).

[305] See inter alia Ranjit, decision no 285394 of 5 December 2007, Conseil d'État, 4ème et 5ème sous-sections réunies; Sara, decision no 295671 of 5 December 2007, Conseil d'État, 4ème et 5ème sous-sections réunies; Dogru v France (App no 27058/05) ECtHR 4 December 2008; Kervanci v France (App no 31645/04) ECtHR, 4 December 2008. All the cases were brought by students, but neutrality requirements are usually understood as applying *a fortiori* to teachers.

[306] BVerfG, Order of the First Senate of 27 January 2015 - 1 BvR 471/10 (German Federal Constitutional Court).

[307] Singh, decision no 228.751 of 14 October 2014 (Belgian Council of State); XXXX, decision no 228.752 of 14 October 2014 (Belgian Council of State).

[308] On the juridification of political debates and the politicisation of judicial decisions in the area of religious diversity, see Neus Torbisco Casals, 'Identity conficts, human rights and the crisis of multiculturalism in Europe: From politics to the courts' (2014) 21 *GRITIM Working Paper Series* 1-52; Russell Sandberg, 'The what, the why and the how' in Marie-Claire Foblets, Katayoun Alidadi, Jorgen Nielsen and Zeynep Yanasmayan (eds), *Belief, law and politics: What future for a secular Europe?* (Ashgate 2014) 107-115; Tariq Modood, Anna Triandafyllidoy and Ricard Zapata-Barrero, *Multiculturalism, Muslims and citizenship: A European approach* (Routledge 2006).

[309] For a critical assessment of Belgian consultative processes, Julie Ringelheim, 'Du dialogue aux Assises, heurs et malheurs de l'interculturalité en Belgique' in Emmanuelle Bribosia and Isabelle Rorive (dirs), *L'accommodement de la diversité religieuse: Regards croisés – Canada, Europe, Belgique* (Peter Lang 2015) 101-122.

[310] Eva Brems (ed), *The experiences of face veil wearers in Europe and the law* (Cambridge University Press 2014); Werner Schiffauer, 'The logics of toleration: Outline for a comparative approach to the study of tolerance' in Jan Dobbernack and Tariq Modood (eds), *Tolerance, intolerance and respect. Hard to accept?* (Palgrave 2013) 103-126; Susanna Mancini, 'Patriarchy as the exclusive domain of the other: The veil controversy, false projection and cultural racism' (2012) 10 [2] *International Journal of Constitutional Law* 411-428; François Fournier, 'Resistances to cultural diversity: Anti-pluralist rhetoric and other common objections' in CoE, *Institutional accommodation and the citizen: Legal and political interaction in a pluralist society* (2009) 183-204.

perceptions are reinforced by the religious frame claimants mobilise to reinforce their case,[311] which leads them to cast cultural practices as binding 'obligations', 'duties', 'rules', 'requirements', 'prescriptions' or 'commands'. Such discourses simultaneously gloss over the contested and dynamic nature of religious norms, represent minority cultures as more oppressive and less compatible with individual autonomy than majority ones and undermine popular faith in the possibility of intercultural dialogue.[312] Reflecting widespread mistrust of courts' capacity or willingness to protect core values, legislators are stepping in with ethnically connoted prohibitions against face covering, polygamy, forced marriages and female genital mutilation, further stigmatising their implicit or explicit targets.[313]

These worrying developments show the need for anti-discrimination agencies and courts to develop a consistent and non-essentialist approach to cultural accommodation in public and private employment. To undercut rather than exacerbate racism, they should seek to maximise the workplace visibility of ethnic identities while minimising their perceived incompatibility with the legitimate interests of those who do not share them. A subtle reinterpretation of direct and indirect discrimination will be necessary in order to square the circle.

[311] Katayoun Alidadi and Marie-Claire Foblets, 'Framing multicultural challenges in freedom of religion terms: Limitations of minimal human rights for managing religious diversity in Europe' (2012) 30 [2] *Netherlands Quarterly of Human Rights* 460-488; Titia Loenen, 'Framing headscarves and other multi-cultural issues as religious, cultural, racial or gendered: The role of human rights law' (2012) 30 [4] *Netherlands Quarterly of Human Rights* 414-430.

[312] Maleiha Malik, 'Complex equality: Muslim women and the headscarf' (2008) 68 [1] *Droit et Société, Revue Internationale de Théorie du Droit et de Sociologie Juridique* 127-152.

[313] Ángeles Solanes Corella, 'Conflictos derivados del uso del velo integral en Europa: prohibiciones y gestión de la vida en común' en *Diversidad cultural y conflictos en la Unión Europea. Implicaciones jurídico-políticas* (Tirant lo Blanch 2016) 89-124; Letizia Mancini, 'Burqa, niqab and women's rights' in Alessandro Ferrari and Sabrina Pastorelli (eds), *The burqa affair across Europe: Between public and private space* (Routledge 2013) 25-36; Renée Kool, 'Step forward, or forever hold your peace: Penalising forced marriages in the Netherlands' (2012) 30 [4] *Netherlands Quarterly of Human Rights* 388-413; Ángeles Solanes Corella, 'Human rights and conflicts in European multicultural societies' (2013) 7 [1] *Migraciones internacionales* 69-100.

4.3.1. Invalidation of employee neutrality policies

Public and private policies requiring workers to maintain an appearance of cultural or religious neutrality arguably constitute the widest-ranging type of restriction on cultural diversity, for they can be invoked to reject any demand presented and/or perceived as linked to a minority background. Their foreseeable implications in terms of ethnic invisibility and stigma make it primordial to determine whether they serve any legitimate purpose, as courts' current acceptance of neutrality defences to discrimination claims presupposes.

Their most convincing rationale is that of avoiding the identification of employers, including public authorities, with a particular cultural or religious tradition. On this account of neutrality as impartiality, universal rules equalise the status of all citizens by making their specific identities irrelevant in the employment context.[314] Upon closer inspection, however, this causal relationship is far from self-evident. One way to understand why is to distinguish two processes of collective identity formation, developed in organisational psychology. The first route, which has been called 'deductive', proceeds from institutionalised norms that group members are expected to follow. The second route, labelled 'inductive', works the other way around, through individual members' active negotiation and recreation of these norms based on their own traits, preferences and behaviour.[315] In essence, neutrality or secularism supporters contend that nothing impedes the purely deductive approach to identity formation to be equally inclusive of majority and minority cultural identities. However, this would require institutions to avoid discouraging any particular preference that can be reconciled with universally endorsed principles of justice.[316] Do they in fact comply with this condition?

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[314] Malcolm Evans, *Manual on the wearing of religious symbols in public areas* (Martinus Nijhoff 2009) 96-99.

[315] Tom Postmes, Russell Spears, Antonia Lee and Rosemary Novak, 'Individuality and social influence in groups: Inductive and deductive routes to group identity' (2005) 89 [5] *Journal of Personality and Social Psychology* 747-763; Tom Postmes, Gamze Baray, Alexander Haslam, Thomas Morton and Roderick Swaab, 'The dynamics of personal and social identity formation' in Tom Postmes and Jolanda Jetten (eds), *Individuality and the group: Advances in social identity* (SAGE 2005) 215-236.

[316] For a classical elaboration of this view, see John Rawls, *Political liberalism* (Columbia University Press 1993).

Unless one is willing to accept that no idiosyncratic preference shapes the functioning of public and private organisations, including the discretionary actions of their individual managers, the answer is clearly negative. Far from applying equally to all cultural norms, neutrality policies impose dominant ones and foreclose institutional adaptation to demographic transformations.[317] Dress codes provide a paradigmatic illustration of such contingent tastes masquerading as universal neutrality. Instead of expelling religious, philosophical and political identities from the workplace, they maintain the symbolic privilege of those who adhere to dominant religious, philosophical and political outlooks, which are inextricably bound up with established aesthetic conventions.[318] These conventions are not universal but rooted in particular regions, historical times, social classes, organisations and so on. What misleads so many into considering them superior to all alternatives, and perhaps morally required, is the near-hegemonic position Western European culture currently enjoys among global elites.[319]

Even if neutrality policies entrench dominant traditions, they may still be defended as a way of cultivating a sense of belonging, both at the national and the organisational level. On this view, shared practices and symbols have the merit of reinforcing the psychological salience of workers' (and, by extension, citizens') common identity, which in turn catalyses valuable forms of civic participation and solidarity. Conversely, ethnic claims may reinforce perceptions of intergroup difference and maintain or increase long-term hostilities.[320] Like the conflation of neutrality and

[317] Lucy Vickers, 'The relationship between religious diversity and secular models: An equality-based perspective' in Marie-Claire Foblets, Katayoun Alidadi, Jorgen Nielsen and Zeynep Yanasmayan (eds), *Belief, law and politics: What future for a secular Europe?* (Ashgate 2014) 123-127; Eugenia Relaño Pastor, 'The "inclusive state neutrality" normative paradigm' in Marie-Claire Foblets, Katayoun Alidadi, Jorgen Nielsen and Zeynep Yanasmayan (eds), *Belief, law and politics: What future for a secular Europe?* (Ashgate 2014) 201-209; Adam Seligman, 'RELIGARE: Reflections on research and policy recommendations' in Marie-Claire Foblets, Katayoun Alidadi, Jorgen Nielsen and Zeynep Yanasmayan (eds), *Belief, law and politics: What future for a secular Europe?* (Ashgate 2014) 211-215; Charles Taylor, 'The meaning of secularism' (2010) *The Hedgehog Review* 23-34; Ronan McCrea, *Religion and the public order of the European Union* (Oxford University Press 2010).

[318] Ronan McCrea, 'Religion, law and state in contemporary Europe' in Marie-Claire Foblets, Katayoun Alidadi, Jorgen Nielsen and Zeynep Yanasmayan (eds), *Belief, law and politics: What future for a secular Europe?* (Ashgate 2014) 91-98.

[319] Bikhu Parekh, *A new politics of identity: Political principles for an interdependent world* (Palgrave Macmillan 2008) 181-193.

[320] David Miller, *On nationality* (Clarendon Press 1995) 130-141; Ronan McCrea, *Religion and the public order of the European Union* (Oxford University Press 2010) 266. This line of reasoning echoes anti-

impartiality, the common identity argument is morally attractive but empirically unconvincing, for it overlooks the effect of neutrality policies on the inductive formation of collective norms. States and workplaces that prohibit the manifestation of ethnic identities may secure the loyalty of majority citizens and employees, but they are likely to be structured by exclusive cultural norms, which undermine commitment among minorities.[321] In addition, assimilation rarely inoculates the latter against discrimination, since markers such as race, name and accent cannot easily be concealed. Neutrality-promoting organisations thus force minority employees to contend against discriminatory norms that are not recognised as such by their majority superiors and colleagues, setting the stage for chronic resentment, conflict and alienation.[322] By contrast, diversity policies that explicitly value all cultural identities have proved able to generate feelings of inclusion among both majority and minority employees.[323]

The last way in which neutrality policies may be justified is as a legitimate concession to the dominant group's right to sustain its own culture. This argument comes out as particularly compelling against the backdrop of Americanisation or Europeanisation processes, which frequently put pressure on local and national artistic consumption, customs and tastes.[324] By reducing the influence of unassimilated immigrants and their descendants, neutrality requirements may slow down the dilution

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essentialist objections to the use of ethnic categories by administrative agencies and researchers. See Section 4.1.1 and Rogers Brubaker, 'Ethnicity without groups' (2002) 2 *Archives Européennes de Sociologie* 163-189.

[321] Kristina Bakkaer Simonsen, 'How the host nation's boundary drawing affects immigrants' belonging' (2016) 42 [7] *Journal of Ethnic and Migration Studies* 1153-1176; Maykel Verkuyten, 'The integration paradox: Empirical evidence from the Netherlands' (2016) 60 [5-6] *American Behavioral Scientist* 583-596; Sabine Otten and Wiebren Jansen, 'Predictors and consequences of exclusion and inclusion at the culturally diverse workplace' in Sabine Otten, Karen van der Zee and Marilynn Brewer (eds), *Towards inclusive organizations: Determinants of successful diversity management at work* (Psychology Press 1995) 67-86.

[322] Derek Avery and Douglas Johnson, 'Now you see it, now you don't: Mixed messages regarding workforce diversity' in Kecia Thomas (ed), *Diversity resistance in organizations* (Laurence Erlbaum Associates 2008) 221-248; Maykel Verkuyten and Kumar Yogeeswaran, 'The social psychology of intergroup toleration: A roadmap for theory and research' (2016) *Personality and Social Psychology Review* 14-16.

[323] Wiebren Jansen, Sabine Otten and Karen van der Zee, 'Being part of diversity. The effects of an all-inclusive multicultural diversity approach on majority members' perceived inclusion and support for organizational diversity efforts' (2015) *Group Processes & Intergroup relations* 1-16; Kyra Luijters, Karen van der Zee and Sabine Otten, 'Cultural diversity in organizations: Enhancing identification by valuing differences' (2008) 32 *International Journal of Intercultural Relations* 154-163.

[324] Bikhu Parekh, *A new politics of identity: Political principles for an interdependent world* (Palgrave Macmillan 2008) 194-203.

of the public culture citizens need in order to lead fulfilling lives.[325] The flaw here is normative rather than empirical. Neutrality as a principle of cultural preservation correctly assumes that individuals have a legitimate interest in the perpetuation of their own ways of life, but it fails to include ethnic ones among these. This stance can hardly be reconciled with the universal and egalitarian morality that underpins human rights. If everyone is entitled to practice, develop and transmit their culture, then some weight must be given to ethnic demands as well as majority ones.[326]

Unless some alternative, legitimate purpose can be shown to underlie employee neutrality policies, they should thus be discontinued as a form of indirect ethnic discrimination. Contrary to the present situation, this shift should be spearheaded by public institutions, precisely because –rather than in spite– of their representative function and correlative influence on national norms and prototypes. Liberated from their *prima facie* illegitimacy, ethnic practices could thus be negotiated like any other preference, based on a contextual assessment of their impact on organisational efficiency and third party interests.

4.3.2. Good faith treatment of all ethnic practices

In most workplaces, conflicts between ethnic practices and professional requirements are normally resolved through informal negotiations among the parties concerned, leading either to the modification or maintenance of organisational rules. It is only in the latter scenario that employees or enforcement agencies may resort to anti-discrimination laws in order to compel a different decision. Courts then have to determine whether the restriction was justified or amounted to indirect discrimination. To do so, they must articulate a plausible argument on the value of the practice and its weight relative to the inconveniences that may derive from its protection.

[325] David Miller, *On nationality* (Clarendon Press 1995) 186-187; Ronan McCrea, *Religion and the public order of the European Union* (Oxford University Press 2010) 268-269.
[326] UN Independent Expert on minority issues, Effective promotion of the Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities, Report A/68/268 of 5 August 2013, para 30-32, 65-66.

In philosophical discussions, mandatory adjustments have often been justified based on practices' subjective importance for their adherents, either as a matter of moral integrity,[327] self-esteem,[328] compliance with group norms,[329] cultural belonging and continuity[330] or existential purpose.[331] The problem with these approaches is that they fail to explain why anti-discrimination law should, in principle, offer greater protection to ethnicity-related practices than to other interests whose pursuit employers may hamper. In other words, their anti-racist dimension is an epiphenomenon that comes at the cost of highly controversial assumptions on the psychological and moral significance of specific cultural or ethical commitments (as opposed to other, presumably superficial beliefs and preferences) and representations of litigants as tightly bound by, or dependent on, their norms, traditions and convictions.[332] As we have seen, this discourse perniciously feeds stereotypes of ethnic illiberalism, extremism and irrationality. When applied disproportionately to minority employees, it may also validate their majority colleagues' impression that diversity policies exclude them.[333]

An initially attractive alternative would consist in removing accommodation claims from the judicial arena altogether, leaving them to be settled through a deliberation among equal citizens seeking to reconcile their respective interests.[334] In

[327] Jocelyn Maclure and Charles Taylor, *Secularism and freedom of conscience* (Harvard University Press 2011) 89; Jocelyn Maclure, 'Reasonable accommodations and the subjective conception of freedom of conscience and religion' in Avigail Eisenberg and Will Kymlicka (eds), *Identity politics in the public realm: Bringing institutions back in* (UBC Press 2011) 260-280.
[328] Andrew Shorten, 'Cultural exemptions, equality and basic interests' (2010) 10 [1] *Ethnicities* 100-126.
[329] Jeremy Waldron, 'One law for all? The logic of cultural acommodation' (2002) 59 [1] *Washington and Lee Law Review* 3-34.
[330] Avigail Eisenberg, *Reasons of identity: A normative guide to the political & legal assessment of identity claims* (Oxford University Press 2009).
[331] Andrew Robinson, *Multiculturalism and the foundations of meaningful life: Reconciling autonomy, identity and community* (UBC Press 2007).
[332] Koen Lemmens, 'RELIGARE, believers and non-believers: But where is the citizen?' in Marie-Claire Foblets, Katayoun Alidadi, Jorgen Nielsen and Zeynep Yanasmayan (eds), *Belief, law and politics: What future for a secular Europe?* (Ashgate 2014) 237-244; David Pollock, 'An ill-disguised defence of religious privilege' in Marie-Claire Foblets, Katayoun Alidadi, Jorgen Nielsen and Zeynep Yanasmayan (eds), *Belief, law and politics: What future for a secular Europe?* (Ashgate 2014) 245-253; Brian Leiter, *Why tolerate religion?* (Princeton University Press 2013) 92-100.
[333] Flannery Stevens, Victoria Plaut and Jeffrey Sanchez-Burks, 'Unlocking the benefits of diversity: All-inclusive multiculturalism and positive organizational change' (2008) 44 [1] *The Journal of Applied Behavioral Science* 116-133.
[334] Patrick Loobuyck, 'Critical remarks on the pro-religion apriority of the RELIGARE project' in Marie-Claire Foblets, Katayoun Alidadi, Jorgen Nielsen and Zeynep Yanasmayan (eds), *Belief, law and politics:*

general democratic theory, such flexibility has been championed as a way of lightening the burden on courts, stimulating individual responsibility, promoting exchange and reciprocity, fostering mutual understanding and the fair consideration of diverse viewpoints, increasing institutional legitimacy, improving leaders' accountability, redressing imbalances in communicative resources, drawing attention away from abstract principles and toward concrete problems, ensuring the viability of proposed reforms, promoting the internal contestation of cultural norms and empowering subordinated group members.[335] However, the research cited earlier in this chapter has also revealed the structural inequalities that tend to weaken minority workers' organisational influence, including their concentration in subordinated units and colleagues' prejudices. The upshot is that deliberations on the adaptation of existing rules to ethnic practices often fail to deliver fair outcomes. Instead of creating opportunities for mutual understanding and cooperation, they produce biased exaggerations of minor differences and dogmatic defences of established conventions.[336]

While these findings bode ill for the spontaneous protection of ethnic practices in the workplace, they also shed light on the wrong that anti-discrimination law should seek to redress: the lack of good faith in employer responses, directly or indirectly stemming from racism.[337] Some courts have already made strides in this direction. In 2006, the Dutch Equal Treatment Commission was called upon to assess the rejection of a Muslim applicant for the job of customer manager who refused to shake hands with women. The employer argued that this would obstruct his relationship with clients.

What future for a secular Europe? (Ashgate 2014) 232; Brian Barry, *Culture and equality: An egalitarian critique of multiculturalism* (Polity Press 2001) 34-50.

[335] Maleiha Malik, 'Religious freedom and accommodation in the United Kingdom' in Marie-Claire Foblets, Katayoun Alidadi, Jorgen Nielsen and Zeynep Yanasmayan (eds), *Belief, law and politics: What future for a secular Europe?* (Ashgate 2014) 89-90; Monique Deveaux, *Gender and justice in multicultural liberal states* (Oxford University Press 2006) 89-126; Sarah Song, *Justice, gender, and the politics of multiculturalism* (Cambridge University Press 2007) 41-84; Ayelet Shachar, *Multicultural jurisdictions: Cultural differences and women's rights* (Cambridge University Press 2004) 117-45; Jorge Valadez, *Deliberative democracy, political legitimacy, and self-determination in multicultural societies* (Westview Press 2001) 117-45.

[336] Per Mouritsen and Tore Vincents Olsen, 'Liberalism and the diminishing space of tolerance' in Jan Dobbernack and Tariq Modood (eds), *Tolerance, intolerance and respect. Hard to accept?* (Palgrave 2013) 127-156.

[337] For an early and pointed articulation of this view, see Christophe Eisgruber and Lawrence Sager, 'The vulnerability of conscience: The constitutional basis for protecting religious conduct' (1994) 61 *The University of Chicago Law Review* 1245-1315.

Accepting the link between the applicant's religious beliefs and his opposition to handshakes, the Commission found indirect discrimination on the grounds that other means could have been used to promote customer-friendliness and sexual equality. This conclusion was reached through a highly contextualised demonstration of employer bad faith: no one had ever complained about not receiving a handshake, the business lacked a specific policy on customer treatment and it had failed to consider any alternative mode of interaction. In another case of handshake-related religious discrimination two years later, the Court of Rotterdam took the opposite position, reflecting the fact-sensitive nature of indirect discrimination analyses.[338]

Avoiding indirect discrimination sometimes entails allowing an exemption from a general rule or otherwise taking specific steps in order to satisfy the needs of a minority employee. This has been the starting point of the reasonable accommodation doctrine, developed through American legislation and adopted by Canadian courts as a complement to the prohibition of religious discrimination. According to this doctrine, public and private bodies have a duty to accommodate practices that do not cause 'undue hardship', an open-ended concept that takes into account the financial costs borne by the organisation, its size and mode of functioning, prevailing security standards, the coordination of human resources and the protection of important public interests.[339] While reflecting the same concern for good faith as the proportionality analysis of indirect discrimination, the 'undue hardship' test places a greater burden on employers to think creatively and proactively about new rules and methods to make their organisation structurally inclusive. As substantive conceptions of equality take root in European social and legal norms, however, the distinction between both standards may become increasingly blurred.[340]

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[338] Christa Tobler, *Limits and potential of the concept of indirect discrimination* (Office for Official Publications of the European Communities 2008) 64.

[339] Pierre Bosset and Paul Eid, 'Droit et religion: de l'accommodement raisonnable à un dialogue internormatif?' (2007) 41 *Revue juridique Thémis* 513-542.

[340] Andreas Stein, 'Reasonable accommodation for religion and belief: Can it be accommodated in EU law without an express duty?' in Marie-Claire Foblets, Katayoun Alidadi, Jorgen Nielsen and Zeynep Yanasmayan (eds), *Belief, law and politics: What future for a secular Europe?* (Ashgate 2014) 171-180; Marie-Claire Foblets, 'Freedom of religion and belief in the European workplace: Which way forward and what role for the European Union?' (2013) 13 [2-3] *International Journal of Discrimination and the Law* 240-255; Eduardo Ruiz Vieytez, *Las prácticas de armonización como instrumentos de gestión*

By stopping decision-makers from imposing unnecessary cultural assimilation on workers, the prohibition of indirect discrimination and its correlative duty of reasonable accommodation hold the promise of fostering what philosophers have alternatively advocated as the serious consideration of other cultures,[341] respect for reasonable cultural pluralism,[342] multicultural manners[343] and a logic of deliberation rather than negotiation.[344] These legal standards do not seek to preserve the integrity of any specific tradition but to guarantee minorities an opportunity to express their cultural demands and receive a fair hearing. After taking into account all the interests at stake, including practical concerns and foreseeable effects on third parties, courts try to determine if the plaintiff was treated in good faith or, to put it differently, without prejudice.[345] This is inevitably a delicate exercise, not least because the weight and rationality of defendants' justifications are typically hard to assess.[346] Moreover, prudential considerations may sometimes make it preferable to err on the side of moral minimalism and require no more than 'gritted-teeth toleration' rather than unambiguous endorsement of cultural diversity.[347] Even then, the possibility of judicial review puts pressure on all organisations to design inclusive decision-making procedures, for instance by consulting minorities regularly and ensuring they are adequately represented in senior positions.[348] For these reasons, the good faith treatment of ethnic practices should be required by employment equality laws, either as an explicit statutory

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pública de la diversidad religiosa (Observatorio del Pluralismo Relisioso en España 2012) 31-32; Pierre Bosset, 'Droits de la personne et accommodements raisonnables: le droit est-il mondialisé?' (2009) 62 *Revue interdisciplinaire d'études juridiques* 1-32.

[341] Javier de Lucas, 'Condiciones jurídicas y políticas del proyecto intercultural en España' (2005) 21 *Anales de Historia Contemporánea* 161-176.

[342] Jocelyn Maclure, 'Respect for reasonable cultural diversity as a principle of political morality' in Michel Seymour (ed), *The plural states of recognition* (Palgrave 2010) 141-151.

[343] Jacob Levy, 'Multicultural manners' in Michel Seymour (ed), *The plural states of recognition* (Palgrave 2010) 61-77.

[344] Anthony Simon Laden, 'Negotiation, deliberation, and the claims of politics' in Anthony Simon Laden and David Owen (eds), *Multiculturalism and political theory* (Cambridge University Press 2007) 198-218.

[345] Aileen McColgan, 'Class wars? Religion and (in)equality in the workplace' (2009) 38 [1] *Industrial Law Journal* 1-29.

[346] Carl Stychin, 'Faith in the future: Sexuality, religion and the public sphere' (2009) 29 [4] *Oxford Journal of Legal Studies* 729-755.

[347] Such moral minimalism, compatible with mild forms of ethnic discrimination, underlies recent attempts to rehabilitate toleration as a second-best alternative to recognition. See Veit Bader, 'Moral minimalism and more demanding moralities: Some reflections on tolerance/toleration' in Jan Dobbernack and Tariq Modood (eds), *Tolerance, intolerance and respect. Hard to accept?* (Palgrave 2013) 23-51.

[348] Myriam Jézéquel, 'The reasonable accommodation requirement: Potential and limits' in CoE, *Institutional accommodation and the citizen: Legal and political interaction in a pluralist society* (CoE Publishing 2009) 21-36.

obligation or an interpretive standard in their enforcement.[349]

4.3.3. General allowance of symbolic identification

Due to their open-ended nature, the proportionality or 'undue burden' tests applied in indirect discrimination cases make room for a wide range of reasons to prohibit ethnic practices. This flexibility has the advantage of taking into account the full variety of incentives and constraints that structure employment relations, but it also entails lower levels of protection. The risks of such an approach have come into plain view through its application to displays of ethnic, including religious, symbols by workers. As recent headscarf jurisprudence shows, courts have been willing to accept a bewildering variety of reasons for their interdiction, including the emancipation of women, conviviality, national cohesion, the fight against terrorism and radicalism, health and safety issues, the legitimacy of public institutions and the protection of children, with minimal scrutiny of their empirical soundness, conceptual coherence and legitimacy.[350] This is all the more troubling since symbolic identification normally offers an efficient way of maximising the visibility of ethnicity at minimal financial or logistical cost for employers. Unlike holidays, prayers or alimentary customs, attire can mark out minority employees throughout their daily tasks, and their impact boils down to intangible concerns about seeing and being seen.

The fact that ethnic dress or styles are often banned despite their apparent

[349] On these approaches' respective benefits and limitations, see Lucy Vickers, 'The relationship between religious diversity and secular models: An equality-based perspective' in Marie-Claire Foblets, Katayoun Alidadi, Jorgen Nielsen and Zeynep Yanasmayan (eds), *Belief, law and politics: What future for a secular Europe?* (Ashgate 2014) 123-127; Frédérique Ast, 'Reflections on the recognition of a right to reasonable accommodation in EU law' in Marie-Claire Foblets, Katayoun Alidadi, Jorgen Nielsen and Zeynep Yanasmayan (eds), *Belief, law and politics: What future for a secular Europe?* (Ashgate 2014) 131-143.

[350] Pierre Bosset, 'Mainstreaming religious diversity in a secular and egalitarian state: The road(s) not taken in Leyla Sahin v Turkey' in Eva Brems (ed), *Diversity and European human rights: Rewriting judgments of the ECHR* (Cambridge University Press 2013) 192-217; Susanna Mancini, 'The power of symbols and symbols as power: Secularism and religion as guarantors of cultural convergence' (2009) 30 [6] *Cardozo Law Review* 2629-2668; Niraj Nathwani, 'Islamic headscarves and human rights: A critical analysis of the relevant case law of the European Court of Human Rights' (2007) 25 *Netherlands Quarterly of Human Rights* 221-254; Carolyn Evans, 'The "Islamic scarf" in the European Court of Human Rights' (2006) 7 *The Melbourne Journal of International Law* 52.

benignity suggests they raise their own unique issues, qualitatively different from the practical inconveniences that might stand in the way of other accommodations. Indeed, it seems to be precisely the symbolic nature of these practices that makes them so controversial. By expressing their identities, minorities challenge established conceptions of the national community, bringing out into view a trait that had remained confined to the private sphere. When they constitute a psychologically significant and stigmatised 'other', this is perceived as a contamination of national customs and values, a threat to unity and authenticity, and thus as a legitimate object of repression.[351] If this analysis is correct, it follows that prohibitions on ethnic symbols can usually be seen as stemming from prejudice as well as contributing to its reproduction. Consequently, they should be treated by default as incompatible with anti-discrimination law. In other words, administrative agencies and courts should apply them higher levels of scrutiny, replacing the permissive indirect discrimination tests with the much stricter ones used to identify direct discrimination.[352]

This interpretive shift would do much to smoke out spurious concerns but leave some leeway for employers to ban ethnic symbols by resorting to the 'genuine and determining occupational requirement' proviso laid out in Article 4 of the EU Racial Equality Directive. While the existence of such requirements must necessarily be assessed on a case-by-case basis, one specific issue should be settled in advance on principled grounds: the admissibility of justifications relying on the effects of ethnic prejudice. These effects implicitly underlie several of the arguments levelled against Muslim veils by employers and states, such as those which cast them as 'conspicuous', 'powerful' or 'proselytising' symbols, a disturbance and a threat for public order, an obstacle to conviviality, an affront to non-Muslims' religious beliefs or a detrimental

[351] Anna Triandafyllidou, 'National identity and diversity: Towards plural nationalism' in Jan Dobbernack and Tariq Modood (eds), *Tolerance, intolerance and respect. Hard to accept?* (Palgrave 2013) 159-185; Effie Fokas, 'Islam in Europe: The unexceptional case' (2011) 24 [1] *Nordic Journal of Religion and Society* 1-17; Cécile Laborde, *Critical republicanism: The hijab controversy and political philosophy* (Oxford University Press 2008) 85-114; Anna Elisabetta Galeotti, *Toleration as recognition* (Cambridge University Press 2002) 85-114.

[352] For similar proposals on the special protection of religious symbols, see Robert Wintemute, 'Accommodating religious beliefs: Harm, clothing or symbols, and refusals to serve others' (2014) 77 [2] *Modern Law Review* 223-253; Brian Leiter, *Why tolerate religion?* (Princeton University Press 2013) 100-115; Letizia Mancini, 'Símbolos religiosos y conflictos en las sociedades multiculturales' in María José Añón Roig and Ángeles Solanes Corella (eds), *Construyendo sociedades multiculturales: Espacio público y derechos* (Tirant lo Blanch 2011) 127-142.

influence on children's development. To the extent that visible manifestations of stigmatised identities tend to be received unfavourably by a worker's colleagues, customers, beneficiaries or collaborators, they can sometimes rationally be framed as hampering the efficient fulfilment of their tasks.[353]

Is this sufficient to make bans legitimate? There are at least two ways of approaching this question. The first consists in examining whether they can be reconciled with the harm principle formulated by Mill in his classical discussion on the relationship between social prejudices and legal coercion. According to this principle, the only purpose for which power can rightfully be exercised over any member of a civilised community against her will is to prevent harm to others.[354] Given Mill's background aim of defending the freedom to pursue one's life plans unimpeded by arbitrary conventions, it would certainly seem awkward to include prejudiced reactions to such life plans within the category of morally relevant harms. Unfortunately, Mill did not explicitly address the utility costs they may entail in the employment context. Since consequentalist arguments figured prominently in his application of the harm principle to various situations, including public violations of good manners (whose interdiction he endorsed), at least some prejudice-based justifications for symbolic prohibitions may be compatible with the harm principle.

Analysing the bans from a recognition perspective leads to a different conclusion. As we have seen throughout this chapter, an anti-racist conception of employment equality law would support a strong emphasis on the reduction of ethnic segregation, stratification and assimilation in public and private organisations. Moreover, it would call for a sustained effort to reach and maintain the proportional representation of all ethnic categories that are widely singled out for stereotyping and discrimination in a given society, activity and time frame. Prejudiced prohibitions on ethnic symbols yield exactly the opposite result. Since they grow out of negative

[353] Alan Wertheimer, 'Jobs, qualifications and preferences' (1983) 94 [1] *Ethics* 99-112. See also Robert Post, 'Prejudicial appearances: The logic of American antidiscrimination law' (2000) 88 [1] *California Law Review* 1-40; Larry Alexander, 'What makes wrongful discrimination wrong? Biases, preferences, stereotypes, and proxies' (1992) 141 *University of Pennsylvania Law Review* 173-176.
[354] John Stuart Mill, *On Liberty* (Yale University Press 2003) 80.

attitudes among an organisation's staff, clients or partners, their proliferation can be expected precisely where patterns of ethnic underrepresentation, segregation and stratification are most entrenched. In addition, the correlation between symbols' propensity to elicit anxiety or hostility and the stigma of their associated identities means that prejudiced bans normally exact greater cultural assimilation from the ethnic categories most in need of recognition. These paradoxes make it imperative for courts to reject prejudiced reactions as a justification for imposing symbolic assimilation.[355] Whatever the costs of visible ethnicity for a particular organisation, they are likely to be dwarfed by the long-term benefits of inclusive public spheres and national identities.

[355] For analogous reasonings, see Sophia Moreau, 'What is discrimination?' (2010) 38 [2] *Philosophy & Public Affairs* 167; Kasper Lippert-Rasmussen, *Born free and equal? A philosophical inquiry into the nature of discrimination* (Oxford University Press 2014) 236-260.

5. Ethnic recognition and education

According to a recent meta-analysis, ethnic biases do not merely affect adults but emerge in early childhood, around five years of age, and maintain themselves throughout adolescence, with an increasing degree of contextual variation as time passes.[356] In primary and secondary schools, majority children evince a mix of positive national identification and selective derogation of other national groups, whereas minority pupils sometimes see themselves as falling outside the national community. Historical geopolitical rivals (Turks in Greece, Germans in the United Kingdom) tend to arouse acute hostility; conversely, entire continents (Africa, Asia and South America) frequently remain shrouded in mystery. Non-Whites and Muslims generally elicit the most negative stereotypes, which often take the form of negative moral judgments and strongly gendered representations of boys as violent and girls as submissive.[357]

This chapter argues that education policies significantly contribute to such a state of affairs. As the workplace does for adults, schools largely provide the social and normative backdrop that structures children's attitudes: they enable or constrain intergroup interactions, shape perceptions of power inequalities and disseminate influential discourses on national identity and eventual threats posed by immigrants and their descendents. Therefore, subjecting these policies to human rights scrutiny could offer an effective way of tackling racist attitudes before they develop and become ingrained within powerful institutions.

All Western European states have ratified universal treaties enshrining the human right to education, including ICESCR, the Convention on the Rights of the Child

[356] Tobias Raabe and Andreas Beelmann, 'Development of ethnic, racial, and national prejudice in childhood and adolescence: a multinational meta-analysis of age differences' (2011) 82 [6] *Child Development* 1715-1737.

[357] Janine Dahinden, Kerstin Duemmler and Joëlle Moret, 'Disentangling religious, ethnic and gendered contents in boundary work: How young adults create the figure of the oppressed Muslim woman' (2014) 35 [4] *Journal of Intercultural Studies* 329-348; Marie Von der Lippe, 'Young people's talk about religion and diversity: A qualitative study of Norwegian students aged 13-15' (2011) 33 [2] *British Journal of Religious Education* 127-142; Martyn Barrett, *Children's knowledge, beliefs and feelings about nations and national groups* (Psychology Press 2007); Ileana Enesco, Alejandra Navarro, Isabel Paradela and Silvia Guerrero, 'Stereotypes and beliefs about different ethnic groups in Spain: A study with Spanish and Latin American children living in Madrid' (2005) 26 *Applied Developmental Psychology* 638-659.

(CRC) [358] and the Convention against Discrimination in Education (CDE). [359] Interestingly, this right explicitly incorporates the prevention of racism among its core aims. As all treaties point out in nearly identical wording, education must strengthen respect for human rights and fundamental freedoms as well as promote understanding, tolerance and friendship among all national, racial, ethnic or religious groups[360] (ICERD uses the same formula in its most forward-looking provision, where 'teaching and education' are mentioned alongside 'culture' and 'information' as major remedies to racial prejudice).[361] Article 2 of the ECHR's additional protocol also protects the right to education, though in much broader terms and without referring to its implications for intergroup attitudes.

In their General Comments, UN monitoring committees have spelled out a number of related state obligations that may help counter the drivers of racism. Regarding the curriculum, they have established that it must provide information on human rights treaties[362] and promote their underlying values.[363] For instance, it must address historical manifestations of racism in particular communities[364] and compulsory subjects on the history of religions and ethics must be imparted in an 'unbiased and objective way'.[365] The same principles should permeate pedagogical methods and the whole school environment[366], where bullying and other exclusionary practices must be actively combated. [367] Authorities should systematically review textbooks, complementary teaching materials and school policies as well as provide pre-service and in-service training for teachers, educational administrators and other stakeholders. In all their interventions, they should avoid superimposing Convention aims and values

[358] Convention against Discrimination in Education (adopted 14 November 1960, entered into force 22 May 1962) 429 UNTS 93.
[359] Adopted at 11th session of the UNESCO General Conference in Paris, from 14 November to 15 December 1960; entered into force 22 May 1962.
[360] Art. 13.1 ICESCR, Art. 5.1a) CDE and Art. 29.1 CRC.
[361] Art. 7 ICERD.
[362] ComRC GC no. 1, para 15.
[363] ComESCR GC no. 13, para 49; ComRC GC no. 1, para 8. See also Javier García Medina and Ángeles Solanes Corella, 'Promoción de los derechos humanos: La educación en derechos' in Fernando Rey Martínez, Joana Abrisketa Uriarte and Federico de Montalvo (eds), *Los derechos humanos en España: Un balance crítico* (Tirant lo Blanch 2015) 91-116.
[364] ComRC GC No. 1, para 11.
[365] ComESCR GC no. 13, para 28.
[366] ComRC GC no. 1, para 8 and 15.
[367] ComRC GC no. 1, para 19.

on existing systems without encouraging any deeper changes.[368] Consistent with a substantive conception of equality, they should disaggregate educational data by the prohibited grounds of discrimination and take measures against *de facto* biases,[369] making sure they do not lead to unequal or separate standards for different groups nor continue after their objectives have been attained.[370] Finally, the committees prohibit state monopolies on educational services and affirm the right of all individuals and bodies to manage educational institutions. At the same time, transparent and effective monitoring mechanisms must uphold minimal standards on admissions, curricula and credentials, consistent with the general aims of education.[371] Subsidies to private schools must be allocated without discrimination on the prohibited grounds.[372]

The ECtHR has also insisted that school knowledge must be 'objective, critical and pluralistic'. Unlike UN committees, however, it has been reluctant to engage in the details of curriculum planning, considered as falling within states' competence.[373] The main exceptions to this trend have aimed to safeguard parents' right to educate their children according to their religious or moral convictions, explicitly recognised in all international treaties (see Section 5.3). As a result, the predominance of majority faiths in religious education has been found to comply with the Convention as long as exemption procedures did not impose an excessive burden on parents or children (see Section 5.1.3).[374] The Court has also adopted a permissive approach to school fees, limiting itself to ensure that they were not applied in a discriminatory manner.[375] This being said, its conception of educational discrimination has significantly broadened in a string of Roma-related cases establishing a positive duty to prevent the segregation of disadvantaged minorities in specific schools.[376] Moreover, the scope of state obligations

[368] ComRC GC no. 1, para 18.
[369] ComESCR GC no. 13, para 37.
[370] ComESCR GC no. 13, para 32.
[371] ComESCR GC no. 13, para 29.
[372] ComESCR GC no. 13, para 54.
[373] *Kjeldsen, Busk Madsen and Pedersen v Denmark* App nos 5095/71, 5920/72, 5926/72 (ECtHR, 7 December 1976) para 53.
[374] Mansur Yalçin and others v Turkey (App no 21163/11) ECtHR 16 September 2014 para 71-75; Hasan and Eylem Zengin v Turkey (App no 1448/04) ECtHR 9 October 2007 para 58-75; Folgero and others v Norway (App no 15472/02) ECtHR 29 June 2007 para 95-100.
[375] Ponomaryovi v Bulgaria (App no 5335/05) ECtHR, 21 June 2011 para 53.
[376] Lavida and others v Greece (App no 7973/10) ECtHR, 30 May 2013 para 65-73.

has been extended to all educational functions they perform regardless of schools' public or private management.[377]

While generally promising and sometimes ambitious, these standards in some respects fall short of providing a sufficient legal basis for anti-racist educational reform. In order to understand why, the following sections focus on three key challenges currently faced by Western European education systems: the ethnocentric bias of curricular contents, the underrepresentation of ethnic minorities in the teaching workforce and high levels of between-school ethnic segregation. Highlighting the ineffectiveness of some well-meaning reforms, each section shows how anti-racist interpretations of the right to education could clear the path for alternative, more promising approaches. The final part contends that this can only be achieved if public and private schools are subjected to similar regulations in a number of areas.

5.1. Critical multiperspectival curriculum

On any plausible understanding of objectivity, criticism and pluralism, much remains to be done for Western European states to adequately apply these requirements to the knowledge imparted in compulsory education. To be sure, all of them actively intervene in setting curricular standards, training teachers and producing or approving textbooks. However, their involvement mainly reflects the interests of politically dominant cultural majorities by privileging their perspectives in subjects such as history, geography, citizenship, religion and literature. In history, curricula tend to focus on states' emergence and (often military) triumphs, glossing over their internal divisions, magnifying their external influence, downplaying their crimes and disregarding important events that took place beyond their boundaries. In geography, they naturalise existing borders based on outstanding landmarks such as rivers, mountains and seas, overlooking their temporal shifts and inaccurately making them coincide with the

[377] Kjeldsen, Busk Madsen and Pedersen v Denmark (App nos 5095/71, 5920/72, 5926/72) ECtHR 7 December 1976 para 50.

distribution of languages and religions. In citizenship, they conflate universal moral principles and national values, ignoring their frequent contradictions and representing foreign cultures as less than civilised. In religion, they overstate the modernisation of Christian doctrine and the secularisation of political institutions, depicting non-Christian faiths as incompatible with modernity. In literature, they promote a narrow canon that consistently exalts social and aesthetic idiosyncrasies and often glorifies warfare in terms of survival, expansion and heroism. While correcting some nationalist biases, EU and CoE interventions seem to have replaced them with an equally exclusivist discourse on European identity. This discourse emphasises Greco-Roman Antiquity, Medieval Christianity, the Renaissance, the Enlightenment and the Industrial Revolution, paying little attention to external and other internal influences on these developments.[378]

While the specific events and relative weight of their national and European dimension vary among states and subjects, few official curricula seem free from ethnocentrism.[379] Biases can be transmitted through a number of more or less explicit means, such as the division of instructional units, the amount of space devoted to each topic, the proportional representation of different ethnic categories, the roles in which they are depicted and the adjectives used to describe them.[380] For instance, a review of 63 textbooks used in the Italian provinces of Verona, Trento and Bolzano found that only 1,5% of reading space addressed intercultural issues, which were especially scarce

[378] David Coulby, *Beyond the national curriculum: Curricular centralism in Europe and the USA* (Routledge 2000) 50-58, 88-96; David Coulby and Crispin Jones, *Postmodernity and European education systems: Cultural diversity and centralist knowledge* (Trentham Books 1995). For similar critiques of Eurocentric epistemologies, see Jack Goody, *The theft of history* (Cambridge University Press 2006); Edward Said, *Orientalism* (Penguin Books 1978); Edward Said, *Culture and imperialism* (Vintage Books 1994).

[379] Daniel Faas, 'The nation, Europe, and migration: A comparison of geography, history and citizenship education curricula in Greece, Germany, and England' (2011) 43 [4] *Journal of Curriculum Studies* 471-492; Hanna Schissler and Yasemin Nuhogly Soysal (eds), *The nation, Europe, and the world: Textbooks and curricula in transition* (Bergahn Books 2005); Antolín Granados Martínez and Francisco García Castaño, 'Racialismo en el currículum: La transmisión de discursos de la diferencia en el currículum oficial de la comunidad andaluza' in Antolín Granados Martínez and Francisco García Castaño (eds), *Educación, ¿integración o exclusion de la diversidad cultural?* (Universidad de Granada 1997) 297-306.

[380] Christine Bennett, 'Genres of research in multicultural education' (2001) 71 [2] *Review of Educational Research* 171-217; Antolín Granados Martínez and Francisco García Castaño, 'Racialismo en los libros de texto: La transmission de discursos sobre la diferencia en diferentes libros de texto de la educación primaria' in Antolín Granados Martínez and Francisco García Castaño (eds), *Educación, ¿integración o exclusion de la diversidad cultural?* (Universidad de Granada 1997); Christine Sleeter and Carl A. Grant, 'Race, class, gender and disability in current textbooks' in Michael Apple and Linda Christian-Smith (eds), *The politics of the textbook* (Routledge 1991) 78-110.

in the first years of primary education. Humanity was divided into different 'races', Black people were shown as poor and some cultures were dubbed 'primitive'. More subtly, textbooks also referred to other 'peoples', 'tribes', countries or continents in a superficial manner, without any explanation on their political and social organisation, economy, culture or religion. History textbooks were structured around a separation between ancient civilisations (third grade), the Middle Ages (fourth grade) and contemporary events (fifth grade). They offered an Italo-centric understanding of Mediterranean culture, a Eurocentric narrative on the 'discovery' of America and little information on pre-Columbian civilisations. Non-Western cultures were seen through the prism of Western colonialism or conquest.[381] Such biases can be expected to reproduce colonial ideologies, stereotype ethnic minorities as subordinated and radically exclude them from European identities.

In official discourses and sometimes in practice, states often commit themselves to promote intercultural education through special didactic units exposing children to minority traditions, achievements and experiences.[382] However, psychosocial studies fail to bear out the claim that such knowledge can displace negative stereotypes. One reason is that the limited class time devoted to these additive activities[383] cannot counterbalance the considerably greater amount of stereotype-consistent information transmitted by the curriculum. In addition, very young or highly prejudiced children often forget most counter-stereotypical information or use it to create new subtypes (say, Black scientists) that leave the general category (Black people) intact. As a result, activities that convey a mix of stereotypical and counter-

[381] Agostino Portera, 'Stereotypes, prejudices and intercultural education in Italy: Research on textbooks in primary schools' (2004) 15 [3] *Intercultural Education* 283-294.

[382] Carl Grant and Agostino Portera (eds), *Intercultural and multicultural education: Enhancing global interconnectedness* (Routledge 2011); Olivier Meunier, *Approches interculturelles en éducation: Étude comparative internationale* (Institut National de Recherche Pédagogique 2007); Eurydice, *Citizenship at school in Europe* (2005); Luce Pépin, *Teaching about religions in European school systems: policy issues and trends* (Network of European Foundations 2009). See numerous examples in OSCE/ODIHR, *Human rights education in the school systems of Europe, Central Asia and North America: A compendium of good practice* (2012) 97-188.

[383] James Banks, 'Multicultural education: historical development, dimensions, and practice' in James Banks and Cherry McGee Banks (eds), *Handbook of research on multicultural education* (John Wiley & Sons 2004) 3-29.

stereotypical information may actually lead to an increase in prejudice, as the latter is discarded in favour of the former.[384]

Curriculum planners and teachers may also fall in the trap of benign prejudice, transmitting positive stereotypes that validate rather than undermine prevailing conceptions. As we have seen in Section 3.3, powerful social categories tend to be perceived as cold but skilled and subordinated ones as warm but incompetent. To the extent that such images permeate common-sense thinking, education professionals will be tempted to depict, for instance, economically successful minorities as hardworking and struggling ones as sociable.[385] These discourses will do little to alter feelings of envy toward the former and pity toward the latter. Moreover, all stereotypical representations ultimately accentuate perceptions of intra-group homogeneity and inter-group difference, the basic cognitive process that should be superseded in order to prevent the development of biased attitudes.[386]

Finally, classroom lessons and debates on ethnic discrimination can inadvertently enable the reiteration of racist discourses that mask rather than reveal ethnic subordination processes.[387] Such discourses might state that racism is an

[384] Jessica Walton, Naomi Priest and Yin Paradies, 'Identifying and developing effective approaches to foster intercultural understanding in schools' (2013) 24 [3] *Intercultural Education* 181-194; Frances Aboud et al., 'Interventions to reduce prejudice and enhance inclusion and respect for ethnic differences in early childhood: A systematic review' (2012) 32 *Developmental Review* 307-336; Jennifer Pfeifer, Christia Spears Brown and Jaana Juvonen, 'Teaching tolerance in schools: Lessons learned since Brown v Board of Education about the development and reduction of children's prejudice' (2007) 21 [2] *Social Policy Report* 2-24; Elizabeth Levy Paluck and Donald Green, 'Prejudice reduction: What works? A review and assessment of research and practice' (2009) 60 *Annual Review of Psychology* 339-367; Frances Aboud and Sheri Levy, 'Interventions to reduce prejudice and discrimination in children and adolescents' in Stuart Oskamp (ed), *Reducing prejudice and discrimination* (Lawrence Erlbaum Associates 2000) 269-293; Rebecca Bigler (1999), 'The use of multicultural curricula and materials to counter racism in children' (1999) 55 [4] *Journal of Social Issues* 687-705.

[385] Richard Harris and Gill Clarke, 'Embracing diversity in the history curriculum: A study of the challenges facing trainee teachers' (2011) 41 [2] *Cambridge Journal of Education* 159-175; Louise Archer and Becky Francis, 'Constructions of racism by British Chinese pupils and parents' (2005) 8 [4] *Race Ethnicity and Education* 387-407; Jennifer Ng, Sharon Lee and Yoon Pak, 'Contesting the model minority and perpetual foreigner stereotypes: A critical review of literature on Asian Americans in education' (2007) 31 *Review of Research in Education* 95-130.

[386] Aneeta Rattan and Nalini Ambady, 'Diversity ideologies and intergroup relations: an examination of colorblindness and multiculturalism' (2013) 43 *European Journal of Social Psychology* 12-21; Sheri Levy, 'Reducing prejudice: lessons from social-cognitive factors underlying perceiver differences in prejudice' (1999) 55 [4] *Journal of Social Issues* 745-765; Marilynn Brewer, 'The social psychology of intergroup relations: Can research inform practice?' (1997) 53 [1] *Journal of Social Issues* 197-211.

[387] Paul Gorski, 'Complicity with conservatism: The de-politicizing of multicultural and intercultural education' (2006) 17 [2] *Intercultural Education* 163-177.

exceptional phenomenon affecting a limited number of ignorant or deluded individuals; that it expresses itself exclusively in overt name-calling or aggression; that it is a product of migration and cultural differences; and that it can be eliminated by providing people with facts and moral guidance.[388] Conversely, teachers' willingness to prevent inappropriate comments and overheated reactions can inhibit the open expression and discussion of opposing viewpoints.[389]

To overcome these problems, human rights bodies have insisted on the need to infuse the whole curriculum with human rights principles and multiple cultural perspectives, based on a broad consultation with minority groups and international stakeholders. The rest of this section will spell out the far-ranging transformation of school curricula that would be necessary in order to meet these requirements.

5.1.1. Participative standard-setting

First of all, a state's failure to effectively regulate the basic curricular contents of primary and secondary education should be considered as a *prima facie* violation of the right to education.[390] Such regulations can come in many forms, including the listing of mandatory courses, the description of their specific themes, the approval of textbooks and the periodic assessment of students. Comparative studies conducted by the OECD reveal that Western European states vary significantly in this regard. In the Netherlands, over 90% of primary and secondary school principals report that they enjoy complete autonomy on assessment, textbooks and course contents; 75% also say they are free to decide which courses to offer. A similar picture emerges in the United Kingdom, with the proviso that educational authorities play a more decisive role in assessment procedures. At the other end of the spectrum, less than 25% of principals in Portugal,

[388] Audrey Bryan, '"You've got to teach people that racism is wrong and then they won't be racist": Curricular representations and young people's understandings of 'race' and racism' (2012) 44 [5] *Journal of Curriculum Studies* 599-629.
[389] Hester Radstake and Yvonne Leeman, 'Guiding discussions in the class about ethnic diversity' (2010) 21 [5] *Intercultural Education* 429-442.
[390] See UN Special Rapporteur on the right to education, Report A/HRC/26/27 of 2 May 2014.

Switzerland, Norway and Germany regard themselves as the highest authority on course contents. While governments diverge in their emphasis on different regulatory instruments, their intervention generally focuses on the list of courses, whereas schools and teachers enjoy more discretion in their choice of textbooks. Indeed, a wider look at OECD members shows that government control of textbooks mostly takes place in authoritarian states or very young democracies, notwithstanding prominent outliers such as Greece, Switzerland, Luxembourg and the United States.[391] Nonetheless, many European states regularly screen textbooks with the aim of removing blatant forms of bias.[392] These interventions seem necessary given the central role they play in the classroom, especially in a context of increasing inter-school competition and focus on achievement that provides incentives for teachers to adhere closely to prescribed contents.[393]

Nation-wide standards, which restrict the autonomy traditionally enjoyed by some schools and teachers in content selection and assessment, have often been used to enforce assimilation and prevent ethnicised schools from questioning dominant cultural and normative perspectives.[394] However, they could also be put to the service of counter-hegemonic discourses by obliging predominantly White schools to diversify their curriculum.[395] To achieve this, attention should be paid to the actors involved in the political process of selecting the knowledge worthy of being passed down from one generation to the next.[396] For instance, comparative research on historical narratives

[391] OECD, *PISA 2012 Results: What makes schools successful? Resources, policies and practices* (OECD Publishing 2013) 132.
[392] Eckhardt Fuchs, 'Current trends in history and social studies textbook research' (2011) 14 [2] *Journal of International Cooperation in Education* 17-34.
[393] Keith Crawford and Stuart Foster, 'The political economy of history textbook publishing in England' in Jason Nicholls (ed), *School history textbooks across cultures: International debates and perspectives* (Symposium Books 2006); Marie-Christine Baquès, 'History textbooks in France: between national institutions, publishers and teaching practice' in Jason Nicholls (ed), *School history textbooks across cultures: International debates and perspectives* (Symposium Books 2006).
[394] Pauline Stoltz, 'Canons and communities: Children and social cohesion in Sweden and the Netherlands' (2011) 6 [1] *Education, Citizenship and Social Justice* 39-52; Alex Moore, 'Curriculum as culture: Entitlement, bias and the Bourdieusean arbitrary' in Alex Moore (ed), *Schooling, society and curriculum* (Routledge 2006) 87-99.
[395] Uvanney Maylor and Barbara Read, *Diversity and citizenship in the curriculum: Research review* (London Metropolitan University 2007).
[396] Michael Apple, *The state and the politics of knowledge* (RoutledgeFalmer 2003) 1-24; Thomas Popkewitz, *A political sociology of educational reform: Power/knowledge in teaching, teacher education, and research* (Teachers College Press 1991).

have revealed that their reconstruction tends to be a priority for new political regimes seeking to consolidate their legitimacy: events and actors that support their worldview are brought to the fore, whereas other milestones are relegated to the backstage.[397] However, the instrumentalisation of scientific evidence can also serve legitimate purposes, such as making it more relevant for students' personal experiences and projects.[398] As we will see in the following sections, even explicitly ideological aims need not always be objectionable. International organisations such as UNESCO and the CoE have long been promoting an educational emphasis on democracy and human rights,[399] as well as the inclusion of heretofore-neglected Asian, African and Native American viewpoints.[400] This has prompted authorities to complement local, national and European themes with global ones[401] and led to greater acknowledgement of external influences on national life.[402] International agreements on reciprocal textbook revision should be implemented and expanded to protect and build on these achievements.[403]

At the same time, there are signs that international forums of knowledge exchange may downplay enduring world inequalities and conflict, trading mythical national narratives for utopian visions of a peaceful global society.[404] To correct this

[397] UN Special Rapporteur in the field of cultural rights, Report A/68/296 of 9 August 2013, para 21-25; Arie Wilschut, 'History at the mercy of politicians and ideologies: Germany, England and the Netherlands in the 19th and 20th centuries' (2010) 42 [5] *Journal of Curriculum Studies* 693-723; Hannes Swoboda and Jan Marinus Wiersma (eds), *Politics of the past: The use and abuse of history* (Socialist Group in the European Parliament/Renner Institut 2009).
[398] This is a recurring theme in Ian Davies, *Debates in history teaching* (Routledge 2011).
[399] John Meyer, Patricia Bromley and Francisco Ramírez, 'Human rights in social science textbooks: Cross-national analyses, 1970-2008' (2010) 83 [2] *Sociology of Education* 111-134; Robert Fiala, 'Educational ideology and the school curriculum' in Aaron Benavot and Cecilia Brdslavsky (eds), *School knowledge in comparative and historical perspective: Changing curricula in primary and secondary education* (Springer 2007) 15-34.
[400] Falk Pingel, *UNESCO guidebook on textbook research and textbook revision* (UNESCO/Georg Eckert Institute for International Textbook Research 2010); Ann Low-Beer, *The Council of Europe and school history* (CoE 1997).
[401] Elizabeth Buckner and Susan Garnett Russell, 'Portraying the global: Cross-national trends in textbooks' portrayal of globalization and global citizenship' (2013) 57 *International Studies Quarterly* 738-750; Yasemin Nuhoglu Soysal and Suk-Ying Wong, 'Educating future citizens in Europe and Asia' in Aaron Benavot and Cecilia Brdslavsky (eds), *School knowledge in comparative and historical perspective: Changing curricula in primary and secondary education* (Springer 2007) 73-88.
[402] Frank Lechner, 'Redefining national identity: Dutch evidence on global patterns' (2007) 48 [4] *International Journal of Comparative Sociology* 355-368.
[403] UN Special Rapporteur in the field of cultural rights, Report A/68/296 of 9 August 2013, para 14, 85.
[404] John Meyer, 'World models, national curricula and the centrality of the individual' in Aaron Benavot and Cecilia Brdslavsky (eds), *School knowledge in comparative and historical perspective: Changing curricula in primary and secondary education* (Springer 2007) 259-272.

elitist bias, a wide range of actors representing diverse interests and concerns should collaborate with scientific and educational professionals in national-level processes of curriculum and textbook development.[405] Such explicit politicisation of curricular contents would necessarily trigger sporadic 'culture wars',[406] a by-product of citizens' increasing awareness of the high stakes involved in the regulation of institutional discourse.[407] Nevertheless, they appear like the only way of strengthening the symbolic position of subordinated social categories by creating more inclusive national identities, improving ethnic minorities' stereotypical warmth and competence and reducing ethnicity-based social categorisations.[408] Ethnic criticisms of biased historical narratives, religious doctrines and literary canons should thus be encouraged and exploited through high-level consultation and representation.[409] In particular, scientific committees in charge of developing the curriculum and financing or approving textbooks should comprise experts of different ethnic origins, genders and other salient social categories. To ensure their independence, they should be appointed by a range of professional bodies and associations rather than government representatives exclusively.[410]

[405] UN Special Rapporteur on the right to education, Report E/CN.4/2003/9 of 21 January 2003, para 35; UN Independent Expert on minority issues, Report A/68/268 of 5 August 2013, para 91e); OSCE, *Toledo guiding principles on teaching about religions and beliefs in public schools* (OSCE Office for Democratic Institutions and Human Rights 2007) 51; OSCE, *Guidelines for educators on countering intolerance and discrimination against Muslims: Addressing islamophobia through education* (OSCE/ODIHR, CoE, UNESCO 2011) 30; OSCE/ODIHR, *Guidelines for human rights education for secondary school systems* (2012) 30.

[406] Juan Manuel Moreno, 'The dynamics of curriculum design and development: Scenarios for curriculum evolution' in Aaron Benavot and Cecilia Brdslavsky (eds), *School knowledge in comparative and historical perspective: Changing curricula in primary and secondary education* (Springer 2007) 195-210.

[407] Richard Ned Lebow, 'The politics of history in comparative perspective' (2008) 617 *Annals of the American Academy of Political and Social Science* 25-41.

[408] Walter Stephan and Cookie White Stephan, 'Intergroup relations in multicultural education programs' in Walter Stephan and Paul Vogt (eds), *Education programs for improving intergroup relations: Theory, research and practice* (Teachers College Press 2004) 782-798. See also Michael Apple, 'Can schooling contribute to a more just society?' (2008) *Education, Citizenship and Social Justice* 3 [3] 239-261.

[409] Francisco Ramírez, Patricia Bromley and Susan Garnett Russel, 'The valorization of humanity and diversity' (2009) 1 [1] *Multicultural Education Review* 29-54; Joseph Dunne, 'Between states and civil society: European contexts for education' in Keven McDonough and Walter Feinberg (eds), *Citizenship and education in liberal-democratic societies: Teaching for cosmopolitan values and collective identities* (Oxford University Press 2003) 96-120.

[410] UN Special Rapporteur in the field of cultural rights, Report A/68/296 of 9 August 2013, para 91.

5.1.2. Moral judgement

The recognition that school knowledge must simultaneously be regulated and politicised leaves open the issue of setting substantive limits to the resulting arrangements, especially when it comes to morally loaded issues. Indeed, the appropriateness for states to actively promote a specific moral outlook has long been an object of philosophical debate. In line with Rawls' overlapping consensus, however, most theorists now accept that political morality is not only compatible with freedom of conscience but also necessary for the education of active citizens, as long as the state avoids dictating the 'ultimate ends' –religious or secular– served by such morality.[411] Consistent with this position, international law explicitly obliges states to foster human rights values through the selection and transmission of school knowledge. [412]

A number of curricular standards can be derived from this duty. First of all, historical actions amounting to gross violations of human rights should be neither denied nor extolled.[413] The genocides and crimes against humanity caused by European colonialism and imperialism should be explicitly addressed, together with their less problematic and even positive political, economic and cultural consequences. Responsibility for the enslavement of Africans, the extermination of indigenous peoples, the military aggression of foreign regimes and the persecution of religious minorities should be acknowledged rather than entirely shifted to allies, secondary contributors, victims and natural or structural factors (such as differing immunity to

[411] Amy Gutmann, *Democratic Education* (2nd edn, Princeton University Press 1999); Eamonn Callan, *Creating citizens: Political education and liberal democracy* (Oxford University Press 1997); Meira Levinson, *The demands of liberal education* (Oxford University Press 1999) 103; Stephen Macedo, *Diversity and distrust: Civic education in a multicultural democracy* (Harvard University Press 2000); Kevin McDonough and Walter Feinberg (eds), *Education in liberal-democratic societies: Teaching for cosmopolitan values and collective identities* (Oxford University Press 2003).

[412] UN Special Rapporteur on the right to education, Report A/HRC/26/27 of 2 May 2014, para 24-25; UN General Assembly, Revised draft plan of action for the first phase (2005-2007) of the World Programme for Human Rights Education, A/59/525/Rev.1, 2 March 2005; OHCHR/UNESCO, *Human rights education in primary and secondary school systems: A self-assessment guide for governments* (United Nations 2012); OSCE/ODIHR, *Guidelines for human rights education for secondary school systems* (2012) 29-32; UNESCO, *Guidelines for intercultural education* (2006) 37; CoE, *White paper on intercultural dialogue 'Living together as equals in dignity'* (2008) 43-45; Jean-Michel Leclerq, *Facets of interculturality in education* (CoE Publishing 2003) 49-55.

[413] UN Special Rapporteur in the field of cultural rights, Report A/68/296 of 9 August 2013, para 16, 19-20, 32, 70, 86; CoE, Recommendation Rec(2001)15 of the Committee of Ministers to member states on history teaching in twenty-first-century Europe, adopted 31 October 2001.

diseases or inequalities in technological sophistication). Relatedly, the perpetrators of these crimes should be taken down from their moral pedestal, striking a balance between their eventual contribution to some people's wellbeing and others' suffering.

Of course, this assessment could only be provisional and imperfect, the result of a compromise between the moral and other purposes of historical education.[414] In this sense, there are reasons to worry about the proliferation of criminal laws enforcing specific interpretations of history,[415] partly spurred by the 2008 EU Framework Decision on hate speech mentioned in the introduction. Still, states should be held accountable for the flagrant omissions and misrepresentations transmitted by educational institutions under their jurisdiction. To ensure this is the case, lawyers could find inspiration in the educational measures implemented to remember the Holocaust and its moral lessons. For instance, the CoE has encouraged member states to organise an annual 'Day of Remembrance' to educate students in the prevention of crimes against humanity by learning from the experiences of the 20th century.[416] Several countries have also included Holocaust education in their mandatory curriculum. Testifying to the subject's symbolic significance, it has everywhere met with considerable political resistance. In effect, teaching the Holocaust forces nations to confront their own history of racism and anti-Semitism not only during but also after WWII. More broadly, it requires nations, states, communities, teachers, and students to examine broader themes in the nation's history, including the treatment of minority groups, immigration policies and colonialism.[417]

Citizenship education offers another important path for the transmission of human rights' underlying values, including human dignity, equality, autonomy,

[414] Andrew Peterson, 'Moral learning in history' in Ian Davies (ed), *Debates in history teaching* (Routledge 2011) 161-171; Dienke Hondius, 'Finding common ground in education about the Holocaust and slavery' (2010) 21 [S1] *Intercultural Education* 61-69.
[415] Luigi Cajani, 'Criminal laws on history: The case of the European Union' (2011) 11 *Historein* 19-48.
[416] CoE, 'Holocaust Remembrance Day', available at http://www.coe.int/en/web/holocaust/holocaust-remembrance-day [accessed 30 May 2016].
[417] Bryan Davis and Eliane Rubinstein-Avila, 'Holocaust education: global forces shaping curricula integration and implementation' (2013) 25 [1-2] *Intercultural Education* 149-166.

democracy, the rule of law and respect for cultural difference.[418] However, taking advantage of its anti-racist potential requires transcending the narrow national frame in which rights and duties are too often explored, interrogating the various levels at which citizenship is granted and exercised. [419] The Spanish case offers an interesting illustration of such an approach, as well as the political challenges it poses. In 2006, the central government introduced a new compulsory subject on education for citizenship and human rights, to be taught during one year at the primary level and two years at the secondary level. Of its five themes, one focused on issues of discrimination (including racism and xenophobia), another addressed the rights enshrined in universal declarations and treaties and a third analysed global problems, organisations and interdependencies. The subject was heavily criticised by the conservative opposition, which characterised it as a form of moral indoctrination.[420] When it came to power, the subject was substituted by an option on ethics, offered as an alternative to religious education.[421] Of course, religion can also provide a pathway to the promotion of human rights, especially if it is presented as a matter of individual choice and a legitimate source of personal identity and cultural diversity.[422] As we will see, however, this would entail a significant overhaul of current religious courses.

[418] CoE, Recommendation CM/Rec(2010)7 of the Committee of Ministers to member states on the CoE Charter on Education for Democratic Citizenship and Human Rights Education, adopted 11 May 2010, Art. 5.
[419] Alistair Ross, 'Multiple identities and education for active citizenship' (2007) 55 [3] *British Journal of Educational Studies* 286-303; James Banks, 'Educating citizens in diverse societies' (2011) 22 [4] *Intercultural Education* 243-251; Audrey Osler, 'New directions in citizenship education: Re-conceptualizing the curriculum in the context of globalization' in Alex Moore (ed), *Schooling, society and curriculum* (Routledge 2006) 100-114.
[420] Laura Engel, 'Global citizenship and national (re)formations: Analysis of citizenship education reform in Spain' (2014) 9 [3] *Education, Citizenship and Social Justice* 244-247.
[421] Ley Orgánica 8/2013, de 9 de diciembre, para la mejora de la calidad educative, BOE-A-2013-12886 art 6.
[422] CoE, Recommendation CM/Rec(2008)12 of the Committee of Ministers to member states on the dimension of religions and non-religious convictions within intercultural education; OSCE, *Toledo guiding principles on teaching about religions and beliefs in public schools* (OSCE Office for Democratic Institutions and Human Rights 2007) 40, 76; OSCE, *Guidelines for educators on countering intolerance and discrimination against Muslims: Addressing islamophobia through education* (OSCE/ODIHR, CoE, UNESCO 2011) 23-24.

5.1.3. Multiple perspectives

According to the principle of multiperspectivity, educational narratives should break with their tendency to conflate the nation with its dominant social categories and embrace the specific experiences of the marginalised.[423] In this sense, curricular coverage of cultural minorities should not be limited to a story of victimhood and helplessness but include their experiences of struggle against oppression and positive contribution to human welfare. No yardstick of historical significance should allow the omission of migration as an immemorial fact of human existence, nor the racial, linguistic and religious diversity that has characterised European nations from the moment of their birth.[424] Similarly, no measure of aesthetic merit should prevent students from enjoying minority and non-European forms of literature, music, dance or visual arts;[425] no criteria of demographic penetration should blindfold them to the multiple spiritualities people draw on in order to find existential meaning and make moral judgments.[426]

Just like the human rights dimension of education implicitly disqualifies the ideal of the state's moral neutrality, multiperspectivity acknowledges the impossibility

[423] Joseph Huber and Christopher Reynolds (eds), *Developing intercultural competence through education* (CoE Publishing 2014) 20, 39-41; CoE, *Living together: Combining diversity and freedom in 21st-century Europe* (2011) 61: CoE, *White paper on intercultural dialogue 'Living together as equals in dignity'* (2008) 43-45; UNESCO, *Guidelines for intercultural education* (2006) 19, 35, 37; Jean-Michel Leclerq, *Facets of interculturality in education* (CoE Publishing 2003) 39-44.

[424] UN Special Rapporteur in the field of cultural rights, Report A/68/296 of 9 August 2013, para 29, 31, 54, 58, 88a; Robert Stradling, *Multiperspectivity in history teaching: a guide for teachers* (CoE 2003); CoE, Recommendation Rec(2001)15 of the Committee of Ministers to member states on history teaching in twenty-first-century Europe, adopted 31 October 2001; Euroclio, *Connecting Europe through history: Experiences and perceptions of migrations in Europe* (2011) 30; Jagdish Gundara, 'Global and civilisational knowledge: eurocentrism, intercultural education and civic engagements' (2014) 25 [2] *Intercultural Education* 114-127; Laura O'Connor and Daniel Faas, 'The impact of migration on national identity in a globalized world: a comparison of civic education curricula in England, France and Ireland' (2012) 31 [1] *Irish Educational Studies* 51-66; Richard Harris, 'The place of diversity within history and the challenge of policy and curriculum' (2013) 39 [3] *Oxford Review of Education* 400-419; Paul Bracey, Alison Gove-Humphries and Darius Jackson, 'Teaching diversity in the history classroom' in Ian Davies (ed), *Debates in history teaching* (Routledge 2011) 172-185.

[425] Henry Giroux, *Border crossings: Cultural workers and the politics of education* (Routledge 2005).

[426] UN Independent Expert on minority issues, Report A/68/268 of 5 August 2013, 50-51, 91c); CoE, Recommendation CM/Rec(2008)12 of the Committee of Ministers to member states on the dimension of religions and non-religious convictions within intercultural education; Wanda Alberts, 'The academic study of religions and integrative religious education in Europe' (2010) 32 [3] *British Journal of Religious Education* 275-290; Denise Cush, 'Should religious studies be part of the compulsory state school curriculum?' (2007) 29 [3] *British Journal of Religious Education* 217-227; Robert Jackson, *Rethinking religious education and plurality: Issues in diversity and pedagogy* (Routledge 2004).

of offering an exhaustive rendition of the human experience (though factual complexity would certainly benefit from new sources of information). Its more modest aim is to dislodge the perspective of a specific group from its hegemonic position by giving a voice to those who have traditionally been excluded from the public sphere.[427] Such a goal would arguably be consistent with a range of liberal sensitivities, from the multiculturalist to the universalist, constitutionalist, egalitarian, transnational, cosmopolitan, nationalist, patriotic, anti-racist, post-colonial, post-modernist and feminist, together with their potentially infinite combinations.[428] Conservatives might object to the ensuing transformation of traditional identities but could be assuaged by the fact that locally relevant events and knowledge would still predominate, albeit in a reframed manner.

Two ECtHR cases concerning exemptions to religious education exemplify the legal reasoning that could be applied in order to identify a violation of the multiperspectivity principle.[429] In *Folgerø and others v Norway*, non-Christian parents complained that a compulsory course on Christianity, religion and philosophy was not sufficiently 'objective' since it intended to strengthen pupils' religious identity by adopting a Christian outlook and praising Christian beliefs and traditions. The government objected that the subject did not only promote Norway's national history and values but also respect for pupils of different backgrounds: only half of the curriculum was devoted to Christianity, the other half addressing other world religions and philosophies. Based on a thorough analysis of the curriculum and its legislative history, the Court recognised that it had been adopted with the intention of promoting intercultural dialogue and that the primacy of Christian knowledge did not by itself infringe the principles of pluralism and objectivity. However, it pointed out that the quantitative and qualitative differences in the coverage of Christianity and other

[427] Chantal Mouffe, *The democratic paradox* (Verso 2000) 80-107.
[428] See the rich spectrum of views displayed in Kevin McDonough and Walter Feinberg (eds), *Education in liberal-democratic societies: Teaching for cosmopolitan values and collective identities* (Oxford University Press 2003); Martha C. Nussbaum, *For love of country?* (Beacon Press 2002).
[429] For discussions of these cases, see Pierre Bosset, 'Les droits des parents en matière d'enseignement religieux: Pour une mise en perspective du discours juridique' in Mireille Estivalières and Solange Lefebvre (eds), *Le programme d'éthique et culture religieuse: De l'exigeante conciliation entre le soi, l'autre et le nous* (Presses de l'Université Laval 2012); Roger Trigg, *Equality, freedom and religion* (Oxford University Press 2012) 60-62.

spiritual outlooks –for instance, pupils had to 'learn the fundamentals' of the former but merely 'study the main features' or 'know about' the latter– were of such magnitude as to make the goal of intercultural understanding unattainable.[430] A similar reasoning was used in *Hasan and Eylem Zengin v Turkey*, where the imbalance stemmed from an even greater predominance of Sunni Islam in compulsory religious education. Interestingly, the Court highlighted that the complete absence of the Alevi faith (espoused by the claimants) could not be justified in view of its numerous followers in Turkey, implicitly recognising a duty of proportionality in the represention of different cultural groups.[431]

Of course, the claimants in *Folgero* and *Zengin* could rely on a consolidated body of case law on religious freedom and its implications for education policy. Given the underdeveloped state of cultural rights, one can only speculate about the effects of extrapolating these standards to the fields of history, geography, citizenship and the arts. How many foreign and minority writers would enter the canon? How much would children learn about the development of Chinese, Bantu and Inca civilisations? How many African capitals would they have to memorise? How far back would they trace the origins of their lexicon, gastronomy, mathematics or calendar?

5.2. Voluntary desegregation

While the ECtHR's attention to ethnic segregation in the educational sphere has so far focused on the Roma, PISA surveys reveal that similar patterns have taken hold among other minorities. In virtually all EU states, the average native attends a school with less than 10% foreign-origin students, but this share multiplies two to five-fold for the latter.[432] Consistent with their precarious economic situation, children of immigrants also cluster in working-class establishments.[433] Part of this inequality can be explained by residential patterns, although it is unclear how much neighbourhood segregation

[430] Folgero and others v Norway (App no 15472/02) ECtHR 29 June 2007 para 55, 70-73, 88-85.
[431] Hasan and Eylem Zengin v Turkey (App no 1448/04) ECtHR 9 October 2007 para 65.
[432] OECD, *Closing the gap for immigrant students: Policies, practice and performanc*e (2010) 36.
[433] OECD, *PISA 2012 results: Excellence through equity: Giving every student the chance to succeed (Volume II)* (2013) 83.

itself derives from parents' wish to settle in homogenous school catchment areas.[434] More recently, market-based policies increasing parental choice and school autonomy have provided further incentives for ethnic and class specialisation, probably exacerbating within-school and between-school segregation.[435] Whereas upper-class schools tend to adopt an international orientation, focus on achievement and expel troublemakers, middle-class ones strive to retain White families by offering special options, multiplying their promotional activities and isolating minority students in technical or professional tracks. At the bottom of the hierarchy, 'humanitarian' schools adapt to their disadvantaged and racialised intake by developing a strong egalitarian ethos and services for students with learning difficulties.[436]

Like all other kinds of segregation, homogenous schools catalyse racism by limiting children's opportunities to know and befriend different peers.[437] In line with contact theory, available evidence suggests that such interactions can contain and even reverse the rise of prejudiced attitudes between middle childhood and adolescence,[438] especially when they are endorsed by egalitarian school norms.[439] This condition appears more likely to obtain in older immigration countries, whereas new ones evince

[434] OECD, *Closing the gap for immigrant students: Policies, practice and performance* (2010) 82; Agnès Van Zanten and Stephen Ball, 'La construction des ségrégations scolaires en France et en Angleterre' in Ministère de l'Éducation Nationale, *La discrimination positive en France et dans le monde* (SCÉRÉN-CNDP 2003) 33-53.

[435] Agnès Van Zanten, 'Les politiques de choix de l'école et leurs effets' in Noémie Houard (ed), *Politique de la ville. Perspectives françaises et ouvertures internationales* (La Documentation française/Centre d'analyse stratégique 2012) 111-130; Miquel Àngel Alegre and Gerard Ferrer, 'School regimes and education equity: Some insights based on PISA 2006' (2010) 36 [3] *British Educational Research Journal* 433-461. For a literature review, see Lorenzo Capellán de Toro, Javier García Castaño, Antonia Olmos Alcaraz and María Rubio Gómez, 'Sobre agrupamiento, concentración, segregación o guetización escolar: Claves para un análisis interpretative de tales situaciones y procesos' (2013) 18 *Avances en Supervisión Educativa* 1-27.

[436] Stephen Ball and Christian Maroy, 'Schools' logic of action as mediation and compromise between internal dynamics and external constraints and pressures' (2009) 39 [1] *Compare: A Journal of Comparative and International Education* 99-112.

[437] Sabahat Bagci et al., 'Cross-ethnic friendships: Are they really rare? Evidence from secondary schools around London' (2014) 41 *International Journal of Intercultural Relations* 125-137.

[438] Tobias Raabe and Andreas Beelmann, 'Development of ethnic, racial and national prejudice in childhood and adolescence: A multi-national meta-analysis of age differences' (2011) 82 [6] *Child Development* 1715-1737.

[439] Linda Tropp and Mary Prenovost, 'The role of intergroup contact in predicting children's interethnic attitudes: Evidence from meta-analytic and field studies' in Sheri Levy and Melanie Killen (eds), *Intergroup attitudes and relations in childhood through adulthood* (Oxford University Press 2008) 236-248.

no significant relationship between the share of foreign-origin students in classrooms and pupils' inclusive attitudes.[440]

School segregation also reproduces racism through additional, mutually reinforcing processes fed by wider social forces. Since teachers and principals tend to align their practices with the preferences of the population they serve, White schools are less likely than multi-ethnic ones to stress minority rights, enforce sanctions against racist behaviour and present counter-hegemonic perspectives on historical, artistic and social issues. [441] Moreover, they provide a fertile ground for overt or covert discrimination in staff recruitment and promotion [442] , contributing to ethnic underrepresentation in the teaching force.[443] This is especially problematic since racist assumptions often permeate teachers' expectations, evaluations and sanctions. Anti-racist and multicultural issues, unevenly addressed in teacher training programmes, are seen as a superfluous distraction from more important subjects or reframed in terms of cultural deficit; racist incidents are overlooked or dismissed as harmless. [444]

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[440] Jan Germen Janmaat, 'Do ethnically mixed classrooms promote inclusive attitudes towards immigrants everywhere? A study among native adolescents in 14 countries' (2014) 30 [6] *European Sociological Review* 810-822.

[441] Maria Helena Pratas, 'Interculturality and intercultural education in Portugal: Recent developments' (2010) 21 [4] *Intercultural education* 317-327; Christina Allemann-Ghionda, *Intercultural education in schools: A comparative study* (European Parliament 2008) 40; Jordi Garreta Bochaca, 'Ethnic minorities and the Spanish and Catalan educational systems: From exclusion to intercultural education' (2006) 30 *International Journal of Intercultural Relations* 261-279; Richard Milner, 'Developing a multicultural curriculum in a predominantly White teaching context: Lessons from an African American teacher in a suburban English classroom' (2005) 35 [4] *Curriculum Inquiry* 391-427; Chris Gaine, 'Anti-racist education in White areas: The limits and possibilities of change' (2000) 3 [1] *Race, Ethnicity and Education* 65-81.

[442] Elfneh Bariso, 'Code of professional practice at stake? Race, representation and professionalism in British education' (2001) 4 [2] *Race, Ethnicity and Education* 167-184.

[443] Geert Driessen, 'Teacher ethnicity, student ethnicity and student outcomes' (2015) 26 [3] *Intercultural Education* 179-191; Judith Warren Little, 'The teacher workforce and problems of educational equity' (2010) 34 *Review of Research in Education* 285-328.

[444] Lucie Jarkovská, Katerina Lisková and Jana Obrovská, 'We treat them all the same, but… Disappearing ethnic homogeneity in Czech classrooms and teachers' responses' (2015) 18 [5] *Race, Ethnicity and Education* 632-654; Christina Hajisoteriou, 'Intercultural education set forward: Operational strategies and procedures in Cypriot classrooms' (2012) 23 [2] *Intercultural Education* 133-146; Vini Lander, 'Race, culture and all that: An exploration of the perspectives of White secondary teachers about race equality issues in their initial teacher education' (2011) 14 [3] *Race, Ethnicity and Education* 351-364; Jan Mansikka, Eric Holm and Gunilla Holm, 'Teaching minority students within minority schools: Teachers' conceptions of multicultural education in Swedish-speaking schools in Finland' (2011) 22 [2] *Intercultural Education* 133-144; Gill Crozier and Jane Davies, 'The trouble is they don't mix: Self-segregation or enforced exclusion?' (2008) 11 [3] *Race, Ethnicity and Education* 285-301; Per-Ake Rosvall and Elisabet Öhrn, 'Teachers' silences about racist attitudes and students' desires to address these attitudes', 25 [5] *Intercultural Education* 337-348; Dympna Devine, 'Welcome to

As numerous pedagogical theorists have highlighted, the transmission of official knowledge is mediated at classroom level by teaching strategies. Within the limits set by standardised curricula and assessment, these can counteract hegemonic worldviews through critical analyses and materials conveying minority perspectives.[445] However, White teachers tend to agree with the worldview conveyed in the official curriculum, which both validates their own and supports their status. To the extent that they complement it with personal knowledge and judgments, they are more likely than not to perpetuate rather than undermine preconceptions.[446] Students whose personal experiences or family history are left out of the official narrative often lose interest in the related subjects and seldom aspire to teach them as adults, entrenching prevailing demographic imbalances. [447] Independently of actual attitudes or behaviour, homogenous teaching staffs inscribe European Whiteness as an implicit school or classroom norm. [448] In turn, pupils who are seen as deviating from this norm become the target of derogation,[449] especially in situations that increase the salience of group identity and expectations of conformism.[450] Similarly, teacher's high status in the

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the Celtic Tiger? Teacher responses to immigration and increasing ethnic diversity in Irish schools' (2005) 15 [1] *International Studies in Sociology of Education* 49-70.

[445] Paul Orlowsky, *Teaching about hegemony: Race, class and democracy in the 21st century* (Springer 2011); Joe Kincheloe, 'Critical pedagogy and the knowledge wars of the twenty-first century' (2008) 1 [1] *International Journal of Critical Pedagogy* 1-22; Carl Grant and Cristine Sleeter, *Doing multicultural education for achievement and equity* (Routledge 2007); Stephen May, *Critical multiculturalism: Rethinking multicultural and antiracist education* (Falmer Press 1999); Paulo Freire, *Pedagogy of the oppressed* (Continuum 2000/1970); Gloria Ladson-Billings, 'Toward a theory of culturally relevant pedagogy' (1995) 32 [3] *American Educational Research Journal* 465-491.

[446] Thijl Sunier, 'Argumentative strategies' in Werner Schiffauer et al (eds), *Civil enculturation: Nation-state, schools and ethnic difference in four European countries* (Berghahn Books 2004) 210-241; Sabine Mannitz, 'Pupils' negotiation of cultural difference: Identity management and discursive assimilation' in Werner Schiffauer et al. (eds), *Civil enculturation: Nation-state, schools and ethnic difference in four European countries* (Berghahn Books 2004) 242-306.

[447] Richard Harris and Rosemary Reynolds, 'The history curriculum and its personal connection to students from minority ethnic backgrounds' (2014) 46 [4] *Journal of Curriculum Studies* 464-486; Kate Hawkey and Jayne Prior, 'History, memory cultures and meaning in the classroom' (2011) 43 [2] *Journal of Curriculum Studies* 231-247; Maria Grever, Terry Haydn and Kees Ribbens, 'Identity and school history: The perspective of young people from the Netherlands and England' (2008) 56 [1] *British Journal of Educational Studies* 76-94.

[448] Michael Hogg and Scott Reid, 'Social identity, self-categorisation and the communication of group norms' (2006) 16 *Communication Theory* 7-30; Philipp Jugert, Peter Noack and Adam Rutland, 'Friendship preferences among German and Turkish preadolescents' (2011) 82 *Child Development* 812-829.

[449] José Marques and Dario Paez, 'The black sheep effect: Social categorization, rejection of ingroup deviates, and perception of group variability' (1994) 5 [1] *European Review of Social Psychology* 37-68.

[450] Dominic Abrams and Adam Rutland, 'The development of subjective group dynamics' in Sheri Levy and Melanie Killen (eds), *Intergroup attitudes and relations in childhood through adulthood* (Oxford University Press 2008) 47-65.

school environment provides highly accessible cues for children to infer stereotypical correlations between ethnicity and the performance of specific roles.[451]

For all these reasons, human rights bodies' adhesion to the idea that separate education for different ethnic groups is inherently unequal can be seen as a crucial step toward anti-racist educational reform.[452] Unfortunately, few standards have been set – beyond generic references to 'special measures'– on specific strategies to promote inclusion. Yet, the UN Special Rapporteur on the right to education has already highlighted the risks of ill-designed mixing schemes. In a suggestive description of inclusion's four 'stages', she explained that complete exclusion (stage 1) and segregation in lower-quality schools (stage 2) usually precede assimilation (stage 3), whereby newcomers are forced to adjust to dominant norms. Only in the fourth stage does the education system adapt to children's diverse interests and backgrounds.[453] This raises the challenge of ensuring that minority pupils do not become the victims of well-meaning attempts to increase their numbers in unprepared White schools.

5.2.1. Parental choice

Given parents' propensity to send their children to same-ethnic schools, an intuitive solution to school segregation would consist in reducing their capacity to do so by increasing state control on the distribution of pupils. Imposed mixing schemes may involve bussing minority students to White schools or, conversely, restricting exemptions to district-based allotment, merging majority and minority districts, closing segregated schools and opening new ones in more diverse areas or setting an upper limit on the proportion of minority pupils enrolled in a given public school, ideally below the

[451] Rebecca Bigler and Lynn Liben, 'Development intergroup theory: Explaining and reducing children's social stereotyping and prejudice' (2007) 16 [3] *Current Directions in Psychological Science* 162-166.
[452] UN Special Rapporteur on the right to education, Report A/HRC/23/35 of 10 May 2013, para 45; UN Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance, Report A/HRC/23/56 of 1 April 2013, para 56; UN Special Rapporteur on the right to education, Report A/HRC/17/29 of 18 April 2011, para 66; UN Special Rapporteur on the right to education, Report E/CN.4/2004/45 of 15 January 2004, para 56.
[453] UN Special Rapporteur on the right to education, Report E/CN.4/2003/9 of 21 January 2003, para 28.

'tipping point' of White flight.[454] In the European context, political authorities have by and large remained in charge of such initiatives, unlike in the US, where courts have played a more active role in desegregation.[455] Over the last decades, however, US courts and public opinion have become increasing critical of mandatory desegregation.[456] While this is partly due to the mobilisation of White parents,[457] minorities, who typically bear a disproportionate cost of mandatory desegregation in the form of longer commuting, job losses and unresponsive curricula, have often joined them or remained divided on this issue.[458]

Mounting evidence is also casting doubts on desegregation's capacity to deliver its intended outcomes. One of the main reasons is that loopholes in residence-based allotment of pupils often allow White parents to shun multi-ethnic schools without undertaking a costly change of domicile.[459] Even when a degree of diversification takes place, both majority and minority children tend to show a preference for same-ethnic friends, especially if neighbourhoods remain segregated.[460] Moreover, large imbalances between the number of majority and minority pupils and the persisting 'whiteness' of teachers and curricula may trigger the aforementioned black sheep effect. This exposes minorities to various types of peer victimisation,

[454] Sjoerd Karsten, 'School segregation' in OECD, *Equal opportunities? The labour market integration of the children of immigrants* (2010) 205; Joep Bakker and Eddie Denessen, 'Reflections on international perspectives on countering school segregation' in Joep Bakker, Dorothee Peters and Guido Walraven (eds), *International perspectives on countering school segregation* (Garant 2011) 263.
[455] Michael A. Rebell, *Courts & kids: Pursuing educational equity through the state courts* (University of Chicago Press 2009).
[456] Janet Ward Schofield and Leslie Hausmann, 'The conundrum of school desegregation: Positive student outcomes and waning support' (2004) 66 *University of Pittsburgh Law Review* 83-111.
[457] Jeffrey Littlejohn and Charles Ford, *Elusive equality: Desegregation and resegregation in Norfolk's public schools* (University of Virginia Press 2012).
[458] Sonya Douglass Horsford, 'Mixed feelings about mixed schools: Superintendants on the complex legacy of school desegregation' (2010) 46 [3] *Educational Administration Quarterly* 287-321.
[459] Marco Oberti and Clément Rivière, 'Les effets imprévus de l'assouplissement de la carte scolaire: Une perception accrue des inégalités scolaires et urbaines' (2014) 107 *Politix* 219-241; Agnès Van Zanten, 'Compétition et choix dans le champ scolaire. Un modèle statutaire d'analyse des logiques institutionnelles et sociales' (2011) 66 *Lien social et politique* 179-196.
[460] Lotte Vermeij, Marijtje van Duijnb and Chris Baerveldt, 'Ethnic segregation in context: Social discrimination among native Dutch pupils and their ethnic minority classmates' (2009) 31 *Social Networks* 230-239; Heidi McGlothlin, Christina Edmonds and Melanie Killen, 'Children's and adolescents' decision-making about intergroup peer relationships' in Stephen M. Quintana and Clark McKnown (eds), *Handbook of race, racism and the developing child* (John Wiley & Sons 2007) 424-451; Sheila González-Motos, 'Eligiendo a mis amigos: Un análisis de los aspectos organizativos de los institutos favorecedores de la integración relacional de los alumnados inmigrados' in Javier García Castaño and Antonia Olmos Alcaraz (eds), *Segregaciones y construcción de la diferencia en la escuela* (Trotta 2012) 143-165.

including name-calling, harassment and physical aggressions as well as more subtle (and often gendered) forms of depreciation and exclusion.[461] In the worst cases, mixing schemes that lack community support provide a breeding ground for pervasive neighbourhood conflict and insecurity.[462] To the extent that the net effect of intergroup contact on attitudes depends on the difference between positive and negative interactions, dysfunctional schools can actually lead to an intensification of ethnic hostility.[463]

Two related ECtHR cases decided in 2008 and 2012 illustrate the difficulty for public authorities to integrate schools against parents' wishes.[464] Both of them were brought by Greek Roma whose children were denied enrolment in schools frequented by a majority of non-Roma pupils. This went against the official policy of the Greek government, which had been campaigning in Roma settlements in order to encourage parents to send their children. After several interventions by the government and Roma rights activists, the children were finally admitted the next year. On the first day of school, dozens of non-Roma parents blocked the entrance, shouting that no Roma would be allowed in. This was repeated on the second and third day, to the point that police officers were posted at the school to protect Roma children from harassment and violence. Non-Roma parents responded by boycotting classes during nearly two months, after which the Roma were transferred to a separate annexe. In the following years, the annexe was set on fire and looted several times, making it unfit for hosting

[461] Jochem Thijs, Maykel Verkuyten and Malin Grundel, 'Ethnic classroom composition and peer victimization: The moderating role of classroom attitudes' (2014) 70 [1] *Journal of Social Issues* 134-150; Beatriz Ballestín González, '"Dile al negrito y al cola cao que paren de molestarnos!" Sociabilidad entre iguales y dinámicas de segregación en la escuela primaria' in Javier García Castaño and Antonia Olmos Alcaraz (eds), *Segregaciones y construcción de la diferencia en la escuela* (Trotta 2012) 119-142; Camilla Pagani, Francesco Robustelli and Cristina Martinelli, 'School, cultural diversity, multiculturalism, and contact' (2011) 22 [4] *Intercultural Education* 337-349; Ann Phoenix, 'De-colonising practices: Negotiating narratives from racialised and gendered experiences of education' (2009) 12 [1] *Race, Ethnicity and Education* 101-114; Dympna Devine, Mairin Kenny and Eileen Macneela, 'Naming the other: Children's construction and experience of racisms in Irish primary schools' (2008) 11 [4] *Race, Ethnicity and Education* 369-385; Camilla Hällgren, 'Working harder to be the same: Everyday racism among young men and women in Sweden' (2005) 8 [3] *Race, Ethnicity and Education* 319-342.

[462] Shamim Miah, 'School desegregation and the politics of forced integration' (2012) 54 [2] *Race & Class* 26-38.

[463] Jochem Thijs and Maykel Verkuyten, 'School ethnic diversity and students' interethnic relations' (2013) 84 *British Journal of Educational Psychology* 1-21.

[464] Sampanis et autres c. Grèce (App no 32526/05) ECtHR, 5 June 2008; Sampanis et autres c. Grèce (App no 59608/09) ECtHR 11 December 2012.

the students. A government mediator, local authorities, school principals and parents held a number of meetings in order to reach an agreement, but the opposition continued and segregation dragged on.

The Court ultimately condemned Greek authorities for their failure to provide Roma children with an integrated education, simultaneously recognising the racism they faced in mixed schools and rejecting the legitimacy of this justification.[465] However, some philosophers have taken a different stance, arguing that obliging children to endure bad schools simply because they are mixed is a costly 'surrender to principle'. Given the far-from-ideal conditions prevailing in common schools, limiting parental choice unacceptably curtails individual autonomy, including that of minority parents and students, in the name of elusive benefits in terms of social equality. Therefore, justice would be better served by ensuring that all students receive high-quality education, whether in an integrated or a segregated school.[466]

Consistent as they are with the weight of evidence, these points should make courts wary of desegregation schemes that radically limit school choice and trigger strong opposition from parents. This being said, they offer little guidance on how to defuse such opposition or improve ethnic relations in the schools that have been integrated, preventing both White and ethnic retrenchment. A closer look at school reform, including but going beyond curricular contents, may bring out ways of enhancing the status of minorities within the educational setting.

5.2.2. Teacher diversification

Notwithstanding the aforementioned scarcity of immigrant-origin teachers, policymakers have sometimes sought to increase their numbers on the premise that they

[465] Sampanis et autres c. Grèce (App no 32526/05) ECtHR, 5 June 2008 para 82, 92; Sampanis et autres c. Grèce (App no 59608/09) ECtHR 11 December 2012 para 83, 100.
[466] Michael Merry, *Equality, citizenship and segregation: A defense of separation* (Palgrave Macmillan 2013) 46.

may act as role models or buffers against systemic racism.[467] While there is theoretical and empirical support for the latter premise,[468] minority teachers often pay a high price for their contribution. Targeted with suspicions of inferior qualifications or inappropriate cultural practices, they must contend with distrustful colleagues and parents, irreverent students, limited administrative support and restricted prospects of advancement.[469] They also face the risk of being pigeonholed into the role of 'minority experts' in charge of all ethnicity-related issues, diminishing the time available for other activities and relieving the rest of the personnel from the burden of developing culturally responsive practices.[470] As early as teacher training courses, expected hardships push many to segregated minority schools or alternative careers.[471] Similarly, White teachers in predominantly non-White schools can be ostracised as unprepared or insensitive by their colleagues and students, even when efforts are made to uphold strict

[467] Geert Driessen, 'Teacher ethnicity, student ethnicity, and student outcomes' (2015) 26 [3] *Intercultural Education* 179-191.

[468] Rita Kohli, 'Unpacking internalized racism: Teachers of color striving for racially just classrooms' (2014) 17 [3] *Race, Ethnicity and Education* 367-387; Anne Hickling-Hudson, 'Teaching to disrupt preconceptions: Education for social justice in the imperial aftermath' (2011) 41 [4] *Compare: A Journal of Comparative and International Education* 453-465; Cinthia Salinas and Antonio Castro, 'Disrupting the official curriculum: Cultural biography and the curriculum decision making of Latino preservice teachers' (2010) 38 [3] *Theory and Research in Social Education* 428-463; Alice Quiocho and Francisco Rios, 'The power of their presence: Minority group teachers and their schooling' (2000) 70 [4] *Review of Educational Research* 485-528.

[469] Vera Lee, 'Teachers of color creating and recreating identities in suburban schools' (2013) 18 *The Qualitative Report* 1-16; Huong Tran Nguyen, 'What role do race, ethnicity, language and gender play in the teaching profession?' (2012) 15 [5] *Race, Ethnicity and Education* 653-681; Clea Schmidt, 'Systemic discrimination as a barrier for immigrant teachers' 4 [4] *Diaspora, Indigenous, and Minority Education* 235-252; Binaya Subedi, 'Contesting racialization: Asian immigrant teachers' critiques and claims of authenticity' (2008) 11 [1] *Race, Ethnicity and Education* 57-70; Carmelita Castaneda, John Kambutu and Francisco Rios, 'Speaking their truths: Teachers of color in diasporic contexts' (2006) 13-23 *The Rural Educator* 13-23; Reitumetse Maboleka and Jean Madsen, 'Intergroup differences and their impact on African American teachers' 38 [6] *Urban Education* 725-749; Michelle Haynes, 'Vive la différance: Jewish women teachers' constructions of ethnicity and identity and their experiences of anti-Semitism in secondary schools' (2003) 6 [1] *Race, Ethnicity and Education* 51-70.

[470] Ninetta Santoro, 'The drive to diversify the teaching profession: Narrow assumptions, hidden complexities' (2013) *Race, Ethnicity and Education* 1-19; Anthony Brown, 'On human kinds and role models: A critical discussion about the African American male teacher' (2012) 48 [3] *Educational Studies: A Journal of the American Educational Studies Association* 296-315; Goli Rezai-Rashti, 'Black male teachers as role models: Resisting the homogenizing impulse of gender and racial affiliation' (2010) 47 [1] *American Educational Research Journal* 37-64; Uvanney Maylor, 'They do not relate to Black people like us: Black teachers as role models for Black pupils' 24 [1] *Journal of Education Policy* (2009) 1-21; Hilton Kelly, 'Racial tokenism in the school workplace: An exploratory study of Black teachers in overwhelmingly White schools' (2007) 41 [3] *Educational Studies: A Journal of the American Educational Studies Association* 230-254.

[471] Tehmina Basit et al., 'The bar is slightly higher: The perception of racism in teacher education' (2007) 37 [2] *Cambridge Journal of Education* 279-298; Bruce Carrington and Christine Skelton, 'Re-thinking role models: Equal opportunities in teacher recruitment in England and Wales' (2003) 18 [3] *Journal of Education Policy* 253-265; Bruce Carrington et al., 'The recruitment of new teachers from minority ethnic groups' (2000) 10 [1] *International Studies in Sociology of Education* 3-22.

taboos on racial discourses.[472]

The critical multiperspectival curriculum advocated in the previous section would go some way in solving these problems. By making contents more relevant for minority students, it may increase their willingness to enter the teaching profession and thus mitigate their paucity among trainees. Another positive feedback would come from the anti-racist knowledge acquired by White trainees, whose ideological outlook might be nudged in an egalitarian direction. Helped by a more welcoming environment, minority teachers would become more likely to complete their training, find work and remain in the profession.[473] In turn, their increased representation in the educational field would induce incumbents to develop complex professional identities and lessen subsequent resistance to the incorporation of minority colleagues.

Despite this virtuous circle, some school autorities would predictably try to protect their status-enhancing homogeneity through covert discrimination in hiring procedures. Given the strategic importance of the teaching profession for the long-term governance of ethnic relations, compulsory schooling should be identified as a priority area for anti-discrimination enforcement and positive action programmes. As usual, the latter should be sensitive to a variety of ethnic categories and the specific position of minority staff, preventing their concentration at the bottom of the hierarchy or in specific courses (such as foreign languages or religion). This would motivate head teachers to include diversity management among their top priorities and spur structural changes in all school practices, from management to pedagogy, discipline, assessment, tracking and community relations.[474]

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[472] Jennifer Buehler, 'There's a problem, and we've got to face it: How staff members wrestled with race in an urban high school' (2013) 16 [5] *Race, Ethnicity and Education* 629-652.

[473] James Ryan, Katina Pollock and Fab Antonelli, 'Teacher diversity in Canada: Leaky pipelines, bottlenecks and glass ceilings' (2009) 32 [3] *Canadian Journal of Education* 591-617; Michael Vavrus, *Improving the multicultural education of teachers: Theory, research and practice* (Teachers College Press 2002); Lisa Dieker et al., 'Voice from the field: Teachers from culturally and linguistically diverse backgrounds entering the profession through alternative certification' (2003) 26 [4] *Teacher Education and Special Education* 328-340; Audrey Osler, 'Education for democracy and equality: The experiences, values and attitudes of ethnic minority student teachers' (1994) 5 [1] *European Journal of Intercultural Studies* 23-37.

[474] Sabrina Zirkel, 'Creating more effective multi-ethnic schools' (2008) 2 [1] *Social Issues and Policy Review* 187-241.

Without a doubt, a long road remains to be travelled before courts impose positive action in the teaching profession as a requirement for the protection of minorities' right to education. Beyond the general issue of recasting positive action as a vital component of anti-discrimination law rather than as an exception, they will face the challenge of balancing anti-racist and more instrumental rationales for the recruitment of minority teachers. While the anti-racist approach prioritises their incorporation in White schools, international organisations have put greater emphasis on the use of their symbolic and cultural capital in multi-ethnic ones, which often struggle to recruit and retain experienced and motivated personnel.[475] Given the limited overall supply of minority teachers, there is a risk that anti-racist goals may be overlooked or given lip service until the other, seemingly more urgent ones are attained. Since this would catalyse all the aforementioned processes behind ethnic segregation, courts should remain sceptical toward policies purporting to promote the ethnic 'match' of students and teachers, especially when they lead to a stagnation or reduction of minority teachers in White schools.

5.2.3. Student mix

For schools with a reformed curriculum and diverse teachers, it would only be a small step to attract families from different ethnic backgrounds. Due to their inclusive image, they would encourage parents to base their choices on non-discriminatory criteria, such as proximity, pedagogy, infrastructure, optional courses or extracurricular activities.[476] To speed up this process, a number of programming and advertising measures could lure ethnic minority families to White schools and the other way around. Teachers throughout Europe have already been trained to adapt their practices to children with different linguistic backgrounds, understand processes of identity formation, design

[475] OECD, *Equity and quality in education: Supporting disadvantaged students and schools* (OECD Publishing 2012) 131; European Commission, European Agenda for the Integration of Third-Country Nationals, COM(2011) 455 final, adopted 20 July 2011, 6.
[476] OECD, *PISA 2012 Results: What makes schools successful? Resources, policies and practices* (Volume IV) (2013) 136-137.

cooperative learning activities and build trust with culturally diverse families.[477] In Sweden, extra-curricular activities have been used to increase the status of minority schools. In Denmark and the Netherlands, groups of White parents have been encouraging their neighbours to choose the local school so as to ensure that their own children would not be the only White pupils. White schools can also target minority families in their information campaigns, raising awareness about available educational options and building trust with different communities.[478]

States should provide incentives for school managers to develop these initiatives. Widespread recourse to targeted programming and advertising shows that simply prohibiting student selection would be insufficient to balance schools' ethnic and socioeconomic intake, especially in light of parents' own self-segregating tendencies. Mirroring positive action in staff recruitment, pupils' ethnicity (together with their socioeconomic status) should thus be taken into account in funding calculations, as is already the case in several places.[479] Increasing resources for the education of minority students would make them more attractive to White schools and prevent their leaders from shifting the burden of cultural adaptation on individual teachers.[480] It would also give multi-ethnic ones more financial leeway to improve their infrastructure, reduce class sizes, train qualified teachers, provide mentoring and counselling, develop after-school activities, engage parents or other measures that improve children's learning opportunities.[481] In effect, this would turn all multi-ethnic

[477] Sabine Severiens, *Developing school capacity for diversity* (Migration Policy Institute 2014).
[478] Dorothee Peters and George Muskens, 'Ethnic school segregation exists: Possibilities for counteracting measures' (2011) 4 [2-M5] *The Open Education Journal* 158-163; Joep Bakker and Eddie Denessen, 'Reflections on international perspectives on countering school segregation' in Joep Bakker, Dorothee Peters and Guido Walraven (eds), *International perspectives on countering school segregation* (Garant 2011) 266; OECD, *Closing the gap for immigrant students: Policies, practice and performance* (2010) 86-87; OECD, *Equity and quality in education: Supporting disadvantaged students and schools* (OECD Publishing 2012) 71-72.
[479] European Commission/EACEA/Eurydice, *Financing schools in Europe: Mechanisms, methods and criteria in public funding. Eurydice report* (Publications Office of the European Union 2014) 37.
[480] Fred Carlo Anderson and Eli Ottesen, 'School leadership and ethnic diversity: Approaching the challenge' (2011) 22 [4] *Intercultural Education* 285-299.
[481] OECD, *Equity and quality in education: Supporting disadvantaged students and schools* (OECD Publishing 2012) 103-161; Brenton Faubert, 'A literature review of school practices to overcome school failure' (2012) 68 *OECD Education Working Papers*; Daniel Muijs, Alma Harris, Christopher Chapman, Louise Stoll and Jennifer Russ, 'Improving schools in socioeconomically disadvantaged areas: A review of research evidence' (2004) 15 [2] *School Effectiveness and School Improvement: An International Journal of Research, Policy and Practice* 149-175.

establishments into ‘magnet schools’, a concept pioneered in the United States in an attempt to draw White families to Black neighbourhoods with well-funded special programmes.[482]

For these schemes to work, two pitfalls should be avoided. Both are closely connected to the general dilemmas of positive action outlined in Section 4.2. The first is that multi-ethnic schools may seek to maximise their funding by keeping their number of White students as low as possible, thus increasing rather than limiting segregation. For instance, they might choose to spend their extra resources on foreign language and culture classes, minority teaching assistants, multicultural festivals and specialised services for recent immigrants,[483] all of which would seem irrelevant or perhaps objectionable to White families. To prevent such dynamics from taking hold, extra funding for minority students should be withdrawn when they become overrepresented relative to their share in the national population (see Section 4.2.2). A possible criticism is that this would deprive schools with higher concentrations from much needed resources. This is a valid point, but one that could be addressed by increasing the funding tied to each pupil under the stipulated threshold. A case might also be made that the additional costs incurred by schools for adapting to diversity will tend to decrease beyond this threshold. In addition, decoupling ethnicity-based extra funding from class-oriented priority education policies[484] would allow desegregation goals to be pursued without penalising socioeconomically disadvantaged children.

Resource allocation should also strive to prevent within-school resegregation, which reproduces at a smaller scale all the racism-enhancing processes that voluntary desegregation was meant to disrupt.[485] In particular, states should compile data on the ethnicisation of different academic tracks, paying special attention to the share of

[482] Erica Frankenberg, Genevieve Siegel-Hawley and Gary Orfield, *The forgotten choice? Rethinking magnet schools in a changing landscape* (The Civil Rights Project 2008).
[483] See Eurydice, *Citizenship at school in Europe* (2005) 36-37; OECD, *Closing the gap for immigrant students: Policies, practice and performance* (2010); Roland Bénabou, Francis Kramarz and Corinne Prost, ‘The French zones d’éducation prioritaire: Much ado about nothing?’ (2009) 28 *Economics of Education Review* 352.
[484] For detailed analyses of these policies, see Marc Demeuse, Daniel Frandji, David Greger and Jean-Yves Rochex (eds), *Education policies and inequalities in Europe* (Palgrave Macmillan 2012).
[485] For an extensive discussion, see Kathleen Lynch and Anne Lodge, *Equality and power in schools: Redistribution, recognition and representation* (RoutledgeFalmer 2002).

minority students in vocational training and White students in enriched programs. Ability grouping has often played a prominent role in US magnet schools[486] and is likely to figure among the requests of parents who fear that their child might get bullied in mixed classes. Where these fears are justified, they should be alleviated through effective sanctions against harassment, reinforced by the multiperspectival curricula and diverse teachers propounded in the previous sections.

Finally, states should set out transparent rules for admissions to oversubscribed schools. Since pupil selection undermines parental choice and opens the door to direct and indirect forms of discrimination, it should be prohibited, together with first come, first serve policies, which disproportionately benefit affluent families. Other admissions criteria should take into account parental preferences and children's interests while simultaneously maximising schools' internal diversity. Proximity considerations should be interpreted flexibly and avoid the demarcation of rigid catchment areas which tend to catalyse and institutionalise residential segregation. Municipal or regional authorities should be mandated to guarantee the rigorous application of rules, either by taking admissions in charge themselves or closely supervising their administration in individual schools.[487]

5.3. Regulation of private providers

Until now, the discussion has proceeded on the assumption that all primary and secondary schools would be subjected to the same regulatory and financial regime. This is a considerable oversimplification: in all Western European states, school management partly rests with private organisations enjoying a degree of autonomy from central, regional or local government standards. As of 2009, the proportion of pupils attending these establishments ranged from barely significant (below 6% in Norway, Finland,

[486] Erica Frankenberg, Genevieve Siegel-Hawley and Gary Orfield, *The forgotten choice? Rethinking magnet schools in a changing landscape* (The Civil Rights Project 2008) 24-26.
[487] OECD, *Equity and quality in education: Supporting disadvantaged students and schools* (OECD Publishing 2012) 68-69; Meira Levinson, *The demands of liberal education* (Oxford University Press 1999) 155-156.

Germany, Greece, Italy, the United Kingdom and Switzerland) to majoritarian (in Belgium, the Netherlands and Ireland). Countries in the middle range included Sweden (10%), Austria (13%), Portugal (14%), Denmark (23%) and Spain (34%).[488]

Private providers of compulsory education broadly fall in four categories. The first and most significant is made up of long-established religious organisations that usually performed educational functions before the generalisation of public schooling in the 19th and 20th centuries. A majority of these are Catholic, not only in predominantly Catholic countries but also in those with a mainly Protestant population. The latter's greater diversity in terms of Christian denominations provides part of the explanation, but the fact that the main Protestant churches remain closely involved in the governance of public education also reduces their incentives to create private schools. Conversely, in traditionally Catholic societies where secularist forces have wrestled with the Vatican over the control of education, the church has tended to establish separate networks of state-supported religious schools. This is currently the case in France, Belgium, Spain, Ireland, Portugal and Austria.[489] The Netherlands and Italy provide the main exceptions to this Protestant/Catholic dichotomy, consistent with the former's long-standing lack of a dominant national church and the latter's close collaboration with ecclesiastical authorities in educational matters. As for Orthodox Greece, its powerful church has placed it squarely within the Protestant model of religiously inflected public schooling.[490]

More recently, under the combined influence of large-scale immigration and stronger minority rights, several states have liberalised the opening of Islamic, Hindu,

[488] OECD, *Public and private schools: How management and funding relate to their socio-economic profile* (2012) 19.
[489] In less secularised Ireland, nearly all primary schools and a large proportion or secondary schools are managed by the Catholic church. See Nathalie Rougier and Iseult Honohan, 'Religion and education in Ireland: Growing diversity – or losing faith in the system?' (2015) *Comparative Education* 71-86.
[490] Jaap Dronkers and Silvia Avram, 'What can international comparisons teach us about school choice and non-governmental schools in Europe?' (2015) 51 [1] *Comparative Education* 122-123; Luisa Ribolzi, 'Italy: The impossible choice' in Patrick Wolf and Stephen Macedo (eds), *Educating citizens: International perspectives on civic values and school choice* (The Brookings Institution 2004) 268-286; Anne Bert Dijkstra, Jaap Dronkers and Sjoerd Karsten, 'Private schools as public provision for education: School choice and market forces in the Netherlands' in Patrick Wolf and Stephen Macedo (eds), *Educating citizens: International perspectives on civic values and school choice* (The Brookings Institution 2004) 67-90.

Jewish and other non-Christian religious schools. Their number remains small but is growing quickly in some places. In the United Kingdom, around 150 Islamic schools serve 5-7% of Muslim children,[491] and nearly 100 Jewish establishments are attended by half of their target population.[492] In 2015, the Netherlands had 43 Islamic primary schools, frequented by 10% of children with a Muslim background, as well as one liberal and two orthodox Jewish ones.[493] In France, according to the National Federation of Muslim Education, around 30 Muslim schools are in operation.[494] Unlike majority faith schools, whose presence is usually taken for granted, minority ones are often suspected of transmitting illiberal values or stifling critical thinking. As a result, they have faced much greater difficulties in securing official recognition as well as public funding.[495]

Since the 1990s, the rise of new forms of public management based on the involvement of the private sector in the delivery of public services has indirectly boosted political support for both majority and minority religious schools. In particular, international organisations such as the OECD and the World Bank have promoted them as a source of diversification that broadens the range of parental choices and puts competitive pressure on state schools to improve their performance.[496] In the medium

[491] Farid Panjwani, 'Faith schools and the religious Other: The case of Muslim schools' in Judith Chapman, Sue McNamara, Michael J. Reiss and Yusef Waghid (eds), *International handbook of learning, teaching and leading in faith-based schools* (Springer 2014) 140.
[492] Marie Parker-Jenkins, 'Identity, belief and cultural sustainability: A case-study of the experiences of Jewish and Muslim schools in the UK' in Judith Chapman, Sue McNamara, Michael J. Reiss and Yusef Waghid (eds), *International handbook of learning, teaching and leading in faith-based schools* (Springer 2014) 158.
[493] Marcel Maussen and Floris Vermeulen, 'Liberal equality and toleration for conservative religious minorities. Decreasing opportunities for religious schools in the Netherlands?' (2015) 51 [1] *Comparative Education* 87-104.
[494] Fédération Nationale de l'Enseignement Musulman, 'L'enseignement privé en chiffres' (22 May 2016), available at: http://www.fnem.fr/lenseignement-prive-en-chiffres/ [accessed 4 August 2016].
[495] Marcel Maussen and Veit Bader, 'Non-governmental religious schools in Europe: Institutional opportunities, associational freedoms, and contemporary challenges' (2015) 51 [1] *Comparative Education* 12, 14; Fredrik Hertzberg, *(In)tolerance and recognition of difference in Swedish schools. The case of Islamic denominational schools and practices of veiling* (European University Institute 2011) 15-16; Tore Vincents Olsen and Sofie Marie Ahlgren, *(In)Tolerance and accommodation of difference in Danish public and private schools* (European University Institute 2011) 31-32; Maurizio Ambrosini and Elena Caneva, *The embodiment of tolerance in discourses and practices addressing cultural diversity in Italian schools* (European University Institute 2011) 26-35; Claire Tinker, 'Rights, social cohesion and identity: Arguments for and against state-funded Muslim schools in Britain' (2009) 12 [4] *Race, Ethnicity and Education* 539-553; André Elias Mazawi, 'Qui a peur du lycée musulman? Media representations of a Muslim school in France' (2009) 19 [3] *Social Semiotics* 235-256.
[496] Harry Anthony Patrinos, Felipe Barrera-Osorio and Juliana Guáqueta, *The role and impact of public-private partnerships in education* (World Bank 2009); Stavros Moutsios, 'International organisations and

term, however, the drive for privatisation may prove especially beneficial for secular non-profits promoting specific educational philosophies or methods. In Denmark, for instance, state-subsidised private schools include those affiliated to the Catholic and Lutheran churches but also grammar schools,[497] free schools,[498] little schools,[499] Waldorf schools,[500] international schools[501] and German minority schools.[502]

More controversially, for-profit ventures are also making inroads in the compulsory education sector.[503] Their expansion has been especially rapid in Sweden, whose universal voucher system has allowed them to compete on an equal footing with public and non-profit providers. Before the scheme was introduced in 1992, less than 1% of Swedish pupils attended private schools; two decades later, this proportion had risen to 10%, and 65% of private schools were run for profit.[504] Even more strikingly, private equity firms based in Denmark, Norway, the United States and Guersey (a British tax haven) had taken over Sweden's four largest educational providers, catalysing a wave of school openings and acquisitions. AcadeMedia, the market leader, operates some 240 establishments enrolling over 60 000 students from pre-school to adult education. In 2011, John Bauer, the number two, served about 16 500 students. Three of its listed companies ranked among Sweden's fastest-growing firms, and its international affiliate had undertaken to create schools in other European countries such as Norway and Spain.[505]

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transnational education policy' (2009) 39 [4] *Compare: A Journal of Comparative and International Education* 469-481.

[497] Focusing on the acquisition of classical academic skills.

[498] Inspired by Grundtvig, a 19th-century philosopher who advocated individual growth, interpersonal relationships, story-telling and self-expression.

[499] Progressive, small urban schools promoting group work and individual responsibility, also serving students with mild learning difficulties.

[500] Subordinating formal learning and exams to social abilities, artistic creation and verbal evaluations, as recommended by Adolf Steiner, another philosopher.

[501] Offering an English, French or German curriculum to children of diplomats, researchers and other mobile professionals.

[502] Enabling students to pursue higher education in either the German or Danish education system. See Beatrice Schindler Rangvid, 'Private school diversity in Denmark's national voucher system' (2008) 52 [4] *Scandinavian Journal of Educational Research* 335.

[503] Stephen Ball, 'Globalización, mercantilización y privatización: Tendencias internacionales en educación y política educativa' (2014) 22 [41] *Archivos analíticos de políticas educativas* 1-17.

[504] Gabriel H. Sahlgren, 'Schooling for money: Swedish education reform and the role of the profit motive' (2011) *Institute of Economic Affairs* 28-35.

[505] Inger Erixon Arreman and Ann-Sofie Holm, 'School as "edu-business": Four "serious players" in the Swedish upper secondary school market' (2011) *Education Inquiry* 637-657.

Private schools pose a number of challenges for the development of anti-racist education systems. First of all, they are usually allowed to depart from at least some government-imposed curricular standards and examinations. As a general rule, this freedom increases in proportion to their financial independence from public authorities.[506] In Spain, the common curriculum of primary and secondary education thus applies equally to public and subsidised private schools, but not to unsubsidised ones.[507] In France, private schools under an 'association contract' are fully funded by the state but follow 100% of the national curriculum; those that subscribe a 'simple contract', which obliges them to raise some of their own resources, comply with 80%.[508] In Scotland, around 100 private independent schools catering to 5% of pupils are exempt from the national curriculum, unlike the 370 subsidised denominational schools, most of them steered by the Catholic Bishops' Conference of Scotland.[509] In Denmark's largely subsidised private schools, pupils' parents have traditionally been invested with most of the responsibility for supervising the quality of instruction.[510] In theory at least, partial or total exemptions from central guidelines and assessment may significantly limit states' capacity to ensure that all students are exposed to human rights values and multiple cultural perspectives.

Unlike public establishments, private ones often fund themselves in part by charging tuition fees ranging from the nominal to the prohibitive. As a result, the socioeconomic profile of their intake is above the average in all Western European countries except the Netherlands and Finland, where private education is almost entirely funded by the state.[511] Since ethnicity correlates with class, fees may function as tools of racial exclusion and eventually allow White schools to make up for positive action

[506] OECD, *Synergies for better learning: An international perspective on evaluation and assessment* (2013) 239-270.
[507] Ley Orgánica 2/2006, de 3 de mayo, de Educación, BOE-A-2006-7899 (Spain).
[508] Xavier Pons, Agnès van Zanten and Sylvie Da Costa, 'The national management of public and Catholic schools in France: moving from a loosely coupled towards an integrated system?' (2015) 51 [1] *Comparative Education* 60.
[509] OECD, *Improving schools in Scotland: An OECD perspective* (2015) 36; Stephen J. McKinney and James C. Conroy, 'The continued existence of state-funded Catholic schools in Scotland' (2015) 51 [1] *Comparative Education* 105-117.
[510] OECD, *Synergies for better learning: An international perspective on evaluation and assessment* (2013) 72; Tore Vincents Olsen, 'The Danish free school tradition under pressure' (2015) 51 [1] *Comparative Education* 22-37.
[511] OECD, *Public and private schools: How management and funding relate to their socio-economic profile* (2012) 26.

penalties. Religious identity provides another indirect source of ethnic segregation, which can follow various patterns. Minority faith schools usually market themselves to migrant-origin students disenchanted by the state offer,[512] whereas majority ones often act as a refuge for White parents fleeing multi-ethnic public schools.[513]

Even more consequential is private schools' greater freedom to select their students based on religion or other criteria that tend to correlate with ethnicity.[514] This is sometimes explicit, such as in the United Kingdom, where oversubscribed religious schools are legally allowed to do so.[515] Alternatively, schools can declare themselves open to all but exploit weak government oversight to turn minorities away based on ostensibly legitimate considerations of residential proximity, enrolled siblings or capacity. [516] Sometimes defended by school choice advocates, pupil selection paradoxically subordinates parental preferences to marketing strategies, undermining a basic tenet of privatisation schemes.

Religious discrimination is not limited to students but extends to teachers, who are often asked to personally identify with the school's ethos.[517] These practices are protected by a specific exemption from the EU Employment Equality Directive 2000/78/EC for 'occupational activities within churches and other public of private organisations the ethos of which is based on religion or belief'. In particular, Article 4 of the Directive grants these organisations a right to require their workers to act 'in good

[512] Saeeda Shah, 'Muslim schools in secular societies: Persistance or resistance!' (2012) 34 [1] *British Journal of Religious Education* 51-65; Eddie Denessen, Geert Driessena and Peter Sleegers, 'Segregation by choice? A study of group-specific reasons for school choice' (2005) 20 [3] *Journal of Education Policy* 347-368; Debbie Weekes-Bernard, *School choice and ethnic segregation: Educational decision-making among Black and minority ethnic parents* (Runnymede Trust 2005); Saeeda Shah, 'Muslim schools in secular societies: Persistence of resistance!' (2012) 34 [1] *British Journal of Religious Education* 51-65.

[513] Jaap Dronkers and Silvia Avram, 'What can international comparisons teach us about school choice and non-governmental schools in Europe?' (2015) 51 [1] *Comparative Education* 126-127;

[514] OECD, *Public and private schools: How management and funding relate to their socio-economic profile* (2012) 40.

[515] Steven J. Courtney, 'Mapping school types in England' (2015) 41 [6] *Oxford Review of Education* 807.

[516] Javier García Castaño and María Rubio Gómez, 'Juntos pero no revueltos: Procesos de concentración escolar del "alumnado extranjero" en determinados centros educativos' (2013) *Revista de Dialectología y Tradiciones Populares* 7-31; Ricard Zapata-Barrero and Flora Burchianti, *Tolerance to cultural diversity in Spanish schools. Discourses and practices* (European University Institute 2011).

[517] Marcel Maussen and Veit Bader, 'Non-governmental religious schools in Europe: Institutional opportunities, associational freedoms, and contemporary challenges' (2015) 51 [1] *Comparative Education* 12-14.

faith and with loyalty to the organisation's ethos'.[518] While the exact scope of this provision is difficult to determine, the dominant legal doctrine seems to characterise teachers' beliefs as closely related to their capacity to discharge their duties in a religious school.[519]

Whatever the link between privatisation and performance, an issue that lies beyond the purpose of this discussion, we have seen that international human rights law unambiguously protects the right of non-state organisations to create and manage schools. At the same time, it imposes a duty on states to regulate these in order to safeguard the general aims of education, including intercultural understanding.[520] Based on a careful balancing of both mandates, several courts, legal experts and political philosophers have taken up the task of determining which requirements should be extended from public schools to their private counterparts. Critically analysed in the light of empirical evidence, their proposals may serve as a useful starting point for the development of international norms.

5.3.1. Minimal curriculum standards

From a legal-philosophical perspective, the task of pinning down minimal curricular standards for private schools is complicated by the considerable cross-national (and potentially temporal) variation in the share of children attending them. Whereas public school regulations can be based on the assumption that a large chunk of the population will fall within their scope, human rights norms on private schools must be flexible enough to remain legitimate in contexts where these serve as little as 1% of pupils. They must also take into account that not all of them will necessarily be funded by the state. Even more importantly, the fact that they circumscribe the range of educational options

[518] Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation [2000] OJ L303/16.
[519] Emmanuelle Bribosia and Isabelle Rorive, *In search of a balance between the right to equality and other fundamental rights* (Publications Office of the European Union 2010) 48-55.
[520] Marie Parker-Jenkins, 'The legal framework for faith-based schools and the rights of the child' in Roy Gardner, Jo Cairns and Denis Lawton (eds), *Faith schools: consensus or conflict?* (Routledge 2005) 37-48.

on offer obliges them to be as respectful as possible of children's right to enjoy their own culture, practice their own religion and use their own language.[521] Since schools' relative demographic penetration and dependence on public funds tend to provide reasons for tighter regulation, the challenge consists in pinning down appropriate norms for relatively marginal, non-subsidised private education networks, whose justifications will be most likely to withstand contextual differences.

As we have seen in Section 5.1.2, the necessity for all children to develop their capacity for moral judgement by learning human rights values is now widely accepted among philosophers. Two concerns generally underlie this requirement. The first is that even a small number of children who fail to internalise humanist values can significantly undermine social justice.[522] Extrapolating this point to the terrain of ethnic relations, one could argue that a few racist crimes may have devastating long-term consequences on social trust and integration processes.[523] The second concern is that the exercise of critical judgement appears like an essential precondition for individual autonomy. In other words, children cannot meaningfully be considered free if they lack an opportunity to ponder the virtues and limitations of different ways of life, including some that their own families and communities may disapprove of.[524] Relatedly, they have a strong interest in understanding their own legal rights and obligations, both to benefit from the law and to avoid infringing it. For instance, an adult who has not learned to respect people of other faiths may later find it difficult to get on in a diverse workplace, let alone assume a managing role.

Human rights requirements set important limits on the ways in which religious schools should be allowed to interpret the tenets of their faith,[525] and states have a duty

[521] Art. 30 CRC.
[522] Walter Feinberg, *For goodness sake: Religious schools and education for democratic citizenry* (Routledge 2006) 153-168; Amy Gutmann, *Democratic education* (2nd edn, Princeton University Press 1999) 118; Meira Levinson, *The demands of liberal education* (Oxford University Press 1999) 103.
[523] FRA, *Promoting respect and diversity: Combating intolerance and hate* (2015).
[524] Eamonn Callan, *Creating citizens: Political education and liberal democracy* (Oxford University Press 1997) 155; Meira Levinson, *The demands of liberal education* (Oxford University Press 1999) 36-63; Walter Feinberg, *For goodness sake: Religious schools and education for democratic citizenry* (Routledge 2006) 125-152.
[525] Walter Feinberg, 'Religious education in liberal democratic societies: The question of accountability and autonomy' in Kevin McDonough and Walter Feinberg (eds), *Education in liberal-democratic societies: Teaching for cosmopolitan values and collective identities* (Oxford University Press 2003) 402.

to make sure they do not offer a platform for the denial of equal human dignity and freedom. The standardised tests, textbook revisions and on-site inspections that are used to supervise the quality of public schools could serve a similar purpose in private ones. In the process, however, states should avoid engaging in an ideological crusade against the illiberal aspects of minority cultures. In this sense, they should recognise that the concrete implications of human rights principles partly depend on the context and the other values or goals with which they often collide.[526] Just like public schools operating in different neighbourhoods, cities or countries –or at different times– diverge in the implications they emphasise and overlook, private schools are likely to give more weight to principles consistent with their particular ethical commitments. As long as they accept and promote core values, states should refrain from imposing an official stance on all morally relevant issues and leave students to draw their own conclusions regarding the trade-offs between universal and group-specific norms.[527]

Since it entails the transmission of factual information rather than the formulation of normative judgements, the requirement for all schools to teach multiple perspectives on history, geography, citizenship, literature, religion and the arts may be easier to reconcile with families' diverging ethical commitments. In this case, the main conundrum consists in establishing criteria for selecting particular experiences and perspectives over the potentially infinite range of alternatives. At least two key questions spring to mind: 1) whether some perspectives should be taught to everyone, and 2) whether some perspectives should be taught to all the members of a given political community.

[526] Javier de Lucas, 'Para una discusión de la nota de universalidad de los derechos (A propósito de la crítica del relativismo ético y cultural)' (1994) II [3] *Derechos y Libertades* 259-312.

[527] William Galston, 'Civic republicanism, political pluralism, and the regulation of private schools' in Patrick Wolf and Stephen Macedo (eds), *Educating citizens: International perspectives on civic values and school choice* (Brookings Institution Press 2004) 321; Richard Garnett, 'Regulatory strings and religious freedom: Requiring private schools to promote public values' in Patrick Wolf and Stephen Macedo (eds), *Educating citizens: International perspectives on civic values and school choice* (Brookings Institution Press 2004) 330; Jeff Spinner-Halev, *Extending diversity: Religion in public and private education* (Oxford University Press 2000) 88; Terence McLaughlin, 'The burdens and dilemmas of common schooling' in Kevin McDonough and Walter Feinberg (eds), *Education in liberal-democratic societies: Teaching for cosmopolitan values and collective identities* (Oxford University Press 2003) 137.

To answer these questions, it may be useful to recall that unlike human rights, culturally diverse perspectives have not been defended based on their intrinsic moral value but on their contribution to the cultivation of equal respect for all human beings. The idea is that prejudice toward national, racial, ethnic or religious groups (as well as other social categories) can only be eliminated if children learn to apprehend the world through their eyes. If this is correct, it follows that no curriculum should eschew a genuinely cosmopolitan perspective on the social world, emphasising not only the wars and violence but also the cooperation and innovation brought about by intercultural encounters.[528] This global knowledge would put some human flesh on abstract rights and provide a factual basis for assessing the wider implications of local actions.

Similar arguments have been mobilised to advocate the need for all citizens to learn about the different cultural groups making up their national, regional or local community. Some philosophers have even defended that local interculturalism may be more vital for social justice than the cosmopolitan kind, because it obliges pupils to take interest in people who have become especially stigmatised as a result of historical rivalries and mistrust. Whereas many parents want their children to access the opportunities that global knowledge provides, they are often reluctant to engage with the minorities living next door. Yet, this is exactly what well-functioning democracies require, and schools find themselves in an ideal position to instil the necessary attitudes and skills.[529]

Upon closer inspection, this initially attractive position seems to rest on two dubious assumptions. Firstly, it presupposes that adequate knowledge will be acquired on all the political communities a given citizen may participate in, which would minimally include the local, regional, national and European level. Secondly, it holds that everyone must receive this information during compulsory education for a just

[528] Jeremy Waldron, 'Teaching cosmopolitan right' in Kevin McDonough and Walter Feinberg (eds), *Education in liberal-democratic societies: Teaching for cosmopolitan values and collective identities* (Oxford University Press 2003) 23-55.
[529] Will Kymlicka, 'Multicultural states and intercultural citizens' (2003) 1 [2] *Theory and Research in Education* 159-161.

society to perpetuate itself.[530] However, there is inevitably a negative correlation between the number of communities covered by the curriculum and the level of complexity at which they can be depicted. While children have much to gain from identifying and engaging with various groups, it is also crucial to stress that each one of these groups is far from homogenous in terms of personal characteristics, interests and values. Absent an obvious solution to this tension, it is not clear that the former goal should necessarily take precedence over the latter. In addition, the notion that existing political arrangements should dictate the scope of social analysis seems rooted in the conservative view that citizens have a duty to serve their institutions rather than the other way around.[531] Within a liberal framework that subordinates the legitimacy of institutions to their subjects' right to self-determination,[532] there is no apparent reason why non-political communities (be they based on religion, language or any other criteria of membership) should not also be treated as legitimate objects of inquiry.[533]

These reservations are not merely theoretical. As state-imposed standards and examinations are being promoted as a guarantee of educational quality, their sociological content is likely to be tilted toward a national perspective that relegates local, regional or non-territorial self-understandings and engagements to a secondary status. Increasing the internal pluralism of the national narrative may reduce this bias, but various groups may still take issue with its central thrust, especially those that have historically occupied a subordinate position in national life.[534] In this context, the least human rights law should do is avoid reinforcing the trend by favouring national over other forms of social knowledge. Within the justified limits imposed by legislation,

[530] Melissa Williams, 'Citizenship as identity, citizenship as shared fate, and the functions of multicultural education' in Kevin McDonough and Walter Feinberg (eds), *Education in liberal-democratic societies: Teaching for cosmopolitan values and collective identities* (Oxford University Press 2003) 208-247.
[531] Richard Garnett, 'Regulatory strings and religious freedom: Requiring private schools to promote public values' in Patrick Wolf and Stephen Macedo (eds), *Educating citizens: International perspectives on civic values and school choice* (Brookings Institution Press 2004) 334-335; Brian Barry, *Culture and equality: An egalitarian critique of multiculturalism* (Polity 2000) 225-233.
[532] Nancy Fraser, *Scales of justice: Reimagining political space in a globalizing world* (Columbia University Press 2010).
[533] Mark Halstead, 'Schooling and cultural maintenance for religious minorities in the liberal state' in Kevin McDonough and Walter Feinberg (eds), *Education in liberal-democratic societies: Teaching for cosmopolitan values and collective identities* (Oxford University Press 2003) 273-298.
[534] Kevin McDonough, 'Multinational Civic Education' in Kevin McDonough and Walter Feinberg (eds), *Education in liberal-democratic societies: Teaching for cosmopolitan values and collective identities* (Oxford University Press 2003) 351-384.

including conditions on public funding (see below), private schools should retain the freedom to teach about any combination of communities along with humanity as a whole, provided each one is duly portrayed in all its internal diversity.

5.3.2. Mutually exclusive public subsidies and pupil fees

State policies on private school fees follow three broad strategies. Some countries, such as Sweden, prohibit them altogether in exchange for covering all operating costs. Others, such as Greece, leave families to bear nearly all expenses. The vast majority of states fall somewhere in between: they subsidise private schools on a par with public ones (or slightly less) but allow them to top up their budget with contributions from pupils and other private sponsors.[535] The attractiveness of this last approach for school administrators and middle-class families is easy to understand. Excluding the poorest students dispenses private schools from developing the costly services needed to make up for the cultural and other deficits associated with material deprivation. Savings can then be invested in other aspects of the school, such as extracurricular activities or good infrastructure. At the same time, state funding ensures that fees remain affordable for a large proportion of families, ensuring the long-term sustainability of the private network.

It is precisely those features that have led the UN Special rapporteur on the right to education to call for 'an end to market driven education reforms that provide subsidies to private education. [States] should not allow or promote low-cost private schools and the provision of school vouchers, nor should they allow for-profit institutions in education'.[536] The implicit premise is that withdrawing public subsidies would oblige private schools to raise fees to a prohibitive level, thus increasing enrolment in the public sector. Interestingly, the OECD has also warned about class segregation caused by enrolment fees and other indirect costs, such as transportation,

[535] OECD, *Public and private schools: How management and funding relate to their socio-economic profile* (2012) 83.
[536] UN Special Rapporteur on the right to education, Report A/69/402 of 24 September 2014, para 106.

uniforms, classroom materials, school trips and voluntary contributions.[537] However, its overall assessment of public funding for private schools radically departs from the Special rapporteur's: 'Countries with higher levels of public funding for privately managed schools tend to have less stratification, even after accounting for disparities in students' socio-economic background. This signals that greater public funding is related to less stratification'.[538]

When submitted to critical scrutiny, the all-or-nothing options of banning and universalising private schools' access to state funds both seem problematic. The Special rapporteur himself appears to have revised his position in a subsequent report, recognising that public-private partnerships with non-profit foundations, communities and private citizens can generate social support for education and stimulate innovation in pedagogy, curricula and management. Consequently, states' primary duty should be defined as ensuring that private involvement does not interfere with the public purposes of education or lead to a disinvestment in, and deterioration of, state-managed schools.[539] Because the costs and benefits of subsidising private schools depend on various contextual variables, even the most critical philosophers have been cautious in their recommendations.[540]

Others have gone further and argued that withholding state support to these schools unacceptably reduces the options available to minorities who may suffer mistreatment in public schools or otherwise do not wish to be immersed in the institutionalised national culture.[541] According to this view, schools should either be

[537] OECD, *Equity and quality in education: Supporting disadvantaged students and schools* (OECD Publishing 2012) 70.
[538] OECD, *Public and private schools: How management and funding relate to their socio-economic profile* (2012) 47.
[539] UN Special Rapporteur on the right to education, Report A/70/342 of 26 August 2015, para 55-59, 122.
[540] Henry Levin, 'Does educational privatisation promote social justice?' (2013) 39 [4] *Oxford Review of Education* 514-532; Marilyn Mason, 'Religion and schools – A fresh way forward?' in Roy Gardner, Jo Cairns and Denis Lawton, *Faith schools: consensus or conflict?* (Routledge 2005) 73-82; Robert Jackson, *Rethinking religious education and plurality: Issues in diversity and pedagogy* (RoutledgeFalmer 2004) 39-57; Jeff Spinner-Halev, *Surviving diversity – Religion and democratic citizenship* (The John Hopkins University Press 2000) 118-123; Amy Gutmann, *Democratic Education* (2nd edn, Princeton University Press 1999) 64-70.
[541] Michael Merry, *Culture, identity, and Islamic schooling: A philosophical approach* (Palgrave Macmillan 2007); Veit Bader, *Secularism or democracy? Associational governance of religious diversity* (Amsterdam University Press 2007) 276-279; Mark Halstead and Terence McLaughlin, 'Are faith schools

publicly funded and free or declared incompatible with children's right to education and forced to close.[542] As the Swedish experience suggests, this option would probably trigger a proliferation of privately managed schools and a comparative decline of the public sector but also enable the elimination of class and ethnic segregation, as long as it is accompanied by a comprehensive strategy to tackle its multiple sources (see next section).

Despite its principled elegance, the argument for universally subsidised private schools appears insufficient to outweigh two prudential objections. The first is that elected governments may be tempted to exert greater control on schools that receive public funds, not only regarding their human rights record (as would be desirable, within the limits outlined above) but also when it comes to their choice of cultural perspectives. In other words, a legal duty for states to maintain all private schools could set off political processes that would be inimical to the transmission of minority cultures. The other objection is that universal subsidies might boost the popularity of international schools that would provide children with plenty of economic and other opportunities but neglect the local knowledge necessary to take part in political debates at the municipal, regional and national levels. Such schools may come out as particularly attractive for the growing class of cosmopolitan and mobile professionals living in global cities where their employers (multinational corporations, intergovernmental organisations, large NGOs and universities) tend to cluster.[543] While they are are unlikely to threaten democracy, states may still have a legitimate interest in limiting their number by making subsidies conditional on the provision of some local curriculum.

Does this mean that no minimal standard can be set on school fees? Not necessarily. If the aim of their regulation is not to check the growth of all private

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divisive?' in Roy Gardner, Jo Cairns and Denis Lawton (eds), *Faith schools: consensus or conflict?* (Routledge 2005) 61-72; Eamonn Callan, 'Discrimination and religious schooling' in Will Kymlicka and Wayne Norman (eds), *Citizenship in diverse societies* (Oxford University Press 2000) 45-67.

[542] Meira Levinson, *The demands of liberal education* (Oxford University Press 1999) 145; Ian MacMullen, *Faith in schools? Autonomy, citizenship, and religious education in the liberal state* (Princeton University Press 2007) 179-181.

[543] Stephen Ball and Dimitra Pavlina Nikita, 'The global middle class and school choice: A cosmopolitan sociology' (2014) 17 [3] *Zeitschrift für Erziehungswissenschaft* 81-93.

schools but only fee-charging ones, international law could oblige states to make sure that the latter's intake does not exceed a given proportion of children – or, less ambitiously, that their relative weight goes down rather than up. The best way to achieve this would be to ban all fees in subsidised schools and leave the rest to fend for themselves. At the same time, states should strive to lure as many students as possible to the former by leaving them sufficient curricular leeway to accommodate a range of cultural identities. The problem of reconciling such identities with a diverse membership will occupy the rest of this chapter.

5.3.3. Non-discrimination and positive action

Having neutralised the socioeconomic exclusiveness of subsidised private schools, states would still face the task of addressing other indirect sources of ethnic segregation, namely cultural (and especially religious) discrimination in student admissions and staff recruitment, as well as culturally inflected curricular, pedagogical and marketing strategies. Once again, this would require a careful balancing of ethnic minorities' right to transmit their culture and their long-term liberation from stigma, which can only be guaranteed if all children are educated in multi-ethnic environments.

The religious discrimination of teachers is usually justified on the grounds that personal adherence to a faith is necessary in order to transmit its doctrine or values[544] or that exposing children to teachers of different or no faith might lead them to question their own spiritual outlook.[545] As we have already emphasised, the second point actually supports the diversification of teachers in religious schools, since the critical and balanced exploration of multiple ways of life is a basic requirement for any compulsory education purporting to comply with human rights. Schools that fail to meet it should

[544] Lisbet Christoffersen and Niels Valdemar Vinding, 'Challenged pragmatism: Conflicts of religion and law in the Danish labour market' (2013) 13 [2-3] *International Journal of Discrimination and the Law* 155-162; Charles L. Glenn, *The ambiguous embrace: Government and faith-based schools and social agencies* (Princeton University Press 2000) 292.

[545] Ian MacMullen, *Faith in schools? Autonomy, citizenship, and religious education in the liberal state* (Princeton University Press 2007) 182-204; Inge Versteegt and Marcel Maussen, *The Netherlands: Challenging diversity in education and school life* (European University Institute 2011) 23.

never be allowed to operate, with or without public funding. The first objection, however, arises from legitimate concerns about private schools' ability to distinguish themselves from public establishments and one another. Because of teachers' high status within the school context, it is plausible to think that their religious or cultural affiliations could have a significant impact on the reproduction of minority identities. The question is whether such a transformation would effectively defeat private schools' legitimate purposes, as European courts currently accept.[546]

This claim can be put into perspective by contrasting it with the expectations and established practice of many moderate –or, to evoke Rawls' overlapping consensus, 'reasonable'– religious organisations. In 2004, a Christian charity operating some 150 educational institutions across Germany requested an expert committee to ask its 6000 employees about their views on Christian pedagogy. Out of the approximately 1000 people who returned the questionnaire, only two thirds declared that they believed in God, about the same as in the overall German population. Even fewer (approximately half of respondents) considered that Christian pedagogy should be practised by Christians, far behind those who emphasised its objectives and methods, focus on the disadvantaged, personalised interaction between teacher and student, underlying values and motivation, and general quality. The only aspects that ranked lower on the list were religious content (for instance, Bible stories) and religious practice (prayers). Interestingly, the single educational objective employees found most central to their work was the development of 'tolerance toward others', immediately followed by solidarity.[547] In England and Wales, fully funded schools with a (usually Anglican) religious character are allowed to select a fifth of their personnel based on religious criteria, but otherwise have to conform to general employment legislation.[548] In France, Catholic schools cannot ask prospective teachers about their faith or require them to

[546] Some courts go as far as giving orthodox schools greater leeway than moderate ones in regulating their teachers' religious identity. See European network of legal experts in the non-discrimination field, 'News from the EU member states' (2006) 3 *European Anti-Discrimination Law Review* 78-79.
[547] Manfred L. Pirner, 'Christian pedagogy? A research report on the Christian profile of an educational institution in Germany' (2013) 35 [1] *British Journal of Religious Education* 72-86.
[548] Lucy Vickers, 'Religious discrimination and schools: The employment of teachers and the public sector duty' in Myriam Hunter-Henin (ed), *Law, religious freedoms and education in Europe* (Ashgate 2012) 87-104.

take part in religious activities.[549] In a research interview, the head of a Dutch Islamic school where only 9 out of 28 staff had a Muslim background said he dealt with the situation by asking the rest not to discuss their own religious views with pupils.[550]

If teachers' identification with a school's religious outlook can hardly be construed as necessary for the preservation of its distinctive character, the case for controlling pupils' is even less convincing. Article 84.3 of Spanish Education Law 2/2006 seems to acknowledge so much by prohibiting religious discrimination in the admission procedures of all subsidised schools, including religious ones. In 2008, the Catholic Bishops' Conference of England and Wales issued an official statement on the place of children of other faiths in Catholic schools. Among other accommodations, it recommended highlighting the contribution of different faith communities to local, national and international society, inviting their members to speak about religious influences on their life or work, teaching pupils about one another's festivals and celebrations, respecting those who withdraw from acts of collective worship and putting facilities at their disposal for alternative prayers or rituals.[551] Consistent with these guidelines, a recent study on 19 Catholic schools of the English North West found that none of them refused to admit non-Catholic students.[552]

All this is not to deny that even ecumenically oriented religious schools tend to expect a significant proportion of their members to be personally committed to the faith. Many also want the rest to show an appreciation of its main tenets and link them to broader pedagogical objectives.[553] However, these aims could arguably be attained without resorting to religious discrimination, since schools with an explicit religious identity will be more attractive to families and teachers who share it.

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[549] Blandine Chélini-Pont, 'The French model: Tensions between laïc and religious allegiances in French state and Catholic schools' in Myriam Hunter-Henin (ed), *Law, religious freedoms and education in Europe* (Ashgate 2012).
[550] Inge Versteegt and Marcel Maussen, *The Netherlands: Challenging diversity in education and school life* (European University Institute 2011) 23.
[551] Catholic Education Service of England and Wales, *Catholic schools, children of other faiths and community cohesion: Cherishing education for human growth* (2008).
[552] Nancy Walbank, 'What makes a school Catholic?' (2012) 34 [2] *British Journal of Religious Education* 169-181.
[553] Michael Miller, 'Challenges facing Catholic schools: A view from Rome' in Gerald Grace and Joseph O'Keefe (eds), *International handbook of Catholic education: Challenges for school systems in the 21st century* (Springer 2007) 449-480.

At one level, formally prohibiting religious discrimination in staff recruitment and student admissions may thus seem rather futile, as it leaves the door open for plenty of curricular, pedagogical or advertising strategies to alienate non-believers. But as we have seen, the problem of religious or ethnic targeting is bound to arise in any education system allowing for parental choice and inter-school competition, either in the private or the public sector. What makes non-discrimination truly transformative is its complementary duty of positive action favouring diverse schools over homogenous ones (see section 5.2.3). If adequately designed and implemented, such incentives could provide a competitive edge to the former and gradually erode the predominance of their exclusive counterparts. [554] This would be consistent with states' moral and legal duty to promote the development of complex identities and egalitarian attitudes among all children under their jurisdiction.[555]

[554] Alan Murphy, 'Learning together: The case for joint church schools' in Roy Gardner, Jo Cairns and Denis Lawton (eds), *Faith schools: consensus or conflict?* (Routledge 2005) 113-122.
[555] For an analogous reasoning, see Stephen Macedo, *Diversity and distrust: Civic education in a multicultural democracy* (Harvard University Press 2000) 270, 273.

6. Conclusion

As Western European societies come to terms with the reality of global migration and the importance of staving off all forms of racism, internationally recognised human rights to non-discrimination and education stand out as promising drivers of policy change, especially if courts deliberately interpret them in a way that furthers the moral imperative of ethnic recognition. This thesis has explored ways of leveraging their anti-racist potential, based on a critical analysis of current law and policy. While our normative proposals are unlikely to seem equally convincing, realistic and even innovative throughout the whole area under investigation, let alone over the years, we hope they may offer a general blueprint for contemporary debates and much-needed reforms in various contexts. Hereafter we synthesise the substantive policy standards developed in Chapters 4 and 5 through international hard and soft law as well as recent philosophical and sociological insights.

NON-DISCRIMINATION STANDARDS

I. Structural prevention of employment discrimination

I.a. Ethnic monitoring

States should collect data on the labour market position of ethnic minorities, not only through periodical censuses and residency registers but also by imposing monitoring duties on all public and private employers of sufficient size and administrative capacity. These should target the specific identities that structure perceptions and discrimination in their own sphere of activity, notwithstanding the simultaneous recourse to broader census categories. Monitoring should be conducted on a regular basis, with a view to detect conjunctural changes in intergroup dynamics. However, data collection should be limited to hiring and promotion rather than repeated every time an employer reports on its workforce. Ethnic identities should be self-

ascribed unless a convincing justification is provided for external ascription. This would ensure that the categories used are not so stigmatising as to be rejected by minorities themselves. Citizens' input in the design of monitoring procedures should be sought through exploratory or focus group studies on self-identification patterns. Various strategies should be used to neutralise data validity problems, such as the lack of correspondence between the social categories used by discriminators and discriminatees; employees' attempts to conceal or reject their stigmatised identities; the complex interaction between ethnic and other identities; the contested nature of concepts like 'ethnicity', 'ancestry' or 'race'; and fraudulent identification motivated by a desire to secure targeted benefits. Possible solutions include distinguishing between White and non-White identities, aggregating fine-grained categories to make them map onto the broader ones perceived by discriminators, predicting and correcting for systematic biases, offering open-ended lists of identities, leaving space for mixed ones, asking separate questions about race, ethnicity, language and religion or relying on naming patterns. The adequacy of specific monitoring methods will depend on the challenges faced by the organisation in charge of data collection, including the protection of respondents' anonymity. In some cases, objective indicators such as nationality, parents' birthplace or language spoken at home can be used as proxies for the grounds of discrimination.

I.b. Administrative enforcement

The judicial, complaints-led approach to anti-discrimination enforcement should be complemented with a forward-looking one relying on the enforcement power of administrative agencies. Under this model, states would keep track of patently discriminatory patterns within organisations and use the threat of legal sanctions as an incentive for them to change their practices. Employers should be required by law to collect and report data on the ethnic composition of their staff (see above), disaggregated by professional status and level of responsibility. They should also be obliged to use this information in order to draw up an equality plan. Numerical goals to be reached or maintained within a given time frame should be set and periodically monitored and adjusted. The enforcement of these duties should follow an iterative

process characterised by a gradual increase in coercive pressure. Before taking any action against an employer, public agencies should develop user-friendly guidelines explaining the meaning of legal duties and how to discharge them. These should be made available on the Internet and strategically disseminated in the form of handbooks, information kits or codes of practice targeted at different types of organisations. The next step would consist in reviewing employers' equality plans and reports and conducting on-site inspections in organisations displaying signs of inadequate compliance. If this is confirmed, the agency should negotiate with the employer and extract a written commitment on appropriate remedies. Subsequent reviews should verify that these promises have been duly followed through. Only in cases of employer failure to take action should the agency call on courts to impose a dissuasive sanction, such as a fine, a public condemnation, licence suspension, or debarment from state subventions and tenders. Sanctions should be calibrated according to the level of support for strong anti-discrimination norms among employers and the larger population. Temporary imbalances in workforce composition should trigger administrative scrutiny, but only their longer-term entrenchment should give rise to a sanction. To guarantee the independence of equality agencies, parliaments rather than executives should appoint most of their board members and supply them with adequate and predictable funding. They should also be empowered to launch investigations, request necessary evidence and take judicial action against non-complying organisations.

I.c. Mitigation of nationality discrimination

Once an employment relationship has started, all foreign workers should enjoy social rights on a par with national citizens, including freedom of association and assembly, collective bargaining, legal aid, minimum remuneration, days of rest and social benefits. To empower those in an irregular situation, providers of public services should be banned from sharing their data with immigration enforcement agencies. Victims of severe labour exploitation should be encouraged to denounce their employers by offering them the possibility of regularising their status if the latter are found guilty of a criminal offence. Labour inspection should be extended to all

industries, including domestic work in private households. Inspectors should meet with workers, resorting to interpreters when necessary, and receive specialised training to detect the symptoms of exploitation. All violations of migrant rights should give rise to compensatory and punitive sanctions, including criminal penalties for the most serious abuses. States should review all their seasonal or temporary visa programmes and discontinue those that entrench the massive recourse to migrant workers in particular occupations, such as agriculture, construction, domestic work and manufacturing. Likewise, they should modify any regulation that exposes migrants to lapse into irregularity due to economic circumstances beyond their control. This would include many sponsorship programmes that tie workers to a particular employer, sectoral limitations on the job opportunities of temporary visa holders and employment requirements for the renewal of temporary visas or the concession of permanent residency. Courts should also scrutinise nationality requirements in public sector recruitment, academic validation procedures and professional licensing. When these are not observably and significantly related to job-relevant knowledge and skills, or when they could be replaced by other methods of evaluation, they should be characterised as indirect ethnic discrimination.

II. Positive action

II.a. Public management and contractual incentives

In the part of the labour market under the control of national, regional and local authorities, managers' performance should partly be assessed based on the diversity targets set in their organisation's equality plan. This criterion should then be given independent and significant weight in the payment of bonuses as well as promotion decisions. Any cost stemming from positive action would thus systematically be offset by the positive value attributed to the recruitment and retention of minority employees. The content of such rules and the specific personnel to which they apply should be transparently laid out in the organisation's equality plan and their implementation

monitored by equality agencies or other institutions with inspection functions. Failure to adopt or follow them should be sanctioned as indirect discrimination, independently of the workforce composition obtaining at a specific point in time. More flexible measures should prod private employers to go beyond their minimal non-discrimination obligations. As part of their duty to promote equality, public contractors should seek to reward the most inclusive tenderers. This could be done at several stages of the tendering procedure. For instance, suppliers who have infringed their equality obligations could be debarred for a fixed period of time or until they come into compliance. Awarding criteria should give an advantage to applicants who have reached a diversity threshold, perhaps through voluntary adherence to diversity charters or labels. In a more ad hoc spirit, tenderers could be authorised to add a diversity-friendly variant to their standard offers. This would allow authorities to choose either the most cost-effective option or the one that gives greater weight to equality considerations. Similar measures should be extended to state grants, subsidies, licensing and franchising.

II.b. Proportional representation

Beneficiaries of positive action should belong to ethnic categories that are underrepresented in a given organisation at the time when the measure is adopted. The list of categories should be based on the results of periodical workforce monitoring and updated accordingly. In addition, it should disaggregate all identities that are widely used as cues for employee evaluation and discrimination. Since ethnic stereotypes are often strongly gendered, the categories should themselves be disaggregated by sex and possibly other relevant characteristics. The proportion of a given minority in the larger population should be calculated at the national rather than the metropolitan or regional level. It should also take into account all working-age citizens rather than only qualified ones. In order to foreclose ethnic pigeonholing, proportional representation should be sought within each professional category created by an organisation. However, the disaggregation of all socially salient ethnic identities would make it difficult to achieve a fine-grained reflection of national demographics, especially in the case of smaller employers or leadership positions filled by very few workers. One way to overcome this

problem would consist in adopting a longitudinal perspective and tracing the evolution of representation patterns over time. Positive action would thus channel minority employees toward the occupations where their identities have been least visible during the previous years. The admissibility of segregation-enhancing forms of support for minorities and segregation-reducing measures in favour of natives should not be decided in the abstract but by looking at their overall impact on the socioeconomic and symbolic status of subordinated social categories.

II.c. Symbolic elites

Electoral laws should incorporate incentives for political parties to field a proportional number of immigrant-origin candidates, calculated either on the composition of the general population or voting citizens. In keeping with the voluntary logic of positive action, these incentives should not take the form of court-ordered sanctions but rather progressive adjustments in state subsidies. They should also apply to all governing bodies at the local, regional, national and international level. To forestall the confinement of minority candidates at the bottom of party lists or in unwinnable districts, subsidies should be sensitive to their rate of electoral success. In addition, they should reflect the relative power of non-White executives in parties that integrate governing coalitions. In the artistic sphere, the proportional representation rule should be suspended for ethnic organisations. This is because some ethnically branded venues, groups and events manage to reach out to the wider population and because niche circuits offer an accessible space for minority artists to develop and gain visibility before making the leap to the mass market. This being said, the rule should still apply at the aggregate level of all cultural policies, in order to ensure that artists who identify with a stigmatised ethnicity have a fair opportunity to secure subsidies. Ethnic organisations in other cultural fields such as journalism and social science research should also be exempt from the proportional representation rule.

III. Cultural accommodation

III.a. Invalidation of employee neutrality policies

Public and private policies requiring workers to maintain an appearance of cultural or religious neutrality constitute the widest-ranging type of restriction on cultural diversity, for they can be invoked to reject any demand that is presented and/or perceived as linked to a minority background. Since they do not seem to be rationally justified by any legitimate aim, they should be discontinued as a form of indirect ethnic discrimination. Contrary to the present situation, this shift should be spearheaded by public institutions, precisely because –rather than in spite– of their representative function and correlative influence on national norms and prototypes.

III.b. Good faith treatment of all ethnic practices

Workplace conflicts between ethnic practices and professional requirements are normally resolved through informal negotiations among the parties concerned, leading either to the modification or maintenance of organisational rules. In the latter scenario, employees or equality agencies may resort to anti-discrimination laws in order to compel a different decision. The wrong that should be redressed is employer bad faith stemming from racism. This entails preventing decision-makers from imposing unnecessary cultural assimilation on workers and obliging them to taking specific steps in order to satisfy minority demands. Such accommodation duties should either be incorporated in anti-discrimination statutes or used as interpretive standards in their enforcement.

III.c. General allowance of symbolic identification

Prohibitions on ethnic symbols displayed by employees generally stem from racism and decisively contribute to its reproduction. Consequently, they should be treated by default as violations of anti-discrimination law. In other words, equality agencies and courts should apply them higher levels of scrutiny, replacing permissive

indirect discrimination tests with the much stricter ones used to identify direct discrimination. This interpretive shift would do much to smoke out spurious justifications but leave some leeway for 'genuine and determining occupational requirement' defences. The existence of such requirements should be assessed on a case-by-case basis, but the admissibility of justifications relying on the effects of ethnic prejudice should be settled on principled grounds. Since ethnic symbol bans grow out of negative attitudes among organisations' staff, clients or partners, their proliferation can be expected precisely where patterns of ethnic underrepresentation, segregation and stratification are most entrenched. In addition, interdictions typically exact greater cultural assimilation from the ethnic categories most in need of recognition. These paradoxes make it imperative for courts to reject prejudiced reactions as a justification for imposing symbolic assimilation.

EDUCATION STANDARDS

IV. Critical multiperspectival curriculum

IV.a. Participative standard-setting

States should oversee the basic curriculum imparted in primary and secondary education, including by listing mandatory courses and their specific themes, approving textbooks and assessing students. Nation-wide standards, which have often been used to enforce assimilation, should be put to the service of counter-hegemonic discourses by obliging predominantly White schools to diversify their curriculum. To achieve this, sufficient attention should be paid to the actors involved in the curriculum-setting process. International agreements on textbook revision and regular collaboration with UNESCO would help authorities complement local, national and European themes with frequently neglected Asian, African and Native American viewpoints, as well as global issues of democracy and human rights. To correct the elitist bias of international forums of knowledge exchange, a wide range of actors representing diverse interests and

concerns should collaborate with scientific and education professionals in national-level processes of curriculum and textbook development. Ethnic criticisms of biased historical narratives, religious doctrines and literary canons should be encouraged and exploited through high-level consultation and representation. In particular, scientific committees should comprise experts of different ethnic origins, genders and other salient social categories. To ensure their independence, they should be appointed by a range of professional bodies and associations rather than only governments.

IV.b. Moral judgement

States should be held accountable for the flagrant omissions and misrepresentations transmitted by educational institutions under their jurisdiction. Historical actions amounting to gross violations of human rights should be neither denied nor extolled. The genocides and crimes against humanity caused by European colonialism and imperialism should be explicitly addressed, together with their less problematic and even positive political, economic and cultural consequences. Individual and collective responsibility for the enslavement of Africans, the extermination of indigenous peoples, the military aggression of foreign regimes and the persecution of religious minorities should be acknowledged rather than entirely shifted to allies, secondary contributors, victims and natural or structural factors. The perpetrators of these crimes should be described as such, striking a balance between their contribution to some people's wellbeing and others' suffering. Citizenship education should transmit human rights' underlying values, including dignity, equality, liberty, democracy and the rule of law. It should also transcend the narrowly national frame in which rights and duties are too often explored, interrogating the various levels at which citizenship is granted and exercised.

IV.c. Multiple perspectives

Educational narratives should avoid conflating the nation with its dominant social categories and embrace the specific experiences of the marginalised. Curricular coverage of cultural minorities should include their struggle against oppression and their

positive contribution to human welfare. It should also recognise migration as an immemorial fact of human existence and the racial, linguistic and religious diversity that has characterised European nations from the moment of their birth. Students should learn to enjoy minority and non-European arts and explore multiple spiritualities. While multiperspectivity acknowledges the impossibility of offering an exhaustive rendition of the human experience, it aims to dislodge the perspective of a specific group from its hegemonic position by giving a voice to those who have traditionally been excluded from the public sphere.

V. Voluntary school desegregation

V.a. Parental choice

Imposed ethnic mixing programmes are sometimes implemented in primary and secondary education to improve intergroup attitudes among children. These may involve bussing minority students to White schools, restricting exemptions to district-based allotment, merging majority and minority districts, closing segregated schools and opening new ones in more diverse areas or setting an upper limit on the proportion of minority pupils enrolled in a given public school. However, such programmes often fail to deliver their intended outcomes. A key reason for this is that the ‘whiteness’ of teachers and curricula expose minorities to various types of peer victimisation. In addition, mixing schemes that lack community support also provide a breeding ground for neighbourhood conflict. Since the net effect of intergroup contact on attitudes depends on the difference between positive and negative interactions, dysfunctional schools can lead to an intensification of ethnic hostility. Therefore, authorities should avoid desegregation schemes that radically limit school choice and trigger strong opposition from parents.

V.b. Teacher diversification

Compulsory schooling should be identified as a priority area for anti-discrimination enforcement and positive action. As usual, the latter should be sensitive to a variety of ethnic categories and the specific position of minority staff, preventing their concentration at the bottom of the hierarchy or in specific courses. This would motivate head teachers to include diversity management among their top priorities and spur structural changes in all school practices. However, courts should remain sceptical toward policies purporting to promote the ethnic 'match' of students and teachers, especially when they lead to a stagnation or reduction of minority teachers in White schools.

V.c. Student mix

States should provide incentives for head teachers to lure ethnic minority families to White schools and the other way around through their programming, advertising or teacher training strategies. Pupils' ethnicity, together with their socioeconomic status, should be taken into account in funding criteria. Increasing resources for the education of minority students would make them more attractive to White schools and give multi-ethnic ones greater financial leeway to improve their infrastructure, reduce class sizes, train teachers, provide mentoring and counselling, develop after-school activities or engage parents. For positive action schemes to work, two pitfalls should be avoided. The first is that multi-ethnic schools may seek to maximise their funding by keeping their number of White students as low as possible, thus increasing rather than limiting segregation. To prevent such dynamics from taking hold, extra funding for minority students should be withdrawn when they become overrepresented relative to their share in the national population. Secondly, positive action should be designed to prevent within-school resegregation. In particular, schools should compile data on the ethnicisation of different academic tracks, paying special attention to the share of minority students in vocational training and White students in enriched programs. Finally, states should set out transparent rules for admissions to oversubscribed schools. Pupil selection should be prohibited, together with first come,

first serve policies, which disproportionately benefit affluent families. Other admission criteria should take into account parental preferences and children's interests while simultaneously maximising schools' internal diversity. Proximity considerations should be interpreted flexibly and avoid rigid catchment areas which catalyse and institutionalise residential segregation. Public authorities should guarantee rigorous compliance with admission rules, either by applying them directly or closely supervising individual schools.

VI) Regulation of private providers

VI.a. Minimal curriculum standards

States should ensure that private schools do not offer a platform for the denial of equal human dignity and freedom. The standardised tests, textbook revisions and on-site inspections that are used to supervise the quality of public schools could serve a similar purpose in private ones. In the process, however, states should avoid engaging in an ideological crusade against the illiberal aspects of minority cultures. In this sense, they should recognise that the concrete implications of human rights principles partly depend on the context and the other values or goals with which they often collide. Just like public schools often diverge in the implications they emphasise and overlook, private schools are likely to give more weight to principles consistent with their particular ethical commitments. As long as they accept and promote core values, states should refrain from imposing an official stance on all morally relevant issues and leave students to draw their own conclusions regarding the trade-offs between universal and group-specific norms. In addition, no private school curriculum should eschew a genuinely cosmopolitan perspective on the social world, emphasising not only the wars and violence but also the cooperation and innovation brought about by intercultural encounters. This global knowledge would put some human flesh on abstract rights and provide a factual basis for assessing the wider implications of local actions. Within the justified limits imposed by legislation, including conditions on public funding, private

schools should retain the freedom to teach about any combination of communities along with humanity as a whole, provided each one is duly portrayed in all its internal diversity.

VI.b. Mutually exclusive public funding and pupil fees

Many states subsidise private schools approximately on a par with public ones but allow them to top up their budget with contributions from pupils and other private sponsors. This excludes the poorest students and indirectly causes ethnic segregation. For this reason, state regulations should seek to keep the number of fee-charging private schools as low as possible. Since neither the funding of all private schools nor its opposite seem desirable, the best way to achieve this would be to ban all fees in subsidised schools and leave the rest to fend for themselves. At the same time, states should strive to lure as many students as possible to the former by leaving them sufficient autonomy to accommodate a range of cultural identities and other preferences.

VI.c. Non-discrimination and positive action

The cultural, and especially religious, discrimination of students and teachers should be prohibited in private as well as in public schools, since it does not appear necessary for the preservation of the former's distinctive character. In addition, curricular, pedagogical and advertising strategies that maintain ethnic segregation should be countered through positive action, thereby providing a competitive edge to ethnically diverse schools over those that specialise in a given cultural or religious tradition.

6. Conclusión

En un momento en que las sociedades de Europa occidental se enfrentan con la realidad de la migración global y la importancia de combatir todas las formas de racismo, los derechos humanos internacionalmente reconocidos a la no discriminación y la educación aparecen como prometedores catalizadores del cambio político, especialmente si los tribunales los interpretan deliberadamente de acuerdo con el imperativo moral del reconocimiento étnico. Esta tesis ha explorado algunas formas de aprovechar su potencial antirracista, basándose en el análisis crítico de las leyes y políticas actuales. Aunque resulta poco probable que nuestras propuestas normativas sean igualmente convincentes, realistas e incluso innovadoras en toda el área investigada, y mucho menos a lo largo de los años, esperamos que ofrezcan una líneas directrices para los debates contemporáneos y las reformas pendientes en diversos contextos. A continuación sintetizamos los estándares sustantivos de políticas públicas desarrollados en los Capítulos 4 y 5 a través de la jurisprudencia internacional así como algunos avances filosóficos y sociológicos.

ESTÁNDARES DEL DERECHO A LA NO DISCRIMINACIÓN

I. Prevención estructural de la discriminación en el empleo

I.a. Monitoreo étnico

Los Estados deberían recopilar datos sobre la posición de las minorías étnicas en el mercado de trabajo, no solo mediante censos periódicos y registros residenciales sino también imponiendo obligaciones de monitoreo a todos los empleadores públicos y privados de tamaño y capacidad administrativa suficientes. El seguimiento debería centrarse en las identidades específicas que estructuran las percepciones y la discriminación en una determinada esfera de actividad, sin excluir el recurso simultáneo

a categorías censales más amplias. La recolección de datos étnicos debería realizarse con regularidad, a fin de detectar cambios coyunturales en las dinámicas intergrupales, pero ciñéndose a los procesos de contratación y promoción en lugar de repetirse cada vez que un empleador realice un informe sobre sus trabajadores. Las identidades étnicas deberían ser auto-adscritas a menos que existan motivos de peso para la atribución externa. Ello garantizaría que las categorías utilizadas no fueran tan estigmatizantes como para ser rechazadas por las propias minorías. La participación de los ciudadanos en el diseño del monitoreo debería fomentarse mediante estudios exploratorios o grupos focales sobre patrones de auto-identificación. Diversas estrategias deberían utilizarse para neutralizar problemas de validez, tales como la imperfecta correspondencia entre las categorías sociales utilizadas por los discriminadores y los discriminados; la ocultación o el rechazo subjetivo de las identidades estigmatizadas; la compleja interacción entre las identidades étnicas y de otros tipos; las controversias en torno a los conceptos de 'etnicidad', 'ascendencia' o 'raza'; y las identificaciones fraudulentas motivadas por el deseo de conseguir bienes escasos. Las posibles soluciones incluyen distinguir las identidades blancas de las no blancas; agregar categorías sociales específicas para hacerlas corresponder con las más amplias percibidas por los discriminadores; predecir y corregir sesgos sistemáticos; proponer listas abiertas de identidades; dejar espacio para las identidades mixtas; preguntar por separado sobre la raza, el origen étnico, el idioma y la religión; y analizar patrones de nombres. La adecuación de un determinado método de monitoreo dependerá de los retos específicos a los que se enfrenta la organización encargada de la recopilación de datos, incluida la protección del anonimato de las personas encuestadas. En algunos casos, indicadores objetivos como la nacionalidad, el lugar de nacimiento de los padres o el idioma hablado pueden utilizarse como aproximación a los motivos de discriminación.

I.b. Ejecución administrativa

El enfoque judicial y retrospectivo de la lucha contra la discriminación, basado en las quejas individuales, debería complementarse con un enfoque prospectivo basado en el poder ejecutivo de la administración. Bajo este modelo, los estados identificarían sistemáticamente las tendencias discriminatorias arraigadas en organizaciones concretas

y usarían la amenaza de sanciones jurídicas como incentivo para que cambien sus prácticas. Los empleadores deberían estar obligados por ley a recopilar y comunicar datos sobre la composición étnica de su personal (véase más arriba), desglosados por categoría profesional y nivel de responsabilidad. También deberían estar obligados a aprovechar esta información para elaborar un plan de igualdad. Se deberían establecer, supervisar y ajustar periódicamente objetivos numéricos que alcanzar o mantener dentro de un plazo determinado. La ejecución de estas obligaciones debería seguir un proceso iterativo caracterizado por un aumento gradual de las presiones coercitivas. Antes de iniciar cualquier acción contra un empleador, los organismos de igualdad deberían desarrollar directrices fáciles de usar que expliquen el significado de las obligaciones jurídicas y el modo de cumplir con ellas. Estas deberían estar disponibles en Internet y difundirse estratégicamente en forma de manuales, boletines informativos o códigos de conducta dirigidos a diferentes tipos de organizaciones. El siguiente paso consistiría en revisar los planes e informes de igualdad de los empleadores y realizar inspecciones en las organizaciones que muestren signos de incumplimiento. Si se confirma el diagnóstico, los organismos deberían negociar con el empleador un acuerdo escrito sobre los remedios que implementar. Posteriormente deberían hacer un seguimiento de estos compromisos. En casos de incumplimiento, los organismos deberían solicitar a los tribunales que impongan sanciones disuasivas tales como multas, condenas públicas, la suspensión de licencias o la exclusión de subvenciones y licitaciones estatales. Dichas sanciones contra la discriminación deberían calibrarse de acuerdo con el nivel de apoyo que reciben entre los empleadores y la población en general. Los desequilibrios temporales en la composición del personal deberían activar el control administrativo, pero solo su persistencia a largo plazo debería dar lugar a una sanción. Para garantizar la independencia de los organismos de igualdad, los legisladores deberían nombrar a la mayoría de sus miembros y proporcionarles financiación regular y adecuada. También deberían estar facultados para iniciar investigaciones, requerir documentos probatorios y emprender acciones judiciales contra los infractores.

I.c. Mitigación de la discriminación por nacionalidad

Una vez iniciada cualquier relación laboral, todos los trabajadores extranjeros deberían gozar de derechos sociales equiparables a los nacionales, entre ellos la libertad sindical y de asociación, la negociación colectiva, la asistencia jurídica gratuita, el salario mínimo, los días de descanso y las prestaciones sociales. Para empoderar a aquellos que se encuentran en una situación irregular, los proveedores de servicios públicos deberían tener prohibido compartir sus datos con las agencias de control de la inmigración. Asimismo, se debería alentar a las víctimas de explotación laboral severa a que denuncien a sus empleadores ofreciéndoles la posibilidad de regularizar su situación si estos son declarados culpables de un delito. La inspección laboral debería extenderse a todas las industrias, incluido el trabajo doméstico en hogares privados. Los inspectores deberían reunirse con los trabajadores, con intérpretes cuando sea necesario, y recibir capacitación especializada para detectar los síntomas de explotación. Todas las vulneraciones de los derechos de los migrantes deberían dar lugar a sanciones compensatorias y disuasivas, incluyendo de tipo penal en los casos más graves. Los estados deberían revisar todos sus programas de visados temporales y eliminar aquellos que refuercen el recurso masivo a los trabajadores migrantes en determinados sectores, como la agricultura, la construcción, el trabajo doméstico y la industria manufacturera. Asimismo, deberían modificar cualquier regulación que exponga a los migrantes a caer en la irregularidad debido a circunstancias económicas fuera de su control. Entre ellas se encontrarían muchos programas de apadrinamiento que vinculan a los trabajadores con un único empleador, las limitaciones sectoriales para titulares de visados temporales y los requisitos laborales para la renovación de visados temporales o la concesión de la residencia permanente. Los tribunales también deberían controlar la necesidad y proporcionalidad de los requisitos de nacionalidad en la contratación pública, los procedimientos de convalidación académica y las licencias profesionales. Cuando no están relacionados de forma observable y significativa con habilidades y conocimientos laborales relevantes, o cuando podrían ser reemplazados por otros criterios, deberían caracterizarse como formas indirectas de discriminación étnica.

II. Las acciones positivas

II.a. Gestión pública e incentivos contractuales

En la parte del mercado laboral controlada por las autoridades nacionales, regionales y locales, la evaluación de los directivos debería tener en cuenta el alcance de los objetivos de diversidad establecidos en el plan de igualdad de su organización. Este criterio debería tener un peso independiente y significativo en el pago de incentivos y la concesión de ascensos. De este modo, los costes derivados de las acciones positivas se verían sistemáticamente compensados por el valor positivo atribuido a la contratación y retención de empleados pertenecientes a una minoría étnica. Dichos criterios, así como el personal específico al que se aplican, deberían plasmarse de forma transparente en los planes de igualdad de las organizaciones. Su implementación debería monitorearse desde las agencias de igualdad u otras instituciones con funciones de inspección. El hecho de no adoptarlos o seguirlos debería sancionarse como discriminación indirecta, independientemente de la composición del personal en un momento dado. Otras medidas más flexibles deberían inducir a los empleadores privados a ir más allá de sus obligaciones mínimas en materia de no discriminación. Como medida transversal a favor de la igualdad, los contratistas públicos deberían recompensar a los licitadores más inclusivos. Esto podría hacerse en varias fases del procedimiento de licitación. Por ejemplo, los proveedores que han infringido sus obligaciones en materia de igualdad podrían ser excluidos por un período fijo de tiempo o hasta que las cumplan. Los criterios de adjudicación deberían premiar a los solicitantes que alcancen cierto umbral de diversidad, por ejemplo adhiriéndose voluntariamente a determinadas cartas o etiquetas. De forma más *ad hoc*, los licitadores podrían estar autorizados a añadir una variante más diversa a su oferta de servicios estándar, dando a las autoridades la posibilidad de elegir entre la opción más rentable y aquella que más favorezca la igualdad. Medidas similares deberían extenderse a la concesión de subvenciones, subsidios, licencias y franquicias.

II.b. Representación proporcional

Los trabajadores beneficiarios de las acciones positivas deberían pertenecer a categorías étnicas infrarrepresentadas en la organización y el momento en que se adoptan. La lista de categorías debería basarse en los resultados del monitoreo periódico del personal y actualizarse en consecuencia. Además, se deberían desagregar todas las identidades que suelen afectar la evaluación y discriminación de los empleados. Dado que los estereotipos étnicos suelen estar fuertemente diferenciados por género, las categorías deberían desglosarse por sexo y posiblemente por otras características relevantes. La población de referencia para el cálculo de la proporcionalidad debería extraerse a nivel estatal y no metropolitano o regional. También debería incluir a todas las personas en edad de trabajar y no únicamente aquellas que tengan las cualificaciones necesarias. Con el fin de impedir el encasillamiento étnico, la representación proporcional debería buscarse dentro de cada categoría profesional creada por una organización. Sin embargo, la desagregación de todas las identidades étnicas socialmente relevantes haría difícil conseguir un reflejo detallado de la demografía nacional, especialmente en las organizaciones de menor tamaño o los puestos de liderazgo muy escasos. Una forma de superar este problema consistiría en adoptar una perspectiva longitudinal y rastrear la evolución de los patrones de representación a lo largo del tiempo. De este modo, las acciones positivas canalizarían a los empleados minoritarios hacia las ocupaciones donde sus identidades han sido menos visibles durante los años anteriores. En cuanto a las formas de ayuda a las minorías que exacerben la segregación y las medidas de apoyo a los autóctonos que la reduzcan, su admisibilidad no debería decidirse en abstracto sino examinando su impacto global sobre el estatus socioeconómico y simbólico de las categorías sociales subordinadas.

II.c. Élites simbólicas

Las leyes electorales deberían prever incentivos para los partidos políticos que presenten un número proporcional de candidatos de origen inmigrante, en relación con la población general o los ciudadanos con derecho de voto. De acuerdo con la lógica voluntaria de las acciones positivas, estos incentivos no deberían adoptar la forma de

sanciones judiciales sino más bien de ajustes progresivos en los subsidios estatales. También deberían aplicarse a todos los órganos de gobierno a nivel local, regional, nacional e internacional. Para evitar el confinamiento de los candidatos minoritarios al final de las listas o en distritos que no se pueden ganar, los subsidios deberían ser sensibles a su nivel de éxito electoral. Además, deberían reflejar el poder relativo de los ministros no blancos en los partidos que integren gobiernos de coalición. En el ámbito artístico, la regla de la representación proporcional debería suspenderse sistemáticamente para las organizaciones étnicas. Esto se debe a que algunos establecimientos, grupos y eventos especializados logran atraer a un amplio público y a que incluso los nichos artísticos ofrecen un espacio conveniente para que los artistas minoritarios se desarrollen y ganen visibilidad antes de dar el salto al mercado de masas. Dicho esto, la regla debería seguir aplicándose al nivel agregado de todas las políticas culturales, a fin de asegurar que los artistas pertenecientes a una categoría étnica estigmatizada tengan oportunidades equitativas de obtener subsidios. Las organizaciones étnicas activas en otros ámbitos culturales como el periodismo y la investigación social también deberían quedar exentas de la regla de representación proporcional.

III. Acomodo cultural

III.a. Invalidación de las exigencias de neutralidad del personal

Las políticas públicas y privadas que obligan a los trabajadores a mantener una apariencia de neutralidad cultural o religiosa restringen la diversidad de forma especialmente amplia, dado que pueden invocarse para rechazar cualquier demanda presentada o percibida como vinculada a una determinada afiliación. Dado que no parecen estar racionalmente justificadas por ningún objetivo legítimo, deberían considerarse como formas indirectas de discriminación étnica. Invirtiendo la situación actual, este cambio debería ser impulsado por las instituciones públicas, precisamente debido a –y no a pesar de– su función representativa y consiguiente influencia en las normas y los prototipos nacionales.

III.b. Buena fe en el trato de todas las prácticas étnicas

Los conflictos entre las prácticas étnicas y las exigencias de determinados entornos profesionales normalmente se resuelven mediante negociaciones informales entre las partes interesadas, conduciendo o bien a la modificación, o bien al mantenimiento de las normas organizativas. En este último caso, los empleados u organismos de igualdad pueden recurrir a las leyes antidiscriminatorias para inducir un cambio de postura. El problema que deberían corregir dichas leyes es la mala fe de los empleadores arraigada en actitudes racistas. Esto supone impedir la imposición a los trabajadores de una asimilación cultural innecesaria y obligar a los decisores a que tomen medidas específicas para satisfacer las demandas de las minorías. Dichos deberes de acomodo deberían incorporarse a las leyes contra la discriminación o utilizarse como estándares interpretativos en su aplicación.

III.c. Permiso general de la identificación simbólica

La prohibición de los símbolos étnicos exhibidos por los trabajadores generalmente está arraigada en actitudes racistas y contribuye decisivamente a su reproducción. Por lo tanto, debería ser tratada por defecto como una violación del derecho antidiscriminatorio. Dicho de otro modo, los organismos de igualdad y los tribunales deberían aplicarle niveles más exigentes de escrutinio, reemplazando el juicio de proporcionalidad relativamente permisivo de la discriminación indirecta por el más estricto que se utiliza para identificar discriminaciones directas. Este cambio interpretativo contribuiría decisivamente a destapar justificaciones falaces pero dejaría cierto margen para las defensas basadas en ‘requisitos profesionales esenciales y determinantes’. Aunque la existencia de tales requisitos debería evaluarse caso por caso, la admisibilidad de las justificaciones vinculadas a los efectos de los prejuicios étnicos debería decidirse por motivos de principio. Dado que las interdicciones sobre los símbolos étnicos suelen derivar de actitudes negativas entre el personal, los clientes o los socios de las organizaciones que las adoptan, se puede esperar que proliferen precisamente donde la infrarrepresentación, segregación y estratificación étnica está más arraigada. Además, suelen exigir una mayor asimilación cultural a las categorías

étnicas que más necesitan ser reconocidas. Estas paradojas deberían llevar a los tribunales a rechazar las reacciones prejuiciosas como justificación para la asimilación simbólica.

ESTÁNDARES DEL DERECHO A LA EDUCACIÓN

IV. Currículo crítico multiperspectivista

IV.a. Formulación participativa de los objetivos

Los estados deberían supervisar de forma efectiva los contenidos curriculares básicos impartidos en la educación primaria y secundaria, incluyendo mediante la enumeración de cursos obligatorios y sus temas específicos, la aprobación de libros de texto y la evaluación de los estudiantes. Los estándares nacionales, que frecuentemente se han utilizado con fines de asimilación, deberían ponerse al servicio de los discursos contra-hegemónicos y obligar las escuelas predominantemente blancas a diversificar su currículo. Para lograrlo, debe prestarse suficiente atención a los actores involucrados en el diseño de los currículos. Los acuerdos internacionales sobre revisión de libros de texto y la colaboración con la UNESCO pueden ayudar a las autoridades a complementar los temas locales, nacionales y europeos con puntos de vista frecuentemente desatendidos de Asia, África y América Latina, así como cuestiones mundiales relacionadas con la democracia y los derechos humanos. Para corregir el sesgo elitista de los foros internacionales de intercambio de ideas, una amplia gama de actores representativos de diversos intereses y preocupaciones deberían colaborar con los científicos y profesionales de la educación en los procesos de desarrollo curricular y de libros de texto a nivel estatal. Las críticas dirigidas por las minorías étnicas hacia las narrativas históricas, las doctrinas religiosas y los cánones literarios tendenciosos deberían ser fomentadas y aprovechadas mediante su consulta y representación de alto nivel. En particular, los comités científicos deberían estar formados por expertos de diferentes orígenes étnicos, géneros y otras características sociales relevantes. Para garantizar su independencia, deberían ser nombrados por un amplio espectro de organismos y asociaciones profesionales, y no exclusivamente por los gobiernos.

IV.b. Juicio moral

Los estados deberían considerarse responsables por las omisiones y falsedades flagrantes transmitidas por los centros de enseñanza bajo su jurisdicción. En particular, los actos históricos que constituyen violaciones graves de los derechos humanos no deberían ser negados ni ensalzados. Los genocidios y crímenes contra la humanidad causados por el colonialismo y el imperialismo europeos deberían abordarse explícitamente, junto con sus implicaciones políticas, económicas y culturales menos problemáticas e incluso positivas. Deberían reconocerse las responsabilidades individuales y colectivas por la esclavización de los africanos, el exterminio de los pueblos indígenas, la agresión militar de varios regímenes extranjeros y la persecución de las minorías religiosas, en lugar de colocarlas enteramente en algunos aliados y otros actores secundarios, en sus propias víctimas o en factores naturales y estructurales. Los perpetradores de estos crímenes deberían caracterizarse como tales, buscando un equilibrio entre su contribución al bienestar de algunas personas y al sufrimiento de otras. La educación ciudadana debería transmitir los valores subyacentes a los derechos humanos, como la dignidad, la igualdad, la libertad, la democracia y el estado de derecho. También debería trascender el estrecho marco estatal en que los derechos y deberes generalmente se exploran, explorando los diversos niveles en que se concede y ejerce la ciudadanía.

IV.c. Perspectivas múltiples

Los discursos educativos deberían evitar confundir la sociedad nacional con sus categorías sociales dominantes e incorporar las experiencias específicas de los marginados. La representación curricular de las minorías culturales debería incluir su lucha contra la opresión y su contribución positiva al desarrollo humano. También debería reconocer la migración como hecho consustancial a la existencia humana desde tiempos inmemoriales y la diversidad racial, lingüística y religiosa que ha caracterizado a las naciones europeas desde su formación. Los estudiantes deberían aprender a disfrutar de las formas artísticas minoritarias y no europeas y explorar múltiples espiritualidades. Si bien el principio de multiperspectivismo reconoce la imposibilidad

de ofrecer un retrato exhaustivo de la experiencia humana, pretende eliminar la posición hegemónica de grupos específicos, dando voz a quienes tradicionalmente han sido excluidos de la esfera pública.

V. Desegregación escolar voluntaria

V.a. Libertad de elección de los padres

De vez en cuando se implementan medidas de integración étnica obligatoria en la educación primaria y secundaria para mejorar las actitudes intergrupales entre los niños. Ello puede suponer el traslado de estudiantes minoritarios a las escuelas principalmente blancas, restringir las exenciones al reparto por residencia de los alumnos, fusionar escuelas mayoritarias y minoritarias, cerrar escuelas segregadas y abrir otras nuevas en áreas más diversas o fijar un límite superior en la proporción de alumnos de origen inmigrante en cada escuela pública. Sin embargo, estos programas a menudo no producen los resultados deseados. Uno de los motivos fundamentales para ello es que el sesgo blanco de los docentes y planes de estudios expone a los alumnos minoritarios a diversos tipos de victimización. Por añadidura, los intentos de integración que carecen de apoyo entre la población proporcionan un caldo de cultivo para los conflictos vecinales. Dado que el efecto neto del contacto intergrupal sobre las actitudes depende de la diferencia entre las interacciones positivas y negativas, las escuelas disfuncionales pueden conducir a una intensificación de las hostilidades interétnicas. Por lo tanto, las autoridades deberían evitar los programas de desegregación que limitan radicalmente la libertad de elección de centro y suscitan una fuerte oposición entre los padres.

V.b. Diversificación de los profesores

La profesión docente en la educación obligatoria debería identificarse como un área prioritaria para las medidas antidiscriminatorias y las acciones positivas. Como siempre, estas últimas deberían ser sensibles a un abanico de categorías étnicas y a la posición específica del personal minoritario, evitando su concentración en los niveles

inferiores de la jerarquía o en asignaturas específicas. Estas medidas incentivarían a los directores para que mantuvieran la gestión de la diversidad entre sus principales prioridades y estimularían cambios estructurales en todas las prácticas escolares. Sin embargo, los tribunales deberían mostrarse escépticos con respecto a las políticas que pretendan promover el 'emparejamiento' étnico de los estudiantes y los profesores, especialmente cuando conduzcan al estancamiento o a la reducción del número de profesores minoritarios en las escuelas blancas.

V.c. Integración de los alumnos

Los estados deberían incentivar a los directores para que atraigan a las familias minoritarias hacia las escuelas blancas y viceversa mediante sus estrategias de programación, publicidad o formación de profesores. El origen étnico de los alumnos, junto con su situación socioeconómica, debería tenerse en cuenta en los criterios de financiación. El aumento de los recursos destinados a la educación de los estudiantes minoritarios los volvería más atractivos para las escuelas blancas y proporcionaría a los colegios multiétnicos un mayor margen financiero para mejorar sus infraestructuras, reducir el tamaño de las clases, formar a los profesores, ofrecer orientación y atención personalizada a los alumnos, organizar actividades extracurriculares y establecer vínculos con los padres. Dos trampas deberían evitarse para que funcionen las acciones positivas. Por un lado, las escuelas multiétnicas podrían tratar de maximizar su financiación manteniendo el número de alumnos blancos lo más bajo posible, exacerbando en lugar de contrarrestar la segregación. Para prevenir estas dinámicas, la financiación adicional vinculada a los estudiantes minoritarios debería retirarse cuando estén sobrerrepresentados en relación con su peso demográfico en la población del estado. Por otro lado, las acciones positivas deberían diseñarse para prevenir la resegregación intraescolar. En particular, las escuelas deberían recopilar datos sobre la composición étnica de los diferentes itinerarios académicos, prestando especial atención a la proporción de estudiantes minoritarios en formación profesional y estudiantes blancos en programas avanzados. Finalmente, los estados deberían establecer reglas transparentes sobre la admisión en las escuelas con exceso de demanda. Se debería prohibir cualquier selección de los alumnos por parte de las escuelas, junto con la

admisión por orden de llegada, que beneficia desproporcionadamente a las familias acomodadas. Los criterios de admisión deberían tener en cuenta las preferencias de los padres y los intereses de los niños, así como maximizar la diversidad interna de las escuelas. El factor de proximidad debería aplicarse con flexibilidad y evitar la delimitación de zonas de captación rígidas que catalizan e institucionalizan la segregación residencial. Las autoridades públicas deberían garantizar el cumplimiento riguroso de las normas de admisión, ya sea aplicándolas directamente o supervisando las escuelas individuales de cerca.

VI) Regulación de las escuelas privadas

VI.a. Estándares curriculares mínimos

Los estados deberían velar por que las escuelas privadas no se conviertan en una plataforma para negar la igual dignidad y libertad de los seres humanos. Los exámenes estandarizados, las revisiones de libros de texto y las inspecciones *in situ* que se utilizan para supervisar la calidad de las escuelas públicas podrían desempeñar un papel similar en las privadas. Durante este proceso, sin embargo, los estados no deberían embarcarse en una cruzada ideológica contra los aspectos iliberales de las culturas minoritarias. En este sentido, deberían reconocer que las implicaciones concretas de los derechos humanos dependen en parte del contexto y de los demás valores u objetivos con los que colisionan a menudo. Así como las escuelas públicas suelen divergir en las implicaciones que destacan y pasan por alto, se puede esperar que las escuelas privadas otorguen más peso a los principios que coinciden con sus propias orientaciones éticas. Mientras acepten y promuevan valores fundamentales, los estados deberían abstenerse de imponer un discurso oficial sobre todas las cuestiones moralmente relevantes y dejar a los estudiantes que saquen sus propias conclusiones respecto a las tensiones entre normas universales y específicas. Además, ningún currículo de las enseñanzas privadas debería carecer de una perspectiva genuinamente cosmopolita sobre el mundo social, haciendo hincapié no solo en las guerras y la violencia sino también en la cooperación y la innovación generadas por los encuentros interculturales. Este conocimiento mundial añadiría una cara humana a los derechos abstractos y proporcionaría una base factual

desde la que evaluar las consecuencias lejanas de las acciones locales. Dentro de los límites legítimos establecidos legislativamente, incluidos los requisitos para la recepción de fondos públicos, las escuelas privadas deberían tener libertad para abordar cualquier combinación de comunidades junto con la humanidad en su conjunto, siempre que cada una esté debidamente representada en toda su diversidad interna.

VI.b. Exclusión mutua de la financiación pública y las tasas de inscripción

Muchos estados financian las escuelas privadas aproximadamente al mismo nivel que las públicas pero les permiten complementar sus presupuestos con contribuciones de alumnos y otros patrocinadores. Ello excluye a los estudiantes más pobres e indirectamente genera segregación étnica. Por este motivo, las regulaciones deberían diseñarse para reducir al mínimo el número de escuelas privadas de pago. Dado que ni la financiación de todas las escuelas privadas ni su contrario parecen deseables, la mejor manera de conseguirlo consistiría en prohibir todas las tasas en las escuelas subvencionadas y dejar que las demás se autofinancien sin ayudas públicas. Al mismo tiempo, los estados deberían esforzarse en atraer a tantos estudiantes como sea posible a las primeras dejándoles suficiente autonomía para acomodar un abanico de identidades culturales y otras preferencias.

VI.c. No discriminación y acción positiva

La discriminación cultural, y especialmente religiosa, de los estudiantes y profesores debería prohibirse tanto en las escuelas privadas como en las públicas, ya que no parece necesaria para la preservación del carácter propio de las primeras. Además, las estrategias curriculares, pedagógicas y publicitarias que crean segregación étnica deberían contrarrestarse mediante acciones positivas, proporcionando una ventaja competitiva a las escuelas étnicamente diversas respecto a aquellas que se especializan en una determinada tradición cultural o religiosa.

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