

‘Race’, Ethnicity, and Racism in Europe

Since the mid-1980s, the issue of racism has gradually assumed greater prominence within European Union law and policy discourse. Nevertheless, the meaning of core concepts has always been hedged with ambivalence. This is excellently demonstrated within Directive 2000/43. This forbids discrimination on grounds of ‘racial or ethnic origin’,¹ but the preamble declares:

The European Union rejects theories which attempt to determine the existence of separate human races. The use of the term ‘racial origin’ in this Directive does not imply an acceptance of such theories.²

At the same time, the European Commission commonly refers to this Directive as the ‘Racial Equality’ Directive. This book aims to identify the extent to which the objectives of combating racism and promoting equality have been integrated across various areas of EU law and policy. To this end, it is essential to clarify at the outset the meaning of ‘racism’. Legal and policy documents often use this term in a rather loose fashion as if its meaning was self-evident and uncontested. In contrast, this chapter will illustrate the variety of issues potentially falling under the broad category of racism. From a European perspective, it is particularly important to consider the historic and geographic context in which racism is manifested.³ Expressions of racism are not necessarily consistent across the (enlarged) EU. The chapter begins by considering theoretical critiques of ‘race’, ethnic origin, and the concept of racism. It proceeds to consider how these terms have been used within legal instruments. The final sections examine the principal groups vulnerable to racism within the EU.

¹ Art 1, Council Directive (EC) 2000/43 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin [2000] OJ L180/22. This Directive prohibits discrimination on grounds of racial or ethnic origin in employment, vocational training, education, social protection, social advantages, and access to goods and services, including housing.

² Recital 6.

³ E Howard, ‘Race and racism—why does European law have difficulties with definitions?’ (2008) 24 *IJCLIR* 5, 11.

A. 'Race' and Racism

The origins of the term 'racism' lie in a critique of scientific theories on 'race'.⁴ Such theories came to prominence during the nineteenth century and sought to categorize the human population into a number of biologically distinct 'races'. These were often identified by reference to physical characteristics, such as skin colour and facial appearance. Crucially, it was purported that these racial categories were aligned with different levels of intellectual capacity, leading to the view that some 'races' were superior to others.⁵ The supposed objectivity of such scientific analysis originally provided a veneer of legitimacy for imperialism and the slave trade.⁶ It also provided an ideological underpinning for the emergence of race laws in the 1930s and the subsequent Holocaust.⁷

A critique of the concept of biologically distinguishable human 'races' can be traced back to the 1920s and 1930s.⁸ This accelerated in the post-war period under the auspices of several inquiries conducted by UNESCO. These concluded that, in fact, there was no scientific basis for the proposition that the human population was composed of a number of distinct 'races', as opposed to a spectrum of human diversity. The 1978 Declaration on Race and Racial Prejudice summarizes this viewpoint:

1. All human beings belong to a single species and are descended from a common stock. . . .
5. The differences between the achievements of the different peoples are entirely attributable to geographic, historical, political, economic, social and cultural factors. Such differences can in no case serve as a pretext for any rank-ordered classification of nations or peoples.⁹

This international consensus on the scientific falsity of 'race' persists, although there is some return to this debate in the context of contemporary genetic profiling.¹⁰ Within academic literature, the artificial nature of the concept is often indicated by placing 'race' within inverted commas. The corollary of rejecting 'race' as an objective criterion is the recognition that perceptions of 'race' are social constructions. As such, perceptions of 'race' are likely to vary 'over time and across

⁴ R Miles and M Brown, *Racism* (2nd edn, London: Routledge, 2003) 58.

⁵ C Hirschman, 'The origins and demise of the concept of race' (2004) 30 *Population and Development Review* 385, 393.

⁶ *ibid* 395.

⁷ A Lentin, *Racism and Anti-racism in Europe* (London: Pluto Press, 2004) 60.

⁸ Miles and Brown (n 4 above) 58; Howard (n 3 above) 10.

⁹ Art 1, Declaration on Race and Racial Prejudice, 20th General Conference of UNESCO, 27 November 1978.

¹⁰ R Bhavnani, H Safia Mirza, and V Meeto, *Tackling the Roots of Racism—Lessons for Success* (Bristol: Policy Press, 2005) 9; R Carter, 'Genes, genomes and genealogies: the return of scientific racism?' (2007) 30 *Ethnic and Racial Studies* 546.

space'.¹¹ Historical and geographic circumstances will determine the process through which racialization occurs; in other words, the way in which physical characteristics can become imbued with social meaning.¹² In a multinational polity such as the EU, this implies that perceptions of 'race' are likely to differ between states.

The discrediting of 'race' can be associated with a shift in vocabulary towards ethnicity. Whilst scientific theories on 'race' attempted to place the human population into a small number of biologically determined categories, ethnicity is viewed as more fragmented and pluralistic.¹³ Ethnicity is informed by cultural differences, such as language, dress, religion, literature, and music. It is often premised on individuals' *belief* in a shared, common origin.¹⁴ Solomos and Schuster argue that ethnic groups are also social constructions; they are imagined communities based on selective memory and perceived common heritage.¹⁵ In principle, the cultural nature of ethnicity suggests that individuals can alter their ethnicity. McVeigh and Lentin argue that ethnicity is an inherently shifting characteristic which arises from a combination of internal self-definition and external perception.¹⁶ Consequently, it holds the potential to be a better way of signifying the socially constructed nature of perceived difference or 'otherness', rather than the biological notion of 'race'. Nevertheless, there are certain drawbacks to a focus on ethnicity. Bhavnani et al. suggest that there is a tendency to regard the cultural qualities represented by ethnicity as static and unchanging.¹⁷ In particular, ethnic groups risk being viewed as relatively homogeneous entities with little recognition of their internal diversity.¹⁸ If ethnicity becomes viewed as a fixed trait beyond individual control, then it may be little more than a 'politically correct code word for "race"'.¹⁹ This tendency is reinforced by the habit of viewing only the 'other' as bearing ethnic qualities.²⁰ The label 'ethnic' is often used only in conjunction with minorities and it is associated with that which is exotic and different.²¹

B. Scientific, Cultural, and Institutional Racism

Belief in the existence of superior, biologically separate 'races' can be summarized under the label of 'scientific racism'. Whilst this outlook declined in the post-war

¹¹ K Tyler, 'The genealogical imagination: the inheritance of interracial identities' [2005] *The Sociological Review* 476, 479.

¹² Miles and Brown (n 4 above) 100.

¹³ S Fenton, *Ethnicity* (Cambridge: Polity Press, 2003) 52.

¹⁴ *ibid* 62.

¹⁵ J Solomos and L Schuster, 'Citizenship, multiculturalism and the politics of identity: contemporary dilemmas and policy agendas' in R Koopmans and P Statham (eds), *Challenging Immigration and Ethnic Relations Politics* (Oxford: OUP, 2000) 74, 79.

¹⁶ R McVeigh and R Lentin, 'Situating racism: a theoretical introduction' in R Lentin and R McVeigh (eds), *Racism and Anti-racism in Ireland* (Belfast: Beyond the Pale Publications, 2002) 1, 5.

¹⁷ Bhavnani et al. (n 10 above) 14.

¹⁸ Fenton (n 13 above) 68.

¹⁹ Miles and Brown (n 4 above) 93.

²⁰ Lentin (n 7 above) 30.

²¹ The Runnymede Trust, *The Future of Multi-ethnic Britain—The Parekh Report* (London: Profile Books, 2002) xxiii.

period, it was not, however, accompanied by the disappearance of racism as a phenomenon. For example, issues such as Apartheid or segregation in the USA propelled the adoption of the International Convention on the Elimination of Racial Discrimination (ICERD) in 1966.²² In an effort to explain ongoing manifestations of racism, attention increasingly focused on 'cultural racism'.²³ This perspective argues that discrimination and prejudice arise not because of individuals' belief in the biological superiority of their perceived 'race', but rather from conflicts between different ethnic groups. A cultural perspective on racism suggests that individuals have an innate tendency to prefer their own cultural community and that a mixing of cultures inevitably produces conflicts in inter-ethnic relations.²⁴ As overt opposition to persons of a different 'race' becomes less common and widely assumed to be unacceptable discourse, this is replaced with stealthy 'race' talk coded in terms of concern about 'too much' cultural diversity.²⁵ Naturally, this concept of racism implies a strong nexus between racism and discourse on immigration. For example, McMaster highlights how extreme right-wing political parties in Europe shifted away from the use of overt language expressing ideas of racial superiority. Instead, their discourse became couched in terms of opposition to immigrants and immigration.²⁶ As a result, racism has become intertwined with the concept of xenophobia (literally, the fear of foreigners). Kundnani notes how hostility to foreigners (and foreign culture) is often presented as inevitable or natural, thereby invoking xenophobia as an 'alibi for racism'.²⁷

A concept of cultural racism leads to an anti-racist strategy premised on changing *individual* attitudes and behaviour. People have to be persuaded to overcome suspicion and hostility to those of a different culture. On the one hand, law may be deployed to penalize individual acts of racial discrimination. On the other, policy is directed towards learning about other cultures and encouraging people to value diversity.²⁸ This approach seems evident in the EU's anti-discrimination media campaign. It centres on slogans such as 'for diversity, against discrimination' or 'our differences make the difference'.²⁹

One of the limitations in the culturalist vision of racism is its emphasis on individual prejudice as a cause of racism.³⁰ This tends to characterize racism as a

²² International Convention on the Elimination of All Forms of Racial Discrimination (New York, 7 March 1966); K Boyle and A Baldaccini, 'A critical evaluation of international human rights approaches to racism' in S Fredman (ed), *Discrimination and Human Rights—The Case of Racism* (Oxford: OUP, 2001) 135, 150.

²³ Lentin (n 7 above) 76.

²⁴ T Modood, "Difference", cultural racism and anti-racism' in B Boxill (ed), *Race and Racism* (Oxford: OUP, 2001) 238.

²⁵ A Kundnani, 'In a foreign land: the new popular racism' (2001) 43 *Race & Class* 41, 52.

²⁶ N McMaster, *Racism in Europe 1870–2000* (Houndmills: Palgrave, 2001) 210.

²⁷ Kundnani (n 25 above) 50. ²⁸ Lentin (n 7 above) 81.

²⁹ <<http://www.stop-discrimination.info>> accessed 26 April 2007.

³⁰ E Bonilla-Silva, 'Rethinking racism: towards a structural interpretation' (1996) 62 *American Sociological Review* 465, 467.

behavioural aberration which should fade away with the passage of time and individual enlightenment. Critics have argued that this does not pay sufficient attention to the deep-seated nature of stereotypes which are shaped by public discourse and are consequently difficult to dislodge.³¹ This ranges from the casual linking in the media of immigration and terrorism, through to workplace assumptions about who would 'fit in'. Moreover, the focus on individuals downplays the role of structural factors which go beyond the actions of any given individual. McCrudden notes how the persistence of inequality eventually provoked commentators to question whether individual prejudice was a sufficient explanation for racism.³² An alternative perspective, 'institutional racism', rose in prominence, dating from the 1960s in both the UK and USA.

The precise meaning of institutional racism has been the subject of considerable academic debate.³³ As a concept, its strength lies in departing from the idea of racism as purely intentional prejudice on the part of individuals towards those of a different culture. Instead, it recognizes that racism occurs even in the absence of conscious discriminatory motivation. To this end, it attributes great importance to whether equal outcomes are ensured in practice for all ethnic groups; where unequal outcomes persist, this is taken as evidence of institutional racism.³⁴ The concept of institutional racism famously entered mainstream public policy discourse in the UK through the findings of an official inquiry into the mishandling by police of an investigation into the racist murder of a young black man, Stephen Lawrence. The inquiry's report provided the following definition of institutional racism:

The collective failure of an organisation to provide an appropriate and professional service to people because of their colour, culture, or ethnic origin. It can be seen or detected in processes, attitudes and behaviour which amount to discrimination through unwitting prejudice, ignorance, thoughtlessness and racist stereotyping which disadvantage minority ethnic people.³⁵

In this case, institutional racism was detected in the organization's collective failure to treat his murder in the manner that would have been adopted for a white victim. Institutional racism draws attention to the power of 'routines and everyday practices'.³⁶ For instance, when police or immigration officers exercise discretion and assess how 'suspect' an individual is, there is a strong risk of stereotyping.

³¹ Bhavnani et al. (n 10 above) 17.

³² C McCrudden, 'Institutional discrimination' (1982) 2 OJLS 303, 305.

³³ M Verlot, 'Understanding institutional racism' in The Evens Foundation (eds), *Europe's New Racism: Causes, Manifestations and Solutions* (Oxford: Berghahn Books, 2002) 27; Miles and Brown (n 4 above) 66–71.

³⁴ M Rowe, *Policing, Race and Racism* (Cullompton: Willan Publishing, 2004) 10.

³⁵ para 6.34, W MacPherson, 'The Stephen Lawrence Inquiry—report of an inquiry' (Cm 4262-I, 1999).

³⁶ Runnymede Trust (n 21 above) para 5.26.

The idea that racism can arise from taken-for-granted institutional practices can be applied beyond the sphere of criminal justice. McCrudden notes how typical labour market practices can institutionalize disadvantage for ethnic minorities.³⁷ Recruitment of new workers by relying on 'word-of-mouth' or the family and friends of the current workforce will tend to reproduce the existing ethnic profile. An alternative example of institutional racism arises from *DH v The Czech Republic*.³⁸ In this case, children were allocated to special schools for those with learning disabilities on the basis of supposedly neutral psychological tests. In practice, Roma children in the town of Ostrava were more than 27 times more likely to be allocated to such schools than a similarly situated non-Roma child.³⁹ Crucially, the European Court of Human Rights held that it was not necessary to show that any individual Roma child had been subject to prejudicial treatment in the conduct of the tests. The 'disproportionately prejudicial effect on the Roma community' was sufficient evidence to support a finding of unlawful discrimination.⁴⁰ Although the Court does not expressly refer to the concept of institutional racism in its judgment, this may be viewed as implicit both in the emphasis attached to the presence of manifestly unequal outcomes and in the Court's conclusion that the system of testing was inherently discriminatory.⁴¹

The breadth of the concept of institutional racism has, though, been a source of criticism. Miles and Brown refer to 'conceptual inflation' in the analysis of racism and the difficulty of determining the limits to racism if it is completely disconnected from motivation.⁴² If the focus is purely on effects and outcomes, then any difference in the socio-economic position of ethnic groups will be potentially attributed to racism. Some authors also draw a distinction between institutional racism, which concentrates on racism arising from the actions and processes of institutions, and a broader concept of structural racism, which embraces all socio-economic structures that may give rise to inequality.⁴³ Given that this book focuses on the role of the EU (and its institutions), the term institutional racism will be maintained.

In short, sociological debates on the meaning of racism present a spectrum of options. The next section turns to consider the role that law plays in defining racism.

C. 'Race', Ethnicity, and Law

When law is deployed to combat racism, certain choices have to be made in the language used within the law; these convey how the law defines racism. In fact, it is rather rare to find an express definition of 'racism' within legal instruments.

³⁷ McCrudden (n 32 above) 314.

³⁸ *DH and others v The Czech Republic* [GC] (2008) 47 EHRR 3.

³⁹ para 134.

⁴⁰ para 209.

⁴¹ para 201.

⁴² Miles and Brown (n 4 above) 71.

⁴³ Bonilla-Silva (n 30 above) 466.

This may reflect an assumption that racism refers merely to a state of mind, as opposed to specific acts which could be the subject of legal regulation.⁴⁴ Indeed, legal instruments typically concentrate on defining the concept of discrimination.⁴⁵ ICERD, for example, contains no definition of 'racism', but does define 'racial discrimination'. In relation to the latter, a key question for all anti-racism laws is what constitutes 'racial' discrimination. Here, the use of the term 'race' is an initial dilemma. On one side, the sociological critique of 'race' discussed above has exposed the artificiality of 'race' as a means of categorizing the human population. Given the consensus that there is no scientific basis for the existence of 'race', one aim of anti-racism laws should be to undermine this perceived category. Haney López warns that using 'race' as a category within the law tends to legitimize its existence in the popular imagination.⁴⁶ For example, ICERD refers to 'promoting understanding among all races'⁴⁷ or the 'protection of certain racial groups'.⁴⁸ In the European context, the historical resonance of 'race' underscores its problematic nature.⁴⁹ In some states, it is strongly associated with laws promulgated by the Nazi and Fascist governments in Europe during the 1930s and 1940s. Indeed, in 1996, the European Parliament adopted a resolution stating that 'the term should therefore be avoided in all official texts'.⁵⁰

On the other side of this debate, it can be argued that anti-racism laws are designed to prohibit discrimination based on perceptions about 'race', therefore, legal texts need to engage expressly with this concept. In other words, it needs to be clear that if someone treats another less favourably and this is based on their belief about that other's 'race', then this act must be forbidden by law. This rationale is adopted in the general policy recommendation of the European Commission against Racism and Intolerance (ECRI), the Council of Europe's specialized body working on racism and related issues. The explanatory memorandum states:

Since all human beings belong to the same species, ECRI rejects theories based on the existence of different «races». However, in this Recommendation ECRI uses this term in order to ensure that those persons who are generally and erroneously perceived as belonging to «another race» are not excluded from the protection provided for by the legislation.⁵¹

⁴⁴ E Howard, 'The road to equality—developing the protection against discrimination on racial or ethnic grounds within the European Union' Ph.D. thesis, Queen Mary, University of London, February 2007.

⁴⁵ Howard (n 3 above) 27.

⁴⁶ I Haney López, *White by Law—The Legal Construction of Race* (New York: New York University Press, 1996) 111.

⁴⁷ Art 2(1).

⁴⁸ Art 2(2). The preamble of ICERD states that 'any doctrine of superiority based on racial differentiation is scientifically false'.

⁴⁹ Howard (n 3 above) 12.

⁵⁰ para K, Resolution on the communication from the Commission on racism, xenophobia and anti-Semitism [1996] OJ C152/57.

⁵¹ fn 1, ECRI general policy recommendation no 7 on national legislation to combat racism and racial discrimination, CRI (2002) 41, 13 December 2002.

This balance also seems to be the logic within the EC Racial Equality Directive, given the statement in Recital 6, mentioned at the outset of this chapter. An alternative approach in some states has been to qualify the term 'race' within national legislation. For instance, in France, 'race' is often prefaced by the words 'real or assumed'.⁵² These strategies fit comfortably with the prohibition of direct discrimination or harassment, where the actual characteristics of the victim are not determinative of the existence of the unlawful act. Article 2(1) of the Racial Equality Directive defines direct discrimination as 'where one person is treated less favourably than another is, has been or would be treated in a comparable situation *on grounds of racial or ethnic origin*' (emphasis added).⁵³ The law can claim to reject the existence of 'race', yet penalize situations where someone is treated less favourably on this ground. The key is the reason for the discriminator's action, not the actual characteristics of the victim. Greater difficulties arise in respect of indirect discrimination. Article 2(2)(b) of the Racial Equality Directive states:

Indirect discrimination shall be taken to occur where an apparently neutral provision, criterion or practice would put *persons of a racial or ethnic origin* at a particular disadvantage compared with other persons, unless that provision, criterion or practice is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary (emphasis added).

The nature of indirect discrimination is that the rule or practice does not overtly distinguish on grounds of perceived 'race'. Instead, the complainant is seeking to demonstrate that a group of people of a particular racial origin compared with persons not of that racial origin are placed at a particular disadvantage. It is very difficult to mount such a complaint without implicitly accepting the existence of groups that can be defined according to racial origin. Banton observes that 'the introduction of the concept of *racial group* was in Britain seen as the price to be paid for the prohibition of indirect discrimination'.⁵⁴ He criticizes this trade-off, arguing that in the long term the continued use of such terminology 'breathes new life into the obsolete idea of race'.⁵⁵

Given the contested nature of 'race', it is not surprising many legal instruments against racism have sought to identify alternative conceptual categories. This also reflects the shift from a focus on scientific racism towards cultural racism. If cultural difference is viewed as the catalyst for contemporary manifestations of racism, then it is necessary to capture the various markers through which cultural difference is signified. This is already evident in ICERD, which defines racial discrimination as 'any distinction, exclusion, restriction or

⁵² eg Art L. 1132-1 Labour Code.

⁵³ Admittedly, not all language versions of the Directive adopt this expression: eg the Italian version refers to less favourable treatment 'because of his race' ('a causa della sua razza').

⁵⁴ M Banton, *The International Politics of Race* (Cambridge: Polity Press, 2002) 201.

⁵⁵ *ibid.*

preference based on race, colour, descent, or national or ethnic origin'.⁵⁶ More than 35 years later, ECRI's general policy recommendation advocated a longer, open-ended list: «direct racial discrimination» shall mean any differential treatment based on a ground *such as* race, colour, language, religion, nationality or national or ethnic origin' (emphasis added).⁵⁷ The advantage of the open list approach is that it recognizes the dynamic quality of racism. It is not a stable phenomenon, but rather one which varies in its manifestation according to context.⁵⁸ Specifically, the groups vulnerable to racism are likely to vary due to factors such as the process of state formation or the history of migration. Two contemporary examples are asylum-seekers and Muslims. Asylum as an avenue for migration grew sharply in political sensitivity during the 1980s and 1990s and consequently asylum applicants became a key group vulnerable to racism.⁵⁹ Similarly, the period since the 1990s has witnessed an increasing political focus on the situation of Muslims in Europe, a debate accentuated post-9/11. Modood argues that hostility to Muslims, often summarized in the term Islamophobia, is a present-day expression of racism.⁶⁰

The difficulty encountered in defining racism in law is striking the balance between recognition of its changing form with identification of its outer limits. At one end of the spectrum, it is possible to point to discrimination on grounds such as age, gender, or sexual orientation. Although these can be combined with racism, it is rarely argued that discrimination on these grounds is an aspect of racism. In contrast, there are grounds such as religion or nationality where there is considerable variation between legal sources as to whether these should be placed under the umbrella of racism. In contrast to ICERD or ECRI's recommendation, the Racial Equality Directive adopts the relatively narrow formula of discrimination on grounds of 'racial or ethnic origin'. Moreover, it specifies that this does not cover a difference of treatment based on nationality,⁶¹ whilst discrimination on grounds of religion or belief is regulated in a separate Directive.⁶² As discussed above, the concept of racial origin is inherently problematic, so this seems a limited vehicle for capturing the meaning of racism. Instead, ethnic origin is likely to be the centre of judicial scrutiny in interpreting the scope of the EC Directive.

The category of ethnic origin sits comfortably with a strategy designed to combat cultural racism. Ethnicity captures a range of cultural variables that leads to internal or external perception of difference. This view has been affirmed by

⁵⁶ Art 1(1). ⁵⁷ para I(1)(b), ECRI (n 51 above).

⁵⁸ Bonilla-Silva (n 30 above) 475.

⁵⁹ C Lynch, 'Racism in Europe—ENAR Shadow Report 2005' (Brussels: European Network Against Racism, 2006) 7.

⁶⁰ Modood (n 24 above) 247. ⁶¹ Art 3(2).

⁶² Council Directive (EC) 2000/78 establishing a general framework for equal treatment in employment and occupation [2000] OJ L303/16. This Directive prohibits discrimination on grounds of religion or belief, disability, age, and sexual orientation, but only in respect of employment and vocational training.

the European Court of Human Rights. In *Timishev v Russia*, the Court considered alleged discrimination by Russian security services against persons of Chechen ethnicity. It took the opportunity to offer the following definition:

Ethnicity and race are related and overlapping concepts. Whereas the notion of race is rooted in the idea of biological classification of human beings into subspecies according to morphological features such as skin colour or facial characteristics, ethnicity has its origin in the idea of societal groups marked by common nationality, tribal affiliation, religious faith, shared language, or cultural and traditional origins and backgrounds.⁶³

Interestingly, this definition explicitly acknowledges the interaction of nationality and religion in the construction of ethnicity. Pinning down the limits to ethnicity has troubled courts and law-makers in various Member States. In the UK, Sikhs⁶⁴ and Jews⁶⁵ have been accepted as ethnic groups, whereas Rastafarians⁶⁶ have not. In the Netherlands, case law from the Equal Treatment Commission has recognized that discrimination related to ethnic origin can cover Jews⁶⁷ and, in certain circumstances, Rastafarians and Muslims.⁶⁸

The importance of identifying the groups protected by anti-racism laws is perhaps most significant with a view to combating institutional racism. This shifts the focus away from sanctioning individual unlawful acts (although this is still required), towards tackling patterns of inequality. This implies an identification of those groups which currently experience unequal outcomes and in respect of which interventions to redress inequalities are needed. Within EU official documents, the term 'ethnic minorities' is often adopted as a catch-all label for those groups in society which experience inequality arising from racism. For example, beginning in 1999, the EU Employment Guidelines have identified 'ethnic minorities' within the category of groups vulnerable to disadvantage in the labour market.⁶⁹ Yet, the scope of this expression is not always clear. A 1996 comparative study of anti-racism policies for the European Foundation for the Improvement of Working and Living Conditions found a great variation in the terms used to refer to those vulnerable to racism (ethnic minorities, immigrants, foreigners) which overlapped with differences between national policy approaches to racism.⁷⁰

⁶³ para 55, *Timishev v Russia* (2007) 44 EHRR 37.

⁶⁴ *Mandla v Dowell Lee* [1983] 2 AC 548, HL.

⁶⁵ *Seide v Gillette Industries Ltd* [1980] IRLR 427, EAT.

⁶⁶ *Dawkins v Department of the Environment* [1993] IRLR 284, CA.

⁶⁷ Opinion 1998/48, Equal Treatment Commission.

⁶⁸ Opinion 1998/57, Equal Treatment Commission. See further, M Gijzen, *Selected Issues in Equal Treatment Law: A Multi-layered Comparison of European, English and Dutch Law* (Antwerp: Intersentia, 2006) 317.

⁶⁹ Guideline 9, Council Resolution on the 1999 Employment Guidelines [1999] OJ C69/2. See further Ch 5.

⁷⁰ J Wrench, Preventing racism at the workplace—a report on 16 European countries (Luxembourg: OOEPC, 1996) 7–10.

D. Groups Vulnerable to Racism

Compiling a list of groups vulnerable to racism in Europe is a potentially vast task and it could quickly become a rather arid discussion. This section does not, therefore, aim to provide an exhaustive taxonomy, but instead to identify some key differences between the categories of persons vulnerable to racism. These differences will have implications for determining the appropriate legal and policy responses. All European states contain some elements of ethnic diversity, yet the source and nature of this diversity vary greatly. Kymlicka proposes a basic distinction between historic national minorities and migrant communities (he calls the latter 'ethnic groups').⁷¹ Whilst both are vulnerable to discrimination on grounds of their ethnicity, there are important differences in the context in which this occurs and the way in which it is manifested.

Kymlicka defines national minorities as 'groups that formed complete and functioning societies on their historic homeland prior to being incorporated into a larger state'.⁷² These can be further distinguished between national minorities with an ethnic 'kin' state⁷³ (such as Polish minorities in Lithuania, Danish minorities in Germany, or Hungarian minorities in Romania) and those groups almost wholly contained within a broader state, such as Sami in Finland or Catalans in Spain. This handful of examples illustrates that national minorities can be found in both western and eastern Europe. Nevertheless, the sensitivity of the European Union to the situation of national minorities can be linked to the 2004 and 2007 enlargements.⁷⁴ In some central and eastern European states, national minorities constitute a very significant proportion of the population.⁷⁵

Migrant communities can also be found across the EU Member States. In 2007, the Commission estimated that there were 18.5 million third country nationals resident in the EU.⁷⁶ The relative size of this population group varies considerably across the Member States, ranging from 0.1% of the population of Slovakia and Poland to 8.4% in Estonia and Spain (see Table 1.1). There are also significant differences in the extent to which these minorities have become established components of the domestic society. In some states, such as the UK and France, post-war immigrant communities have been present for several

⁷¹ W Kymlicka, *Multicultural Citizenship* (Oxford: OUP, 1995) 10.

⁷² W Kymlicka, 'Western political theory and ethnic relations in Eastern Europe' in W Kymlicka and M Opalski (eds), *Can Liberal Pluralism be Exported? Western Political Theory and Ethnic Relations in Eastern Europe* (Oxford: OUP, 2001) 13, 23.

⁷³ *ibid* 64.

⁷⁴ G Sasse, 'EU Conditionality and Minority Rights: Translating the Copenhagen Criterion into Policy' EUI Working Papers, RSCAS No 2005/16 (Florence: European University Institute, 2005); B de Witte, 'Politics versus law in the EU's approach to ethnic minorities' RSC No 2000/4, EUI Working Papers (Florence: European University Institute, 2000).

⁷⁵ eg in Slovakia, the Hungarian minority forms around 10% of the population: Commission, 'Equality, diversity and enlargement' (Luxembourg: OPOEC, 2003) 104.

⁷⁶ Commission, 'Third annual report on migration and integration' COM (2007) 512, 3.

Table 1.1 Proportion of working age non-EU nationals and foreign-born nationals relative to total working age population, 2005

Member State	Non-EU nationals	Foreign-born nationals
Austria	7.1	5.9
Belgium	2.8	6.2
Cyprus	7.4	3.6
Czech Republic	0.4	1.2
Denmark	2.5	2.5
Estonia	8.4	4.6
Finland	0.9	1.3
France	3.6	6.3
Hungary	0.5	1.2
Germany	5.4	7.9
Greece	5.3	2.1
Ireland	2.7	4
Italy	4.1 ^a	n/a
Latvia	(0.4)	10.9
Lithuania	(0.4)	5
Luxembourg	3.2	3.5
Malta	1.7	2.3
Netherlands	2.6	9
Poland	0.1	0.5
Portugal	2.6	4.1
Spain	8.4	n/a
Slovakia	(0.1)	0.7
Slovenia	(0.4)	7.7
Sweden	3.1	11.5
UK	4	4.8
EU10	0.5	1.5
EU15	4	4.6
EU25	3.4	4.1

^a Data for Italy concern the entire population and are taken from ISTAT, 'La presenza straniera in Italia: caratteristiche socio-demografiche' (Rome: ISTAT, 2007) 35.

Notes: Data in brackets indicate lack of reliability due to small sample size. Data were not available for Bulgaria and Romania.

Adapted from: Commission, 'Employment in Europe 2006' (Luxembourg: OOEPEC, 2006) 214.

generations and in many cases have acquired nationality of the host state. For example, 11.5% of the working age population in Sweden are 'foreign-born' Swedish nationals (see Table 1.1). As immigration is a dynamic phenomenon, new communities are steadily being created, whilst old communities may be altered by fresh sources of migration. In this light, it is important to recognize diversity within migrant groups. The situation of a second generation Pakistani woman holding British nationality may be very different from that of a Pakistani man recently arrived on a temporary work permit. Finding an appropriate

all-encompassing term to refer to such groups is difficult in a multilingual European context.⁷⁷ Whilst ‘foreigners’, ‘immigrants’, or ‘migrants’ may be common terms in many European countries, these labels can be regarded as inappropriate for those descendants of migrants who are now EU citizens and may have lived their entire lives within the EU. At the other end of the spectrum, in the UK, the nuanced term ‘black and minority ethnic’ is frequently used. Yet this has less resonance in a European context.⁷⁸ Whilst recognizing its limitations, this book will generally use the term ‘ethnic minority’ to encompass both migrants and descendants of migrants.⁷⁹

Not all groups vulnerable to ethnic discrimination fit neatly within the two categories discussed above. Notably, Roma communities, who have been described as Europe’s largest ethnic minority,⁸⁰ appear to straddle both categories.⁸¹ Historically, the Roma are traced back to migration from the Indian sub-continent in a period between the eleventh and fifteenth centuries.⁸² Some present-day Roma communities are nomadic, but equally many are now settled communities. Within individual states, there is often diversity within the Roma population; in Italy, for example, there are both established communities of long historical standing, and Roma migrants coming from the Balkans since the 1990s.⁸³ The size of the Roma population varies considerably across the Member States, although the exact figures are often a matter of debate (see Table 1.2).

There is some inconsistency between EU states on whether Roma constitute a national minority and, accordingly, are entitled to benefit from the specific legal protections accorded to such groups. Traditionally, many eastern European states denied Roma access to national minority status, placing them in the less privileged legal category of ‘ethnic minority’.⁸⁴ The relevance of this debate to anti-racism policies lies in the strategies adopted to combat inequality. In some

⁷⁷ S Allen and M Macey, ‘Race and ethnicity in the European context’ (1990) 41 *British Journal of Sociology* 375.

⁷⁸ C Neveu, ‘Is “black” an exportable category to mainland Europe? Race and citizenship in a European context’ in J Rex and B Drury (eds), *Ethnic Mobilization in a Multi-cultural Europe* (Aldershot: Avebury, 1994) 97.

⁷⁹ As discussed below in relation to the Roma, some ‘historic’ national minorities were also originally migrants and the two categories are not always clear-cut. Migrant generally refers here to migration since the Second World War.

⁸⁰ Commission, ‘Equality and non-discrimination in an enlarged European Union’ COM (2004) 379, 20.

⁸¹ P Barsa, ‘Ethnocultural justice in East European states and the case of Czech Roma’ in W Kymlicka and M Opalski (eds), *Can Liberal Pluralism be Exported? Western Political Theory and Ethnic Relations in Eastern Europe* (Oxford: OUP, 2001) 243, 254.

⁸² Commission, ‘The situation of Roma in an enlarged European Union’ (Luxembourg: OPEC, 2004) 7. See further, A Bancroft, *Roma and Gypsy-Travellers in Europe—Modernity, Race, Space and Exclusion* (Aldershot: Ashgate, 2005).

⁸³ N Sigona, ‘Locating “the Gypsy problem”. The Roma in Italy: stereotyping, labelling and “nomad camps”’ (2005) 31 *Journal of Ethnic and Migration Studies* 741, 744.

⁸⁴ R Guglielmo and T W Walters, ‘Migrating towards minority status: shifting European policy towards Roma’ (2005) 43 *JCMS* 763, 765. It should be noted that ‘ethnic minority’ in this context does not extend to contemporary immigration.

Table 1.2 National estimates of the Roma population

Member State	Roma population
Austria	15–20,000
Belgium	10–15,000
Bulgaria	371,356
Cyprus	700
Czech Republic	32,903–200,000 ^a
Denmark	2,000–4,500
Finland	5–8,000
France	250–300,000
Germany	85–120,000
Greece	250–300,000
Hungary	570,000 (higher and lower estimates also exist)
Ireland	20–27,000
Italy	85–120,000
Lithuania	2,571
Luxembourg	200–500
Netherlands	30–40,000
Poland	12,900–20,000 ^a
Portugal	40,000
Romania	1,400,000–2,500,000 (lower estimates also exist)
Slovakia	90,000–350,000 ^a
Slovenia	3,246–10,000 ^a
Spain	90–100,000 (some estimates are up to 600,000)
Sweden	15–20,000
UK	200–300,000

^a The lower figure is taken from the national census, but the real figure is believed to be much higher.

Note: No data were available for Estonia, Latvia, or Malta. The data derive from a variety of sources and from different periods since the mid-1990s.

Reproduced with permission from: European Commission, Directorate-General for Employment, Social Affairs and Equal Opportunities, 'Gender inequalities in the risks of poverty and social exclusion for disadvantaged groups in thirty European countries' (Luxembourg: OOEPEC, 2006) 101–102.

instances, measures normally associated with national minorities have been extended to Roma. For example, in Slovenia, Roma representatives have been guaranteed seats within certain local municipalities, even though they are not officially classified as a national minority.⁸⁵ There are also examples of positive action schemes which might be more typically associated with ethnic minorities. Notably, the European Commission has an internship programme reserved to Roma.⁸⁶ The combination of such initiatives suggests a *sui generis* status for the

⁸⁵ M Tratar and M Hot, 'Report on measures to combat discrimination: Slovenia' (Brussels: European Commission, 2007) 50.

⁸⁶ <http://ec.europa.eu/employment_social/fundamental_rights/roma/rtrain_en.htm> accessed 16 June 2008.

Roma. Indeed, both the Parliamentary Assembly of the Council of Europe⁸⁷ and the European Parliament⁸⁸ have proposed recognizing the Roma as a 'European minority', whilst the European Court of Human Rights has described the Roma as 'a specific type of disadvantaged and vulnerable minority'.⁸⁹

Jewish communities are another example of a group which does not easily fit within the dichotomy between national and ethnic minorities. Jewish communities have a long historical tradition within Europe, but their territorial location was shattered by the Holocaust. It is evident that the manifestation of racism in respect of Jewish people is quite distinct from, for example, its form in respect of the Roma. Anti-Semitism is characterized by negative stereotyping of Jewish people, including linking Jews to conspiracy theories about the exercise of power.⁹⁰ It remains intertwined with Holocaust denial or trivialization.⁹¹ Moreover, the intensity of anti-Semitic acts appears to be partially related to the prevailing political situation within the Middle East.⁹²

This section has focused on the diversity hidden behind broad terms such as 'ethnic minority'. Groups vulnerable to discrimination because of their ethnic origins differ in their characteristics and this needs to be taken into account when designing anti-racism law and policy. Whilst the principal distinction may be between national minorities and ethnic minorities, not all groups are easily placed within these categories. Aside from Jewish people and the Roma, it is also possible to point to other groups that do not fit within this typology, such as Russian minorities in the Baltic states.⁹³ This diversity leads some commentators to refer to 'racisms', rather than a monolithic notion of a single racism.⁹⁴ This pluralistic approach opens the door to recognizing also the interaction of race with other variables, such as gender or disability. This is considered further in the next section.

E. Intersectionality and Racism

One of the criticisms of terms such as 'ethnic group' is that they suggest a uniformity of experience, with all members assumed to share similar characteristics. Yet an individual's ethnic origin will be combined with their other personal characteristics such as gender, age, physical/mental abilities, and sexual orientation. It is almost trite to say that a black woman can face both racial and sexual discrimination, an idea frequently summarized in the umbrella term

⁸⁷ para 2, Recommendation 1203 (1993) on Gypsies in Europe, 44th Ordinary Session.

⁸⁸ para 2, Resolution on the situation of Roma in the European Union [2006] OJ C45E/129.

⁸⁹ para 182, *DH and others v The Czech Republic* [GC] (2008) 47 EHRR 3.

⁹⁰ McMaster (n 26 above) 212–16.

⁹¹ European Union Monitoring Centre on Racism and Xenophobia (EUMC), 'Antisemitism: summary overview of the situation in the European Union 2001–2005' (Vienna: EUMC, 2006) 19.

⁹² *ibid.* ⁹³ Kymlicka (n 72 above) 76–9.

⁹⁴ *eg* S Fredman, 'Equality: a new generation?' (2001) 30 *ILJ* 145, 148.

'multiple discrimination'. This can be broken down into several strands. To the extent that different forms of discrimination operate concurrently, then this may be described as 'additive discrimination'.⁹⁵ For example, if there are barriers to promotion for both women and ethnic minorities, then a black woman faces a dual set of barriers. This is the addition of ethnicity *plus* gender. Whilst this notion is relatively straightforward, the more complex concept is that of 'intersectional discrimination'.⁹⁶ This suggests that the combination of different forms of inequality results in a distinct experience.⁹⁷ Therefore, the situation of a black woman is not akin to the sum of a white woman and a black man. This can be attributed to a number of factors. Intersectionality may give rise to specific stereotypes, such as the assumption that women wearing a headscarf will lack self-confidence or that young Muslim men pose a security risk.⁹⁸ Alternatively, intersectionality can expose tensions within minority communities.⁹⁹ For instance, lesbian, gay, and bisexual (LGB) persons from minority communities can find themselves distant both from LGB communities and from their own ethnic community.¹⁰⁰ An empirical study of South Asian disabled women in the UK emphasized the barriers to independence for such women.¹⁰¹ Physical barriers sometimes made it difficult to participate in collective religious events in the community, whilst there were considerable social barriers for a disabled woman to marry within the community and this heightened dependence on parental support.

Whether characterized as additive or intersectional, there is a growing body of evidence which indicates heightened levels of disadvantage for those vulnerable to multiple discrimination. Considerable research on the interaction of gender and ethnicity was undertaken by the former British Equal Opportunities Commission (EOC). This revealed, *inter alia*, higher unemployment rates, lower pay rates, and increased occupational segregation for women from ethnic minority communities.¹⁰² Very substantial differences existed between the situations of

⁹⁵ S Hannett, 'Equality at the intersections: the legislative and judicial failure to tackle multiple discrimination' (2005) 23 OJLS 65, 68; A McColgan, 'Reconfiguring discrimination law' [2007] PL 74, 83.

⁹⁶ *ibid.*

⁹⁷ K Crenshaw, 'Demarginalizing the intersection of race and sex: a black feminist critique of antidiscrimination doctrine, feminist theory, and antiracist politics' in A Phillips (ed), *Feminism and Politics* (Oxford: OUP, 1998) 314, 315.

⁹⁸ Commission, 'Tackling multiple discrimination—practices, policies and laws' (Luxembourg: OOPEC, 2007) 17.

⁹⁹ S Fredman, 'Double trouble: cumulative discrimination and EU law' (2005) 2 *European Anti-Discrimination Law Review* 13.

¹⁰⁰ F Colgan, C Creegan, A McKearney, and T Wright, 'Lesbian, gay and bisexual workers: equality, diversity and inclusion in the workplace' (London: Comparative Organisation and Equality Research Centre, London Metropolitan University, 2006) para 4.9.

¹⁰¹ Y Hussain, 'South Asian disabled women: negotiating identities' [2005] *The Sociological Review* 522.

¹⁰² L Buckner, S Yeandle, and S Botcherby, 'Ethnic minority women and local labour markets' (Manchester: EOC, 2007).

women from different ethnic communities; whilst Black Caribbean women in England had an economic activity rate of 73%, this figure was just 27% for Bangladeshi women.¹⁰³

Although gender and ethnicity might be the best documented illustration of intersectionality, other ground combinations can be linked to disadvantage. The British HIV/AIDS charity, Crusaïd, reported that 60% of applicants to its hardship fund were of African ethnic origin and 54% were 'at some stage in the asylum or immigration process'.¹⁰⁴ A 2001 study in the UK reported that Black Africans were twice as likely as white people to fear discrimination because of their HIV status.¹⁰⁵ Alternatively, recent research in the UK revealed differences in the treatment of children with autism according to ethnicity.¹⁰⁶

Taking intersectionality into account has a number of implications for anti-racism law and policy. First, there are some grounds which are very difficult to disentangle from 'race' and ethnicity. Differences in treatment due to nationality, religion, and language are often interlinked with discrimination on grounds of ethnic origin. In many instances, direct discrimination on these grounds will constitute indirect discrimination on grounds of ethnic origin. Given the proximity between grounds such as nationality, religion, language, and ethnicity, there is a strong argument in favour of a comprehensive response in law and policy.

Other grounds are less intimately bound up with 'race' or ethnicity, but may give rise to multiple discrimination. Difficulties are likely to arise where the basic scope of anti-discrimination law varies. Currently, EC legislation prohibits discrimination in education on grounds of racial or ethnic origin,¹⁰⁷ but not on grounds of gender.¹⁰⁸ This leaves an obvious gap where multiple discrimination cannot be addressed. In contrast, EC employment discrimination legislation does cover a range of grounds: gender, racial or ethnic origin, religion or belief, disability, age, and sexual orientation. Notwithstanding the disparities between the various Directives applying to these forms of discrimination, this provides a first step in enabling multiple discrimination to be tackled. Therefore, an Asian gay man harassed on grounds of ethnic origin and sexual orientation can bring a case citing both aspects of his harassment. Yet, the fragmented legislative framework does not facilitate an integrated analysis of such complaints. Roseberry cites

¹⁰³ *ibid* 20.

¹⁰⁴ Crusaïd and National AIDS Trust (NAT), 'Poverty and HIV—findings from the Crusaïd Hardship Fund 2006' (London: Crusaïd/NAT, 2006) 6–7.

¹⁰⁵ Terence Higgins Trust (THT), 'Prejudice, discrimination and HIV' (London: THT, 2001) para 4.5.

¹⁰⁶ C Corbett and P Perepa, 'Missing out? Autism, education and ethnicity: the reality for families today' (London: The National Autistic Society, 2007).

¹⁰⁷ Dir 2000/43, Art 3(1)(g).

¹⁰⁸ Art 3(3), Council Directive (EC) 2004/113 implementing the principle of equal treatment between men and women in the access to and supply of goods and services [2004] OJ L373/37.

the experience in the United States where multi-ground discrimination claims are in practice often broken into separate components by the courts.¹⁰⁹

Responding to the nuances of intersectionality also poses challenges for policy frameworks. The history of EU initiatives on equality has been characterized by a strong distinction between gender equality on the one hand, and other forms of discrimination on the other. Whilst this dichotomy has shifted in recent years, there is a risk that rigid policy boundaries hinder recognition of intersectionality. This also permeates into participation and consultation processes. An intersectional perspective will query whether NGOs representing 'women' or 'ethnic minorities' will adequately convey the perspective of minority women. Given the risk that intersectional minorities remain isolated, their voices may be difficult to reach.

F. Conclusions

The aim of this book is to assess the extent to which the objectives of combating racism and promoting equality have been mainstreamed across EU law and policy. A first step to answering that question is to deconstruct what is meant by racism, particularly in the geographic context of the EU. This chapter has illustrated that no single definition of racism can be provided; instead, it is essential to recognize the multiple forms that racism takes, varying across time and place. Specifically, racism extends beyond the notorious belief in the biological superiority of certain 'races' (scientific racism). Contemporary forms of racism encompass prejudice based on cultural difference (cultural racism), but also ethnic inequalities arising from organizational culture and practice (institutional racism). Like most legal systems, EC legislation has not attempted to provide a specific definition of racism; however, it has prohibited discrimination on grounds of 'racial or ethnic origin'. This chapter found that the concept of racial origin is inherently problematic, being grounded in the scientifically false notion that human beings can be separated into biologically distinct 'races'. Whilst the inclusion of terms such as 'race' or 'racial origin' in legislation may be necessary to ensure that protection is comprehensive, they will be generally avoided in this book. In the diverse geographic context of Europe, ethnicity and ethnic origin are arguably more resonant and are less encumbered by the ideological baggage associated with 'race'.

In the enlarged EU, discrimination on the grounds of ethnic origin potentially affects two broad categories. The term 'ethnic minorities' has been adopted to refer to migrants and their descendants, whilst the term 'national minorities' is

¹⁰⁹ L. Roseberry, *The Limits of Employment Discrimination Law in the United States and European Community* (Copenhagen: DJØF Publishing, 1999) 337. See also, G. Moon, 'Multiple discrimination—problems compounded or solutions found?' (London: Justice, 2007) 6.

used to refer to Europe's historic minorities. These categories are not hermetically sealed and it is necessary to be cognizant of groups such as Jewish and Roma Communities who are vulnerable to ethnic discrimination, but who do not fit neatly within the above dichotomy. The understanding of what constitutes an ethnic group is geographically contextual, with the European Court of Human Rights pointing to cultural markers, such as nationality, religion, and language.¹¹⁰ This indicates the blurred boundary between ethnic discrimination and discrimination on grounds of such characteristics. Therefore, measures to combat racism need to take account of discrimination on related grounds, such as religion or nationality. Rather than delving into a long and arid debate about the extent to which Islamophobia is or is not racism, it seems more productive to proceed from an acknowledgement that an effective strategy for combating racism needs to address related forms of religious discrimination.

The above observations on the concept of racism and the groups most vulnerable in Europe to ethnic discrimination provide a framework against which subsequent chapters can analyze EU law and policy in this field. Nevertheless, combating racism is just one element of the objectives normally pursued by mainstreaming. The flip side of combating racism is the positive goal of achieving equality. This is particularly true in the light of the concept of institutional racism, which places the spotlight on whether equal outcomes are being ensured for ethnic minority groups. Therefore, Chapter 2 examines what is meant by equality, especially when placed in the context of combating racism.

¹¹⁰ para 55, *Timishev v Russia* (2007) 44 EHRK 37.