

'Europe' and the Narrative of the 'True Racist': (Un-)thinking Anti-Discrimination Law through Race

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Maeso, S.R., 2018. 'Europe' and the Narrative of the 'True Racist': (Un-)thinking Anti-Discrimination Law through Race. *Oñati Socio-legal Series* [online], forthcoming / en preparación. Available from: <http://ssrn.com/abstract=3161645>



Abstract

The article starts from the assumption that the slow and unsatisfactory development of case law concerning racism in Europe needs to be addressed engaging with wider political and policy developments that have shaped the silence about race and racism. I propose an analysis of political texts, reports and academic literature, developed since the mid-1980s, that approached the discussion and negotiation of legal provisions that prohibit racial discrimination. The analysis aims to unravel the reproduction of the mythical foundation of modern law that erases coloniality and institutional racism, that is, it erases the embeddedness of race in the formation of the West. In this context, racism is seen as an exteriority and a deviation and therefore, policy and legal provisions remain largely unscrutinised in their complicity with the reproduction of racism.

Key words

Anti-discrimination law; coloniality; democracy; Europe; institutional racism

Resumen

El artículo parte del presupuesto de que el lento e insatisfactorio desarrollo de jurisprudencia relativa al racismo en Europa debe abordarse en diálogo con procesos políticos más amplios que han moldeado el silencio sobre la raza y el racismo. Propongo un análisis de textos e informes de carácter político y de literatura académica, desarrollados desde mediados de los años 80, que consideraron el debate y la negociación de provisiones jurídicas que prohibieran la discriminación racial. El análisis tiene como objeto desentrañar la reproducción de la fundación mítica del derecho moderno como narrativa que borra la colonialidad y el racismo institucional, esto es, borra lo racial como constitutivo de la formación de Occidente. En este contexto, el racismo se ve como una externalidad y una desviación y, por tanto, la complicidad de las provisiones políticas y jurídicas con la reproducción del racismo permanece, en gran medida, sin examinar.

This work has been developed within the research project *COMBAT - Combating racism in Portugal: an analysis of public policies and anti-discrimination law*, funded by the Portuguese Foundation for Science and Technology and co-funded by the European Fund for Regional Development (FEDER) through the COMPETE 2020 operational program – ref. PTDC/IVC-SOC/1209/2014 – POCI-01-0145-FEDER-016806.

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Palabras clave

Leyes antidiscriminación; colonialidad; democracia; Europa; racismo institucional

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1. The Politics of Anti-Discrimination Law and Racism in Europe: an Introduction

Yes, the European spirit is built on strange foundations.¹
Frantz Fanon 1963/2004, p. 237

The first decision taken by the European Court of Human Rights (ECtHR) concerning the violation of the prohibition of racial discrimination within the scope of Article 14 (Council of Europe 1950: European Convention for the Protection of Human Rights and Fundamental Freedoms) was in 2004 – the case *Nachova v Bulgaria*. Two previous cases related to racial matters were not under the prohibition of discrimination stipulated in Article 14 (Cahn 2006, Dembour 2009). The first judgment that addressed discrimination against Roma people took place in 1996, but the Court did not find a violation of Article 14 of the Convention (taken together with Article 8) – the case *Buckley v United Kingdom*. There has been only a case that has addressed intersectional discrimination against a black woman of African descent, the case of *B.S. v Spain* in 2012.

It was in 2000 that the European Union adopted a Directive that provided “a framework for combating discrimination on the grounds of racial or ethnic origin” (Council Directive 2000/43/EC, also known as *EU Race Directive*) and it was transposed into the domestic law of the Member States in the next years. Reports on the implementation of EU anti-discrimination law have pointed out the scarce development of case-law linked on the Directive 2000/43/EC (Commission of European Communities 2014, European Network of Legal Experts in Gender Equality and Non-Discrimination 2016). From 2000 to 2015, the Court of Justice of the European Union (CJEU) has issued two judgements that are linked directly to the violation of prohibition of discrimination on the grounds of *racial and ethnic origin*: the case of *Centrum voor Gelijkheid van Kansen en voor Racismebestrijding v Firma Feryn NV* (2008) and the case of *CHEZ Razpredelenie Bulgaria AD v Komisia za zashtita ot diskriminatsia* (2015) – the latter is the first judgement on racial discrimination against Roma people delivered by the CJEU (see Grozev 2015). The first ruling concerning discrimination based on religion or belief (within the Council Directive 2000/78/EC that established a general framework for equal treatment in employment and occupation) and, more specifically, on the prohibition on wearing an “Islamic headscarf” in the workplace, has held that this ban does not constitute direct discrimination based on religion or belief – the case of *Samira Achbita, Centrum voor gelijkheid van kansen en voor racismebestrijding v G4S Secure Solutions NV* (2017).

The above *snapshot* of legal responses to racism in the European context shows that law has been a latecomer in the combat to racial discrimination and its intervention has been rather poor. I argue that the slow and inadequate development of case-law concerning racism needs to be addressed engaging with wider political and policy developments that have shaped the *silence* about race and racism in Europe (see Hesse 2004a, Lentin 2008, Goldberg 2009, Dembour 2009, 2010, Maeso and Cavia 2014, Maeso and Araújo 2017). This silencing is telling of the contemporary (post-)colonial contours of *Europeanness* and its heterogeneous manifestations in political/policy arrangements, jurisprudence and academic knowledge production. In other words, this silencing is embedded in the various ways that *Europe* – as an idea and a political project (see Hall 1992, West 1993) – is reproduced for narrating it as an *exceptional* historical formation for the development of democracy, human rights and the rule of law. Peter Fitzpatrick has analysed this narrative as “the mythology of modern law”, a telling account of “the racial foundation of law’s identity”: modern law is presented as universal and yet, informed by the values of the Western polity, this apparent contradiction is

¹ «Oui, l’esprit européen a eu de singuliers fondements».

mediated by racism that allows law to present itself as a unified and transcendent body of rules in constant progression that constitutes the West² (Fitzpatrick 1992, pp. 107-118). Race is constitutive of modern law's identity, of its mythic foundations: the progression from the savage to the civilised and the development of universal, formal legal notions in contrast to particularistic and communitarian traditions. Modern colonialism incorporates and produces law as "a civilizing law to bring order through the constant infliction of violence" that is, the colonised/racialised could only become human and enjoy rights through European conquest (*Id.*, pp. 108-109).

However, racism, as *the mythic mediator* between the universal and the particular of modern law's identity has amnesiac powers: although the idea of the Western sovereign, self-responsible individual and of Western culture as one based on the rule of law have been racially produced – demarcating a divide between *Europeanness* and *non-Europeanness* – these racial contours are erased in the narratives about Europe. This erasure is what Boaventura de Sousa Santos (2007) has named as modern "abyssal thinking" that produces the reality and experiences of colonialism as non-existent or external to the metropolitan reality. This has specific consequences when we analyse contemporary legal endeavours devoted to the fight against racism. For Fitzpatrick (1992, p. 247), "the principles of equality and universality that stand in their terms opposed to racism" import racism, that is, in the liberal form of right, "racism is compatible with and even integral to law". The embeddedness of racism in the rule of law shapes, following Fitzpatrick's analysis, the form of law and how it operates in liberal societies, which starts from the assumption that regards racism as a *deviation*, thus, law proceeds as a corrective measure that redresses the victim of discrimination and re-establishes the legal order (*Id.*, p. 252). In this context, the liberal form of law is grounded on the most potent dimension of liberal's individuality, *intentionality*, that reinforces the episodic nature of discrimination and, even the operationalisation of categories introduced in the current legislation such as the notion of *indirect discrimination* or the *shifting of the burden of proof* towards the respondent, tend to incorporate racist rationalisations into the realm of what is "justifiable" or "legitimate" (*Id.*, p. 254) or they are rarely applied, and racism usually "becomes something else" (*Id.*, p. 256).

In this article, I propose to link the analysis of the reproduction of modern law's mythical narrative with that of more specific European legal provisions to combat racial discrimination. In the next section, I will examine the interrelation between political and academic narratives that have given an account of the development of a concern about the rise of racism in Europe since the mid-1980s and of the specific legal solutions adopted, in particular, the European Directive 2000/43/EC. The analysis engages with previous literature that has examined how the contemporary silencing of race and racism in Europe is a legacy of the remaking of Eurocentric narratives that, since the 1940s, have erased colonialism and enslavement from the understanding of the formation of Europe and the nation-state. The Holocaust is understood as "Europe's tragedy" (Lentin 2008, p. 495), the paradigmatic experience of racism *in Europe* (Césaire 1955/2000, Hesse 2004a, Maeso 2016) disconnected from Euro-American colonialism. I outline here my understanding of this silencing with the notion of *coloniality* and its familiarity with another key notion, *institutional racism*. In the third section I examine more in detail the narratives about the relationship between democracy and racism in the European Parliament's *Evrigenis Report* (Evrigenis 1985) on the *Rise of Fascism and Racism in Europe*. This analysis illustrates the (post-)colonial contours of the debate over racism, law and anti-discrimination measures in contemporary Europe. In the fourth

² In this text I will not make a distinction between Europe and the West; I consider them as discursive objects retrospectively produced by the modern paradigm of knowledge production (see Sayyid 1997/2003).

section, I move towards the examination of two aspects that raised specific concern and political discussion during the negotiation of the Directive 2000/43/EC and their relation to the narratives identified in the *Evrigenis Report* – the absence of an explicit definition of racism, and the circumventing of institutional racism. In the last section, I conclude with some reflections on the thinking of law through race within the current political climate shaped by the anxieties about the rise and electoral success of the far-right – for instance, in recent national elections in France, Germany, the Netherlands or Italy, in the nationalist and racially constructed debate over the so-called *Brexit campaign* or in Trump's unexpected electoral success –, that has some familiar resemblance with the debates of the 1980s and 1990s.

2. Coloniality, democracy and exception: narrating the *crises* of Europe

Thanks to the creation of common Institutions [sic] the Union will be celebrating 50 years of peace in 1995.

It [the Consultative Commission on *Racism and Xenophobia*] has not forgotten the suffering caused by intolerance, hatred, racism and anti-semitism; it remembers the death camps and the extermination campaigns prompted by considerations of race, colour, religion or national and ethnic origin.

It calls for the mobilization of public opinion in order to avoid racist and xenophobic acts being regarded as normal occurrences.

Kahn 1995, pp. 61-62

The concluding remarks of the *Final Report of the Consultative Commission on Racism and Xenophobia*, presented in 1995 (known as the *Kahn Report* after its chairman, Jean Kahn), drew attention to the series of recommendations and proposed measures included in the report, and encouraged the EU and the Member States to develop the necessary strategies to fight against racism. This EU Council's Commission evoked the history of genocidal violence in the continent, with a call for mobilisation against racist acts that were putting "50 years of peace" in danger. This succinct historical record implies a certain idea of Europe as *a place* and, therefore, a certain arithmetic regarding what it is acknowledged as *peace* and *violence* and, eventually, as racist governmentalities. However, if we consider that the history of the modern European nation-states is embedded in the history of modern racial colonialism, another picture emerges. The history of European national states as the history of racial colonialism has shaped the very idea and project of Europe/the West, and its boundaries with the non-West – modern states are, thus, *racial states* (see Goldberg 2002).³ More specifically, this other historical account makes it possible to foreground, on one hand, the complex relationship between the Nazi politics of extermination and colonialism and, on the other, the continuity of racist violence and colonial politics after 1945 – in the wars led by European states against decolonisation and national liberation movements (for instance, France, Portugal and the United Kingdom up to the 1970s) and the state policies for regulation and governance of (post-)colonial immigration and racialised ethnic minorities such as the Roma (see Sayyid 2004, Maeso 2015). Racism, as experienced by racialised immigrants and minorities, is a *normal* occurrence: it is expected in the everyday social relations (Essed 1991). However, legal systems have failed to consistently address these patterns of discrimination:

On the one hand, European legal systems fail to address patterns of historical and structural racial discrimination generated by the experience and context of anti-Semitism, Islamophobia, colonialism and (im)migration. On the other hand, the wrong impression is given to the public: that racism is nowadays perpetrated by a

³ Boundary-making involves the political production of what it is the non-West and the quasi-West thus, Europe and the West are contested notions also within the (presumed) geographical borders of Europe: for instance, the divide between Western and Eastern or Northern and Southern countries.

few lunatic (sick) individuals, delusional neo-Nazis and/or declared anti-Semites. (Möschel 2011, p. 165)

Within the academia, critical accounts of current anti-discrimination law, while providing an examination of some of the shortcomings and failures of legal provisions (as I will analyse in section 4), have continued to deploy dominant narratives about the relationship between socio-economic and demographic changes, and the rise of racism. In particular, they have reproduced an understanding of the historical context in which the Directive 2000/43/EC was negotiated that confines racism to a certain tale of the crises (and accomplishments) of Europe. In fact, socio-legal scholarship that has focused on the development of anti-discrimination and human rights law to combat racism has had almost nothing to say concerning colonialism and its legacies, with some exceptions (for instance: Fitzpatrick 1990, Dembour 2009, 2010, Fredman 2011, Givens 2014), and this absence is specific to the accounts on the adoption of the EU Race Directive (for instance: Brennan 2003, 2004, Geddes and Guiraudon 2007, Bell 2008, 2009, Benedí Lahuerta 2009, Howard 2010, Givens and Evans Case 2014). I propose to illustrate my point with two examples:

The adoption of a Directive devoted to racial discrimination reflected the growing dynamism of EU anti-racism policy during the 1990s. Various factors combined to propel race up the political agenda. High profile incidents of racist violence occurred alongside a significant improvement in the electoral fortunes of parties from the extreme right-wing. These movements often placed anti-immigrant rhetoric at the centre of their policy platforms. During the same period, the role for the European Union in immigration and asylum grew considerably. Critics argued that the emerging policies were unduly restrictive, frequently captured in the notion of Fortress Europe. Anti-racism policy became a means for the EU to counter such criticisms by presenting evidence that it was taking initiatives to assist those migrants already residing within the Union. (Bell 2009, p. 179)

The rise of the immigrant population in Europe since 1994 has brought a greater mixture of individuals and has created a parallel need to manage diversity and integration. This trend, together with pressures from NGOs, led European institutions to take action against racism and xenophobia by inserting, in 1997, Article 13 in the EC Treaty, which considerably extended the Community (EC) competences to fight discrimination. The next development was the adoption of two Directives implementing this provision: the Race Equality Directive (RED) and the Framework Directive (FD) for the grounds of religion or belief, disability, age or sexual orientation. (Benedí Lahuerta 2009, pp. 738-739)

It is not my contention that the above accounts are inaccurate in their description of the general atmosphere of the debate in the EU institutional milieu since the mid-1980s and the framework of discussion of legal provisions: the rise of the extreme-right and of violent racist attacks and killings, and the increasingly restrictive politics of border control and access to citizenship and legalised residence in the EU. Yet, how certain socio-political processes have become *political issues* – the rise of the extreme-right or EU immigration policies – is presented in a way that reproduce historical erasures. They are located in a historical vacuum dominated by the narratives of *post-war* immigration – the “immigrant-worker” – and the rise of fascism that mirrors the tragedy of the Second World War. Both narratives evade an analysis of the interrelations between the extreme right’s anti-immigration rhetoric and the policies and legal provisions of more respectable political parties. The “forgetfulness of coloniality” (Maldonado-Torres 2004) makes possible the sequence *the rise of immigration flows from Third Countries-rise of the extreme right-popularisation of anti-immigration rhetoric* as a narrative disconnected from the recent history of colonialism and Empire and the current geopolitical interests of European liberal democracies.

For instance, during exploratory interviews carried out within the COMBAT project⁴ with decision-makers, politicians and transnational legal activists – two of them were involved in the process of negotiation of the Directive 2000/43/EC – we received two kind of responses concerning the relationship between colonialism and (anti-)racism: on the one hand, those who speak from a “pragmatic point of view” that considered colonialism as pertaining to “identity politics” and, therefore, unconnected to the specific realities of discrimination experienced by immigrants and minorities and, on the other, those who considered the relevance of colonialism but as pertaining to a settled past.⁵ I consider it important to engage with Maldonado-Torres’s analysis of the dismissal of the colonial experience in philosophical writings such as those of the followers of the Frankfurt School for providing a sound understanding of the shortcomings of current interpretations of law and anti-racism. For Maldonado-Torres (2004, pp. 40-41), critical accounts of modernity and the enlightenment reproduce a geopolitics of the West that rest on the failure to address racism and the experience of the colonised. The notion of colonality emerges here to give an account of a political reality that cannot be subsumed to the testing of the presence of certain formal structures of power:

(...) colonialism and decolonization are for the most part taken as ontic concepts that specifically refer to specific empirical episodes of socio-historical and geopolitical conditions that we refer to as colonization and decolonization (...). [F]rom this perspective, those who make the questions about the meaning and significance of colonialism and decolonization inevitably appear as anachronic—as if they exist in a different time and therefore can never be entirely reasonable.

In contrast, colonality and decoloniality refer to the logic, metaphysics, ontology, and matrix of power created by the massive processes of colonization and decolonization. Because of the long-time and profound investment of what is usually referred to as Europe or Western civilization in processes of conquest and colonialism, this logic, metaphysics, ontology, and matrix of power is intrinsically tied to what is called ‘Western civilization’ and ‘Western modernity’. (Maldonado-Torres 2016, p. 10)

The relevance of the embeddedness of Europe/the West as an ideological construction (West 1993) in colonality for unravelling “the integral connections between liberalism and racism” (Fitzpatrick 1990, 249; see also Hesse 2004a) in current anti-discrimination measures is more readily understood throughout the concept of institutional racism. Both notions, colonality and institutional racism, are born out of the necessity to give political meaning to realities that the use of other existing concepts cannot adequately capture. Ture and Hamilton, writing by the end of the 1960s, introduced the term institutional racism to explain that the system of oppression under which black people lived is not the mere consequence of the white individuals overtly acting against black individuals, acts that are contrary to the democratic principles of the American constitution: there is no “American dilemma” (Ture and Hamilton 1967/1992, pp. 4-5). They trace an analogy between the situation of black people and colonialism: “Black people in the United States have a colonial relationship to the larger society, a relationship characterized by institutional racism” (*Id.*, p. 6), that has concrete consequences in their lived experience, such as housing segregation, a poor education that calls for assimilation into whiteness and economic exploitation.

⁴ See Acknowledgements.

⁵ Interviews were conducted between December 2016 and April 2017 with legal and anti-racist activists, legal professionals working in European agencies, networks and organisations, and current and former MPs from the European and Portuguese Parliaments. The COMBAT project (2016-2019) addresses a key research question: how institutional racism is being tackled or silenced in current public policy-making and anti-discrimination legal provisions with a focus on three areas: education, housing and policing. These exploratory interviews were carried out during the first months of the project, and participants discussed how European monitoring agencies develop their reporting activities, their understanding of (institutional) racism and their approach legal measures to combat racism and the debate over the criminalisation of racism in Portugal and the European milieu.

The relationship between coloniality and institutional racism brings about a different framing of the relationship between law and racism beyond the usual approach in terms of a gap between laws as written and as implemented in practice, or a contradiction between democratic principles (namely, the *principle of equality*) and the persistence of prejudiced representations of *others* that need to be *corrected*. Rather, coloniality and institutional racism open the possibility of a counter-narrative to the persistence of racial discrimination in current European contexts. Instead of thinking in terms of democracies being vulnerable to racism, we consider that the persistence of an equation between the West and democracy is racially produced: "Being Western means being democratic, even though such an assertion belies the impact of colonialism and racism on the subversion of any meaningful notion of democracy" (Sayyid 2014, p. 65). Both concepts also allow for an understanding of the different political meanings of *exception* within the interrelation of law and race: first, exception is the hidden script in the Eurocentric narration of *Europe*. Democracy has thus become a signifier that refers not so much a political regime or governmental procedures, but rather an identity and a culture that is taken as *superior, universal, transcendent* – exceptional. Second, modern states *qua* racial states "speak through the law" that is, "the institutionalisation of race in and through the state is a form of legal reasoning" (Goldberg 2002, p. 123) that seeks to govern populations through their racialisation/dehumanisation and the constant reproduction of racial hierarchies. If in the colonised territories, "in its visible assertibility racial rule developed into a form of crisis management" (*Id.*, 129), we can also consider this form of rule as routinely exercised in the (post)colonial metropolis. Racialised people are governed as a negative exception to the European democratic project within a process of continuous redrawing of boundaries between assimilable and non-assimilable, between inclusion and confinement/expulsion. Thirdly, if the West is discursively produced as democratic and distinct from others (Sayyid 2014, p. 70) racism is always constructed as an externality, a deviation, an exception. Anti-discrimination laws operate through the Eurocentric definition of racism as the effect of illiberal, extremist, nationalist ideologies (Hesse 2004a) and they are rendered compatible with legal provisions of confinement and expulsion of racialised bodies aimed to regulate exceptional circumstances. The prohibition of racial discrimination (in)operates within the constraints of liberal's individual intentionality and the perceived exceptional circumstances of racialised people (i.e. cultural backwardness, illiberal and undemocratic ideologies or mind-sets).

In the following section I analyse more in detail the reproduction of this relation between law, exceptionality and racism in the framing of the political debate about the rise of racism in Europe in the mid-1980s. The terms of the conversation are very familiar to those we are witnessing thirty years later: the impact of the economic crisis, the increase of immigration *flows* from non-Western countries and the rise of extreme right organisations and political parties.

3. Framing the Political Debate on (the Threat of) Racism in Europe: the 'Evrigenis Report' (1985)

The Report published by the European Parliament's Committee of Inquiry into the Rise of Fascism and Racism in Europe, known as the *Evrigenis Report* after the rapporteur, the Greek MEP and legal scholar Dimitrios Evrigenis, delivered in December 1985, is considered to have marked the beginning of the process of policy/legal development in the area of racism and the central role of the EP (Givens and Case 2014, 7).⁶ The Committee's inquiry centred on three core issues: the rise of extreme-right parties and groups ("fascist and racist"), the relationship between this phenomenon and the effects of the socio-economic crisis,

⁶ The work of the Committee of Inquiry was contested by some MEPs since its inception in October 1984, most notably by Jean Marie Le Pen, leader of Front National and Chairman of the Group of the European Right. In the 1984 European elections, the FN won 10.95% of the votes, tying the Communist Party.

such as the rise of unemployment, and, finally, the examination of Member States' mechanisms to respond to these organisations. Between the end of 1984 until mid-1985, the Committee gathered information from a diversity of participants, including scholars, public officials, high rank politicians, members of social movements and think tanks, journalists, trade unions, both in oral and written submission at public hearings or written testimonies,⁷ and they also consulted documents sent by the national and the European parliaments. I have identified three main interrelated narratives in the *Evrigenis Report*:

(i) The narrative of 'historical Europe' deploys the Eurocentric definition of *Europe* as an exceptional historical formation, defined by democracy and the respect for the rule of law and fundamental rights. For instance, in the introductory note, Pierre Pflimlin,⁸ President of the European Parliament at that time, considers that the report "contains a wide range of analyses, recommendations and proposals likely to further the cause of democracy and humanism, which are the foundations of our European civilization and of the Community enterprise itself" (EP 1986, n.p.). This is not a mere rhetorical embellishment but it is rather performative of a foundational, *ontic* description of Europe that accommodates and dismisses processes that contradict this self-identification. Within this narrative of Europe, the Second World War and the devastating consequences of totalitarian politics are taken as the "paradigmatic experience" of racism and the point of reference/comparison of any processes of "re-emergence of fascist trends" – as we have already identified, this approach is also present in the *Kahn Report* – that was experienced as the "humiliation of the white man" (Césaire 1955/2000, 36):

Europe will never forget the bloodshed and *humiliation* that were the expression of racism under the totalitarian regimes. And it is significant that Europe is now building its future on the basis of reconciliation and cooperation among its constituent nations. The Community approach means, by definition, the renouncement of nationalist rivalries. Even more obviously, it means the rejection of *all racist tendencies* within the European context. But, *having thrown its doors wide open after the war to newcomers of a variety of ethnic origins* who came here, individually or in groups, either to join in the work of reconstruction and development or seeking in its lands refuge, freedom and justice, Europe today presents a much enriched ethnic and cultural picture. In a world tending increasingly towards a global village, the pluralism so characteristic of the community of European nations is gradually acquiring a new meaning. Like all great changes in history, *this transformation is not without its problems and painful shocks* (...). There is always a danger that *a climate of intolerance or xenophobia may arise and occasionally prove alarming in its manifestations* (...). *The European synthesis* which is now underway can only be achieved *in accordance with the principles of which historical Europe, now partially united within the Community, has always regarded itself as the inspirer, creator and guardian*. (EP 1986, 15, par. 25, emphasis added)

The hegemonic narrative of a *post-war* Europe characterised by an increasing ethno-racial diversity is grounded on what Salman Sayyid has termed as the "immigrant imaginary" that assumes "the ontological distinction between host and immigrant. This is based on a larger distinction between the west and the rest" (Sayyid 2004, 154) and makes of "integration" the preferred policy solution upon which discrimination is condoned. Racism is regarded in this narrative as the unwanted effect – "problems and painful shocks" – that *may arise* in a context of *unprecedented* transformation of European societies that need to leave behind

⁷ The list of participants included scholars from very different intellectual and socio-political backgrounds such as Philomena Essed (Netherlands), Bhikhu Parekh (UK), Raoul Girardet (France) or Ernest Mandel (Belgium); members of SOS Racisme in France and Belgium and from the Runnymede Trust in the UK; or representatives of relevant Jewish organizations and institutions such as Simon Wiesenthal (Jewish Documentation Centre, Vienna) or Michael May (Institute of Jewish Affairs, London).

⁸ Pflimlin had a long political career since the 1950s at national level – he was the Minister of Overseas France (1952-1953) and the Minister of Agriculture (1950-1951) – and local level, he was the Mayor of Strasbourg for several decades (1959-1983).

some of the characteristics of a “closed society” such as “intolerance and discrimination” (*Id.*, p. 23 par. 43). The report’s diagnosis is that of a crisis of *obsolete* “closed societies” (*Id.*, p. 92 par. 298)⁹ under *regulated* change:

The inadequacy of closed societies can be seen, first and foremost, within the Community. Here, however, the changes engendered by constantly growing political, cultural, social or economic interdependence are taking place under the control of a legal and political system which, for all its weaknesses, does provide the necessary stimulation and regulation. (Sayyid 2004, p. 93 par. 299)

There is moment when this general narrative is somewhat interrupted by a wider historical and political perspective:

It has been observed, moreover, that the manner in which racism operates in Europe has been determined in more than one way by its colonial past. *Colonization strongly influenced European perceptions of the world outside, the processes of discovery and contacts through which it occurred inevitably affecting the images and ideas conveyed. Our attitudes are still predominantly Euro-centric notwithstanding the vicissitudes of history.* Secondly, in several instances *decolonization created conflictual relations, traces of which can still be found.* Lastly, *migrational trends* have been closely bound up with relations with the former colonies and for this reason the colonial past as too, indeed, the existence of certain *special bilateral links* inside and outside European territory have determined the *structure of ethnic relations* in Europe today. (Sayyid 2004, p. 23 par. 42, emphasis added)

This mentioning of colonialism as central to understanding the logics of racism vanishes into more descriptive statements about the links between “migration trends” and the colonial past throughout the report: “colonial links have encouraged sizeable immigration to the UK, continuing during and after the change from Empire to Commonwealth. These links have influenced public perceptions of various ethnic minorities living in the country” (Sayyid 2004, pp. 48-49 par. 131; see also p. 68 par. 212); or the anecdotal description of a social *illness* that some members of a fascist organisation may suffer: ‘intransigent nationalists, often with a touch of the “colonial syndrome”’ (*Id.*, pp. 65-66 par. 202). Most important, whereas the *colonial past* is seen as important in the shaping current ethnic relations, it does not disturb the foundational narrative about Europe – defined by democracy and humanism –, a challenge only posed by the humiliating experience of totalitarianism *in Europe*.

(ii) The narrative of the ‘true racist’ tries to make sense of the rise of fascism and racism in European liberal democracies and the connection between these two phenomena. The inquiry focused on describing the relevance of extreme-right organisations in each of the Member States and other European countries, in a context of increasing immigration from the so-called third countries. Within this framework, the narrative of the *true racist* specifies and draws boundaries between different forms of racism and between extremist right-wing groups and the state or the society at large. Concerning the definition of racism, the rapporteur considered “the following types of phenomena”:

- the ideologies thus designated in the proceedings of the United Nations (1965) and UNESCO (1969) referred to above;
- *racist regimes*, exemplified most abominably by the Nazi regime, but also by the apartheid system in South Africa, where the resulting suffering and bloodshed have again recently been condemned by the entire international as well as racial persecution on a mass scale by certain regimes in Africa and Asia;
- groups and organizations which spread the doctrines or champion the regimes referred to above or adopt their ideology;

⁹ Reference to Lévi-Strauss’s *Race and History* published by UNESCO in 1952.

- *institutionalised racial discrimination*, direct or indirect, explicit or implicit, *traces of which may be found in the European countries*;
- *day-to-day cases of discrimination* on racial, ethnic or religious grounds (expression of *prejudiced opinions*, *discriminatory conduct* or, in its most serious form, *racial violence*) whether or not these are within the law. (Sayyid 2004, pp. 23-24, par. 43)

The way these different forms of racism are qualified express what Barnor Hesse has named as *racism's conceptual double bind*: "the concept of racism is doubly-bound into revealing (nationalism) and concealing (liberalism), foregrounding (sub-humanism) and foreclosing (non-Europeanism), affirming (extremist ideology) and denying (routine governmentality)" (Hesse 2004a, 14). In this sense, the typology confines racism in contemporary Europe to residual instances and cases that are separated from the normalcy of democratic regimes. Accordingly, it is the eventual disturbance of citizens' attachment to democracy by racism that appears as the main issue of concern. In other words, the report considers that there can be racist "manifestations" without this meaning that the citizens' preference for democracy is in danger and, therefore, there is confidence in the law's regulation and capacity for redress in cases of discrimination. The Nazi regime and South Africa's apartheid are taken as the paradigmatic examples of the racist state, nevertheless, it is crucial to consider that "while *racist* states may seem exceptional, their very possibility is underpinned by the normalcy of the *racial* state" (Goldberg 2002, 114) that calls for the abandonment of evaluative and comparative epistemologies that measure grades of racisms and racist aggression. We need instead to think in *relational terms* (Weheliye 2014, 51-52) that is, to think critically the relations and connections between what it is taken as exceptional racist regimes and normal democratic states *affected* by traces, cases, acts of discrimination. Thinking democratic, liberal states through the lens of the racial state requires a different take on the relation between fascism and racism that challenges the dominant view of democracy as ontologically opposed to racism. This fundamental opposition is conveyed by the *Evrigenis Report* (1985): "[a]t the level of the individual, racist attitudes are very likely to be closely associated with authoritarian and non-democratic tendencies. *It is not possible to be a 'true racist' and be at the same time a true democrat*" (Evrigenis 1985, p. 24 par. 46, emphasis added). However, it seems that *true democrats* can be, let's say, *a little bit racist*:

But it would be wrong to believe that the association of racist and extremist tendencies is an inflexible rule subject to no exceptions or nuances. The political reality is much more complex than that. *Less extreme forms of racist attitudes or racially-conditioned behaviour need not entail authoritarian tendencies*. They may occur within political organizations or social strata which could not be accused of fascism or even authoritarianism. *It would be even more mistaken to attribute the widespread xenophobia revealed by public opinion polls in European countries with a high proportion of immigrants to any underlying anti-democratic attitudes or lack of attachment to the democratic and liberal order*. Nevertheless, the persistence and gradual acceptance of broadly xenophobic attitudes seriously threaten to undermine loyalty to *the democratic culture of European societies* and may even result in its being openly challenged. (*Ibid.*, emphasis added)

The key concern throughout the report is the conflict between authoritarian/non-democratic forces and the democratic and liberal order. In this narrative, whereas racism is seen as a frequent and common component of right-wing extremist groups, *elements of racial discrimination, xenophobic attitudes, traces of institutionalised racism...* may be found among the *true democrats*. The *high proportion of immigrants* is taken as a premise that normalizes racist or xenophobic attitudes and reifies the presumption of homogeneity (or "heterogeneity in denial" [Goldberg 2002, 16]) in Europe and the threat of racialised otherness coming from *third countries*. Yet, two key questions challenge the narrative of the *true racist* as a narrative of the exteriority of racism to democracy: institutionalised racism and racist culture. Throughout the report, it is noticed how the discussion over

"institutionalised racism" and its relationship with the notion of "State racism" was brought about in several occasions and, in particular, with experts from the UK:

Certain of the experts claimed that 'state racism' or institutionalised racism existed in Britain. These claims stimulated a debate in committee [sic], particularly during the hearings of Professor Parekh and Mr Kohler. The former cited five matters deserving attention: (1) definitions of citizenship of a country; (2) women migrants not being allowed to bring in their husbands or fiancés from their country of origin; (3) dependents of citizens settled in Britain not being allowed to enter Britain in the way they ought; (4) the considerable increase in deportations from Britain; and (5) the maintenance of repatriation as a policy option in Britain. Each of these is due, in Professor Parekh's views, to state or government practice and, he added, 'if the state presents a racist profile to the community, then it tends to give legitimacy to racist attacks'. (...) Stephen Rose claimed anyway that migrants throughout Europe suffered similar discrimination: 'the ethnic minorities groups in Europe are dumped in the worst schools, worst housing, the most socially deprived areas and they are denied fundamental citizen's rights'. (Evrigenis 1985, p. 55 par. 151)

"Institutionalised racism" comprises here discriminatory legislation and policies endorsed and put into place by the state, and patterns of racist routine governmentalities sustained by public and private (in)actions and affecting the key life spheres such as education or housing. This discussion troubles the Eurocentric template of racism *qua* extremist ideologies that were *exceptionally* transformed into state policies by the Nazi regime and *exposes* "the compatibility of racism and liberal-democracy" (Hesse 2004b, 142). But liberal democratic states cannot be *true racists* so there is a call for *objectivity* that restores the confidence in the actions of democratic institutions:

Anyway, the objective observer would recognise that succeeding governments efforts to establish an institutional framework for racial equality has been tenacious and constructive. Most experts, in fact, accepted that institutions and machinery introduced in the United Kingdom in the field of race relations, while giving room for improvement, did not require radical change. (*Ibid.*)

The evidence of the rise of widespread racism and xenophobia in each of the European countries is dismissed and rewritten with the usual tropes of *universal fear* and the problematics in any trajectory of *acculturation* of *immigrants* and *newcomers*. The narrative in the portrayal of the situation in France is paradigmatic. It is considered important to highlight that "Maghreb workers"/"immigrants of Arab origin" are the main targets of "xenophobia" due to a series of factors that relate to the current socio-economic situation (unemployment, the crisis of the educational system), the recent past ("the *accumulated misunderstandings* dating back to *the Algerian war*") and religious prejudice ("a *distorted and unfavourable view of Islam* in public perception") (EP 1986, p. 40 par. 101). This situation is more specifically contextualised for the urban landscape with the testimony of local politician, André Diligent, mayor of Roubaix – a northern city next to the frontier with Belgium – and a former MEP:

Each newly arrived immigrant has to contend with a preconceived social 'image' which is not a flattering one (...). Thus the Belgians were labelled 'butter pots', disliked and despised (...). Thus also the 'wops', the 'pollaks' (all supposed to be dirty and drunken), the 'dagos', the 'wogs' etc. *This xenophobia precedes each new wave of assimilation: are we to call it racism?* At all events, this denial, this rejection of the stranger's native identity is undoubtedly generated by an acute but repressed awareness of one's own difference of birth. (Evrigenis 1985, p. 42, par. 102)

This is a familiar narrative in many policy discourses since the 1990s – although the language of assimilation has been replaced for that of integration and/or interculturality (Maeso 2015) – where the universalisation of the experience of being an immigrant, and the conflation of prejudice and racism, deny the specific history, experience and political subjectivity of post-colonial and minoritised

peoples. Colonialism and colonial violence are dismissed as “misunderstandings” and racism is denied/transformed into “a crisis of assimilation”:

This analysis seems to apply not only to Roubaix but for the whole of France when it is remembered that one Frenchman out of three is the descendant of immigrants who came to the country within the last hundred years. On this interpretation, then, *we are simply, witnessing a crisis of assimilation which must reach a peak before it is extinguished.* (*Ibid.*, emphasis added)

In sum, the report considers it *possible* to acknowledge institutionalised forms of racism – “elements of racial discrimination can be found in the legislation, case law and, above all perhaps, in the administrative practices of European countries. Some features of this situation make it possible to speak of institutionalised racial discrimination, but *it would be a gross exaggeration to speak of the existence of 'state racism' in democratic Europe*” (Evrigenis 1985, p. 66 par. 207) – within a certain interpretation of minorities’ experiences of discrimination, violence and mistrust on the institutions (Evrigenis 1985, p. 354 par. 354). They are seen from a white perspective and thus associated with understandable fears and prejudices of the average citizen: “the *time-honoured distrust of strangers*, fear of the future combined with a *self-defensive reflex* which together often lead to a withdrawal symptom, prejudices arising from the way national and international news is presented, and occasionally a spiral of violence in which aggression and defence are almost inextricably intertwined” (Evrigenis 1985, p. 354 par. 355, emphasis added).

(iii) The narrative of ‘prosecution and prevention’ examines the different spheres where an effective action against racism and fascism is taking place and the proposals for future action. Legal action is considered crucial and there is a specific focus on the prosecution of extreme-right organisations and hate speech, with an emphasis on Criminal law (Evrigenis 1985, p. 81 par. 263). There was a call for action from the European Community and for strengthening the European Parliament’s role in this area (Evrigenis 1985, p. 79 par. 255). Specific recommendations were made on the effective implementation of international and domestic law on “combating political extremism, racism and racial discrimination”, the need to be subject to monitoring, the creation of specialised bodies concerned with “race relations” or the possibility of revise the EEC Treaty to enhance the Community powers in these areas (Evrigenis 1985, pp. 96-96). These recommendations can be seen as antecedents to the initial proposals and negotiation of the European Directive in the second half of the 1990s.

The timid acknowledgement of institutionalised forms of racism throughout the report pairs with an also timid reference to the complicity between law and discrimination:

Although the legal system of any particular country *may have shortcomings or gaps* as regards racial equality, or *allows racially discriminatory situations to continue either overtly or latently*, it is nevertheless a fact that the institutional achievement of the Community Member States is generally satisfactory. (Evrigenis 1985, p. 83 par. 272)

The narrative about the need to *punish* and *prevent* extremist and racist behaviour and the increasing centrality of legal provisions, encapsulates the key elements of the narratives of *historical Europe* and the *true racist*. There is much concern with keeping *anti-democratic forces* at bay and ensuring the essence of Europe – the rule of law and human rights:

(...) Suppression of forces that threaten democracy must not diminish that very democracy which is the essence of politics in Europe. We must beware of using preventive measures and ‘homeopathic’ remedies that end up depriving democracy of that very political salubrity we intend to protect. Secondly, in combating political extremism and racism which is an eminently political task for our democratic society and which therefore takes the form of intellectual confrontation between

democratic and anti-democratic forces, recourse should be had to the suppressive function of the law only as a final resort. (Evrigenis 1985, p. 84 par. 273)

The focus on the dilemmas of legal suppression of extremisms reproduces the imaginary of racism as an aberration, fundamentally exterior to the democratic order – an approach that it is commonly expressed with reference to medical metaphors (Maeso and Araújo 2017) – and shows an uncritical confidence in the current legal provisions and, in particular, the effectiveness of the European Convention of Human Rights (Council of Europe 1950, p. 77 par. 246) – back then composed by the Commission and the Court of Human Rights.¹⁰ The report mentions two key cases concerning immigration, citizenship law and racial discrimination: *East African Asians v United Kingdom* (1978) and *Abdulaziz, Cabales and Balkandali v United Kingdom* (1985) (Evrigenis 1985, p. 78, par. 247). Both cases relate to processes that emerged due to post-colonial immigration laws and control, the hierarchies between categories of citizenship and how migrants' rights are ruled out against claims of State's sovereignty. The *East African Asians* case was ruled by *the Commission of Human Rights* and it concerned the practice of immigration controls under the Commonwealth Immigration Act 1968 that imposed immigrant controls to British passport holders (*citizens of the United Kingdom and the Colonies*) born in African countries such as Uganda or Kenya and of Asian origin. The Commission ruled that refusal of admission to Britain of the husbands of Commonwealth citizens already resident in the UK, in circumstances in which the wives of such citizens would have been admitted, constituted a violation of Article 8 (right to family life) and Article 14 (prohibition of discrimination on the ground of race, birth and sex).

The *Abdulaziz, Cabales and Balkandali* case was the first ruled by *the Court* concerning migrant's rights (Dembour 2015, p. 96), which did not find a violation of the prohibition of discrimination on the ground of race but *only on the ground of sex* – with the dissenting opinions of three judges.¹¹ The case questioned 1980 Immigration procedures that prevented the admission of foreign husbands of women legally resident in the UK but that neither themselves nor their parents had been born in the UK. The Court held that there was no violation of Article 8, taken alone, and of Article 3 (prohibition of inhuman or degrading treatment). Dembour's analysis of the case points out to three key consequences of the Court's decision that remain relevant up to now:

The Court's position was clear: Article 8 ECHR does not entail a right to family reunion: couples are free to pursue their family life outside the contracting state if they so wish. This last proposition is nonetheless problematic on at least three counts. First, the Court does not seriously examine this assumption but just takes it for granted that relocation is a real possibility. Second, the Court refuses to see that migrant's life decisions are not purely individual actions but actions posited under economic and/or political pressure to which states are no stranger. Third, the Court ignores the fact the immigration controls are not exercised in the same way towards all human beings: the intention is to include some people while giving others the freedom to travel. (Dembour 2015, 128)

The racial and (post-)colonial contours of human rights law provisions and their implementation were silenced in the *Evrigenis Report* and this framework of discussion has shaped the negotiation of the European directive (see Givens and Evans Case 2014, pp. 53-54). The narrative of *historical Europe* prevented that the discussion on the measures for the *prosecution and prevention* of racism could go

¹⁰ Until 1998, when the Protocol 11 came into force, individuals did not have direct access to the European Court of Human Rights so they had to apply to the Commission, which decided upon the merits of the case to be ruled by the Court. Protocol 11 abolished the Commission, enlarged the Court, and allowed individuals to take cases directly to it.

¹¹ This case continues to be crucial in many ECtHR's decisions regarding family reunion rights, for instance, in the case of *Biao v Denmark* (2016). The concurring opinion by judge Pinto de Albuquerque in this ruling considered that the *Abdulaziz, Cabales and Balkandali* case should be revisited and not considered good law anymore.

far beyond the prosecution of the *true racist*: the *extremist* and anti-democratic. It silenced how the history of the drafting and ratification of the ECHR confronted many colonial states with the *territorial application* of the Convention, what is known as *the colonial clause*, current Article 56 and by the time of the signature in 1950 it was Article 63 (Brian Simpson 2004, pp. 711-753, Dembour 2015, pp. 66-74). The rights secured by the Convention were not automatically applied to the colonial territories, but needed the explicit notification by the contracting State: "Any State *may at the time of its ratification or at any time thereafter declare by notification* addressed to the Secretary General of the Council of Europe that the present Convention shall, subject to paragraph 4 of this Article, *extend to all or any of the territories for whose international relations it is responsible*". Leopold Senghor stated that this article was echoing the "Colonial Pact" and its admission meant the transformation of the European Convention of Human Rights into the Convention of European Rights (in Brian Simpson 2004, p. 739).

The silencing of the controversial history of contemporary Human Rights law and the postcolonial governance and control of immigration and its racializing effects is telling of the performativity of democracy as "a signifier of the West within the narration of Western identity" where democracy and European identity are continuously *in convergence* (Sayyid 2014, p. 70) and any instance that breaks this identity instead of problematizing the relationship between democracy and racism, is expelled from this very identity:

The narration of Democracy is also the means by which Western identity is narrated. Thus, the instance of the non-democratic government of the Third Reich problematises the membership of the Third Reich as a member of the West. Similarly, the radicalised denial of Democracy in the nation-empires of Britain or France has been made palatable by making the distinction between home and abroad almost hermetic. Thus, one could always claim a democratic status for these countries because of the rights that metropolitan populations enjoyed, while excluding accounts of the denial of many of those rights to their imperial subjects. (*Ibid.*)

The three narratives identified in the *Evrigenis Report* are exemplary of this recitation of Western identity, an identity seen *under threat* by political extremism and authoritarian responses to immigration. Immigration is read in terms of Europe experiencing an unprecedented "cultural shock" (Evrigenis 1985, p. 93, par. 301) where coloniality and institutional racism may emerge in the form of "a wishful evaporation" (Goldberg 2009, p. 152): their acknowledgement is their denial in the form of exceptional occurrences or ignorant, while understandable, prejudices. The relationship between colonialism and racism and its postcolonial contours will effectively vanish in the rest of the reports and proposals that preceded the approval of the Directive 2000/43/EC. In the next section I focus more in detail on the controversies generated during the negotiation of this legal provision and the inscription of anti-discrimination measures.

4. Circumventing Race/Racism within the 'Principle of Equality'

Scholar literature and socio-legal reporting on the negotiation and implementation of the Directive 2000/43/EC have focused on the key issues that raised controversy, the shortcomings and failure of some its formulations for adequately addressing racism, and how case-law is interpreting the scope and meaning of its provisions. I will examine the approaches towards two central issues for unravelling dominant understanding of racism and their relation to the narratives identified in the *Evrigenis Report*.

The first issue has been that of *definitions*, or more precisely, the lack of any explicit definition of racism and of racial and ethnic origin in the Directive and the anxieties that the use of the word *race* raises in the academic, political and legal debate in most of the European contexts (see Tyson 2001, Bell 2008, Howard 2010, Möschel 2011, Ellis and Watson 2012, Givens and Evans Case 2014). Adam Tyson,

who worked by the time of the negotiations at the European Commission's DG for Employment and Social Affairs, narrates this discussion between Member States at the final stages of the process of negotiating the Directive, as "a conundrum", that is, "how to speak about 'race' in a directive which fights racism" (Tyson 2001, p. 201). The use of the word race can have the effect of naturalizing or essentialising what it is a political configuration – the reification of biological or cultural *descriptors* instead of addressing power relations – and, more specifically, its use in a legal text can evoke (and invoke) racist state projects. Against this scenario, the Directive included a recital (6) that stated that the use of the term "racial origin" did not imply the acceptance of theories about the "existence of separate human races". The centrality of the experience of Nazism *in Europe* shapes this understanding of race: "[i]n the European context, the historical resonance of 'race' underscores its problematic nature. 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'" (Bell 2008, p. 13).¹²

Socio-legal literature has followed the analytical path, common in the social sciences since the 1930s, of narrowing down the discussion about race to its status as a *concept* or *idea* about biology or cultural identities. Beliefs and ideologies about race appear as sort of precondition of racism. For instance, Erica Howard (2010, p. 75) adopts the following definition of racism: "(...) the belief that races have distinctive hereditary characteristics, which can be biological or cultural, and that this endows some races with intrinsic superiority, while the term racial discrimination is used for the behaviour based on such a belief". Howard acknowledges that it is not always easy to make the distinction between beliefs and behaviour and that "legislation will prohibit the practical occurrences of racism (...) rather than views and ideas" (*Ibid.*). However, I argue that the discussion over the (mis)use of the concept of race is framed in a way that precludes a more complex understanding of the relationship between race and racism. Race continues to be defined as a form of *false consciousness* and prevents a sound analysis of the contemporary reproduction of racism by (neo)liberal policies and legislation. Europe's legal conundrum, to combat racism without reifying race as an objective defining criterion of individuals or groups, cannot be disconnected from the dominant conceptualisation of racism that the European legislation aims to tackle and its shortcomings. This needs to be connected with "the narrative of 'historical Europe'" and the reproduction of a Eurocentric concept of racism defined by a certain approach to Nazism and fascism that is, as a "white experience" of disruption of the rule of law and therefore of racism as an "exception/aberration" to liberalism and democracy (Hesse 2004b, 2011; see also Fitzpatrick 1990). In fact, since the beginning of the last century, *Western debates over race* have protected the narration of Western identity from race:

In effect, 'racism' was conceptualized as the degradation of biological science inflected by illiberal ideologies (e.g., Nazism), and the form it took in racial doctrines applied to Jewish Europeans in Europe. The idea of race in this context became untenable but only insofar as it did not call into question the universality of the claims attributed to the Western colonial regime of international relations, liberalism, and democracy. The concept of racism would preserve the latter, while discrediting as pathological a particular conceptualization of race as biology and ideology. (Hesse 2011, p. 158)

The European legal conundrum can be reformulated shifting the focus from the problematics of reifying race qua biology, to the problematics of reframing the

¹² "K. whereas the concept of race has no scientific foundation either in genetics or in anthropology and can therefore serve only to encourage discrimination on ethnic, national or cultural grounds or on grounds of skin colour, as it is based on the false premise that established, hierarchically classified 'races' exist; whereas the term should therefore be avoided in all official texts" (EP 1996, 59).

relationship between race and racism. We can ask, borrowing from Alexander G. Weheliye's reading of biopolitics, "how can racism (...) exist without race?" (Weheliye 2014, p. 55). The answer is: it cannot. Race is effected by racial governmentalities, thus, is not to be understood "as a biological or cultural *descriptor* but as a conglomerate of *sociopolitical relations* that *discipline humanity* into full humans, not-quite-humans, and nonhumans" (*Id.*, p. 3). *Race* is not a concept for describing identities but a "technique of governmentality" (Lentin 2016, p. 387) that disqualifies the political projections of non-white people – i.e. racialisation *qua* dehumanisation.

The foreclosure of an understanding of racism within the illiberal/extremist framework –the *true racist*– is reflected in the narrow legal definitions and interpretations of racism in the European context: "The price is being paid by European people of colour who are prevented from legally naming and redressing their real-life experience of racism" (Möschel 2011, p. 1661). This leads me to the second issue, the erasure of *institutional racism* in legal measures. According to *the narrative of 'historical Europe'*, racism is mostly about being a *true racist* and therefore, a *true anti-democrat* and therefore, as antithetical to *Europe*. Racism cannot be thought as an ordinary relation of oppression, embedded in and (re)produced by institutional/policy arrangements. In this sense, some critical views on the future of an anti-racist legislation considered that if the EU held a particular responsibility in combating racism, as suggested by the Treaty of Amsterdam's mandate,¹³ this should include taking action "against the discriminatory effects or potential effects of their own policies and institutions, including the institutions of Member States when implementing policies originating at EU level" (Hervey 1999, p. 331). However, the anxieties regarding the electoral success of the extreme-right played a decisive role in the process of negotiating a European Directive to combat racial discrimination since the mid-1990s¹⁴ and, in particular, the controversies that emerged in the EU and the EP after the electoral success of the Freedom Party, led by Jörg Haider, in the Parliamentary election in Austria in 1999. A report on the position of the Intergovernmental Conference regarding the fight against racism and the revision of the Treaty on European Union showed this concern within a discourse that insists on consigning racism to the ideologies of the extreme right and exterior to the rule of law:

Nonetheless, as the 1990s draw to a close, the resurgence of manifestations of racial hatred and of xenophobic ideology in Europe, as manipulated by the parties of the far right, is creating phenomena which are reaching unacceptable proportions in a Community of states governed by the rule of law. (Intergovernmental Conference 1997)

In this climate, the debate over "institutionalised forms of racism", although present in the Parliament (see also EP 1998) was losing centrality. In fact, neither of the two amendments proposed by the EP to the EC Directive (see the *Report A5-0136/2000. Proposal for a Council directive on implementing the principle of equal treatment between persons irrespective of racial or ethnic origin*, known as the *Buitenweg Report*) – Amendment 13 to Recital 9¹⁵ and Amendment 20 to Recital

¹³ In 1997 – designated as *European Year against Racism and Xenophobia* – the Treaty of Amsterdam finally inserted the new Article 13 that provided the EU with a legal basis to take action to combat discrimination on grounds of racial or ethnic origin, religion or belief, disability, age or sexual orientation, and opened the road for the negotiation of the directive (Council of the European Union 1997).

¹⁴ The concern with the rise of racism, xenophobia and extremism shaped the establishment of different monitoring agencies such as the European Commission against Racism and Intolerance (ECRI) in 1993 by the Council of Europe, the European Monitoring Centre on Racism and Xenophobia (EUMC) in 1997 by the European Council (it was replaced by the Fundamental Rights Agency in 2007), and the European Network Against Racism founded in 1998 by the European Commission.

¹⁵ "To ensure the development of democratic and tolerant societies which allow the participation of all persons irrespective of racial or ethnic origin, specific action in the field of discrimination based on racial or ethnic origin should go beyond access to employed and self-employed activities and cover areas such as education, social protection and social security, social advantages and access to and supply of goods

16a¹⁶ – that recommended the inclusion of “institutional racism”, not the amendment 37 to Article 3 (*Scope*) that proposed the inclusion of the following text: “the exercise by any public body, including police, immigration, criminal and civil justice authorities, of its functions”, were included in the final version.¹⁷ According to a former transnational activist that had a key role in the process of negotiating the Directive, the issue of including “institutional racism” should be approached from a pragmatic point of view:

The more you go into this, the more you run the risk that you are carried away by the idea that you can fight racism by legal means (...). [T]he more you speak with lawyers and you get more lawyers, they will continue to come up with proposals to outlaw this, to describe this (...). You can be discriminated at the same time on [the ground of] gender as on sexual orientation, and they wanted to have a specific article on this. I said: ‘come on, give me a break, how are you going to define it?’ (...) The same with institutional racism: ‘ok, how are you going to define it, how broad, and how specific?’ (...) So, when the Stephen Lawrence [case] and all of that, you use that, and we use it (...). And, you know, we have the law but we need to implement it, because the big, big question is – and I haven't heard you about this – is: how do you implement it? (Interview with former transnational legal activist)

From this view, *institutional racism* is regarded as a type of racism and the problem would arise when we pretend to legislate about all kinds of racism because the list is endless and law cannot cover every *instance* of racist discrimination. In this sense, the literature has underlined that “both law and policy seem more geared towards tackling scientific and cultural racism than institutional racism. The Racial Equality Directive is primarily equipped to tackle individual cases of discrimination through litigation” (Bell 2008, p. 85).

The inclusion of the notion of *institutional racism* in mainstream policy and political discourse in the European milieu took place in the UK with two reports of inquiry – the *Scarman Report* (1981/1983)¹⁸ and, almost two decades later, the *Macpherson Report* (1999)¹⁹ – concerned with policing and racism. Barnor Hesse has pointed out that despite arriving to opposite conclusions (the former denied the existence of institutional racism whilst the latter acknowledged its existence) and engaging with slightly different understandings of institutional racism (the former embraced a

and services and also extend to the issue of institutional racism” (Buitenweg 2000, Recital 12 in the final version – Council Directive 2000/43/EC).

¹⁶ This amendment would include a new text: “Training of public bodies on the aims and the provisions of this Directive is vital because of their responsibility in implementing the Directive in the community at large and in order to offset any risk of institutional racism in the public bodies themselves”.

¹⁷ The CJEU, in the case *Runevič-Vardyn v Vilniaus miesto savivaldybės administracija* (2011), “held that the scope of Directive 2000/43/EC did not extend to cover the performance by public authorities of all their public functions” and the judgment explicitly mentioned that the Council had rejected the Amendment 37 proposed by the European Parliament (O’Cinneide 2012, 29). Accordingly, the Court concluded that “the scope of the Directive did not extend to cover the performance of public functions which could not be construed as involving the provision of a service (...). This limit on the scope of the Directive is likely to pose problems for the CJEU in the future. It can be difficult to draw a clear distinction between service provision and the performance of public functions” (*Id.*, 30).

¹⁸ It was commissioned by the UK government to inquire into the uprising in Brixton (London), in April 1981, against police harassment and brutality against black people. The report’s conclusion stated that: “‘Institutional racism’ does not exist in Britain: but racial disadvantage and its nasty associate, racial discrimination, have not yet been eliminated. They poison minds and attitudes: they are, and so long as they remain will continue to be, a potent factor of unrest” (Scarman 1981/1983, 209).

¹⁹ A judicial inquiry (1997-1999) led by Sir William Macpherson into the police investigation into Stephen Lawrence’s murder. In 1993, Lawrence, an 18-year-old black teenager, was stabbed to death at a bus stop in South London in a racist attack. The Macpherson inquiry found that racism shaped how the Metropolitan Police Service investigation approached and conducted investigations of the murder of a black man. It concluded that there was institutional racism within the MPS and defined ‘institutional racism’ as follows: “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” (Macpherson 1999, par. 6.34).

"high threshold socially generic attribution" whereas the latter worked with a "low threshold institutional specific application"), both reports "shared the concept of racism as aberrant" (Hesse 2004b, p. 132). Hesse's genealogy of the concept of institutional racism foregrounds that the use of a concept that was forged by intellectuals and activists during the Black Power movement (Ture and Hamilton 1968), albeit not the most original or sophisticated, urges us to examine the intimacy between coloniality and contemporary Western racism, and more specifically, between western racism and western democracy:

They [Ture and Hamilton] see institutional racism as emphasising the practices of racial governance, not the ideological codifications of race that so concerns the Eurocentric approach. In suggesting racism comprises a regime of practices, they locate the rationale and coherence of that regime in the colonial relation between white and black (i.e. non-white), European and non-European, west and non-west; rather than in the nationalist relation between majorities and minorities, or citizens and immigrants. (Hesse 2004b, p. 143)

Philomena Essed has considered that whereas this notion has been articulated from structural approaches to racism, such as Ture and Hamilton's definition, it retains a problematical distinction between individual and institutional racism (Essed 1991, 36). On the one hand, Essed underlined that the notion of individual racism "is a contradiction in itself because racism is by definition the expression or activation of group power" (*Ibid.*) and on the other, she viewed that research in European contexts used the concept of *institutional* or *institution* "to narrow the problem of racism down to 'institutional discrimination'" and "underrates the power of ideologies in the structuring of racism in society" (Essed 1991, 37). For Hesse, there can be different ways of understanding the relationship between individual, "overt" forms of racism (e.g. racist attacks, hate speech) and "covert", institutional forms of racism (e.g. racist housing allocation policies, school segregation or racist sterilisation procedures in health care systems), in Ture and Hamilton's work:

The weak sense of the terms treats covert as indirect, subtle, adumbrated or perhaps unwitting; however, this runs the risk of diluting the institutional dimension, it lacks a systematic quality and is imbued with a strangely individual and idiosyncratic orientation. The stronger sense of 'covert', is more institutionally inflected, and can be described as that which is concealed, hidden, disguised, unacknowledged, denied but which is consistent in its impact or strategic effect. In this sense, it is the colonial dimension of the liberal-democratic/colonial assemblage that has a covert institutional presence, underwritten by a 'hidden transcript, euphemised by the 'official transcript'.²⁰ (Hesse 2004b, p. 144)

The above discussion is crucial not so much as matter of *policing* concepts (Hesse 2004b, p. 146, note 7) that would lead us to *the correct* definition of (institutional) racism, but rather because it illustrates the challenges in the relation between law and the combat against racism. In this sense, the approach must shift from debates about types of racism, and the extent to which the law integrates or excludes them, to discussing how the use of certain terms in a specific political and historical context such as the European, is conveying a certain understanding of racism that implies a narrative about its historical contours and the experience of the racialised people in Europe. My contention here is that the explicit exclusion of both the notion of *institutional racism* and a formulation such as "the *exercise* by any public body, including police, immigration, criminal and civil justice authorities, of *its functions*" is revealing of the dominant conceptualisation of racism as an *occurrence*, as a deviation in the normal functioning of public institutions. As Hesse remarked, "although the idea of institutional racism is far from secure either politically or conceptually in the West, understanding the concept's genealogy from the perspective of the postcolonial era compels us to ask questions of racism which are routinely ignored" (Hesse 2004b, p. 144). In this sense, its erasure from the

²⁰ Hesse refers here to J. Scott (1990) *Domination and the Arts of Resistance – Hidden Transcripts*. New Haven: Yale University Press.

public conversation in legal vocabularies and provisions is telling of a profound political denial. As Fitzpatrick observed in relation to Lord Scarman's denial of racism in Britain:

Lord Scarman could provide a celebrated confirmation that “‘institutional racism’ does not exist in Britain” in a report that was an instance of it. In this he was implicitly confronting and dismissing a phrase that black people used to encapsulate their experience of law and of state action. That experience is not simply a contained ‘different voice’ that stands along with, if opposed, to liberal self-representation. It can also be given point in founding a critical engagement with that self-presentation. (Fitzpatrick 1992, p. 250)

Liberal self-representation – the separation/opposition of law and racism – is conveyed by the Directive's master narrative – the *principle of equal treatment* –, which transcribes racism into the liberal template of non-discrimination. This vocabulary presumes a context of equal individuals and protects them against the possible breach of the rule and, thus, evades the fact that law operates in a “racially conceived society and nation” (Fitzpatrick 1992, p. 260). This evasion is performed in the current legislation's distinction between *direct* and *indirect* discrimination. In the first case, discrimination occurs “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” (Council Directive 2000/43/EC, Article 2, 2(a)). This understanding needs a measure of comparison that we must consider as politically configured (that is, how are the terms of what is a *similar situation* established); and it ignores the existing and historically produced inequalities (Howard 2007, pp. 247-248). More importantly, what is generally overlooked, and therefore protected, is how existing inequalities are the product of racist governmentalities. Indirect discrimination is considered 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” (Council Directive 2000/43/EC, Art. 2, 3 (b)). Indirect discrimination is seen as a notion that allows to tackle discrimination beyond the proof of individual intentionality, considering instead “the actual results of equal treatment” (Howard 2007, pp. 248), that is, it allows “to avoid people using neutral provisions or rules to circumvent the prohibition of direct discrimination” and it rests on a more substantive notion of equality (Howard 2015, 6-7). However, indirect discrimination may be considered acceptable if there is proof of “an objective, legitimate end” for that discrimination.

The prohibition of discrimination as regulated in the EU legal provisions not only falls short of tackling institutional racism but rather it protects its reproduction. Cases of school segregation, notably of Roma pupils, are a paradigmatic example of how law is complicit with racism. I will briefly refer to the situation in Portugal, one of the Member States where these cases are recurrent and reveal the historical and structural nature of discrimination against Roma people (Araújo 2016, Maeso and Araújo 2017).²¹ The formation of segregated classes with Roma students are often legitimised in terms of their *integration* into the “culture of schooling” and, thus, as a decision that follows a *pedagogic strategy* to correct trajectories of absenteeism and lack of “social and cultural competencies”. This was the case of a school in the north of Portugal that in 2008-2009 constituted a class of 18 Roma students aged between 8 and 16 years, a decision that was approved by the General Direction of Education – Northern Region (Ministry of Education). Following a complaint filed by SOS Racismo, an anti-racist organisation, the Commission for Equality and Against Racial Discrimination (hereinafter, CEARD)²² opened an administrative offence proceeding (Proceeding 10/2009) that was finally dismissed under the consideration

²¹ I refer here to cases concerning Portuguese Roma people, not immigrants with foreign nationality.

²² *Comissão para a Igualdade e Contra a Discriminação Racial* (CICDR). It is the specialised equality body to combat racial discrimination in Portugal, established by the Law No. 134/99.

that no racial discrimination was found (CEARD 2010) – a position supported by the General Inspection of Education. While the discussion of this case between the members of the CEARD reveals some differences in the appreciation of the case – some members considered that there should have been a sanction to avoid future cases of segregation –, two issues were prevalent and not contested: the issue of integration and school failure, and the intentions or good/bad faith behind the decisions taken by the school. The Portuguese law explicitly forbids the formation of segregated classes based on racial criteria, *unless* that practice is justified “with a view to ensuring the exercise, on an equal basis, of the rights referred to therein” (Lei n° 134/99 [Law 134/99], Article 4, line i).²³ One commissioner alerted that this could be a case of “subtle discrimination” and the Commission’s President at the time named it “a borderline situation” (CEARD 2010, p. 17).

Beyond the discussion on the direct or indirect nature of the discrimination, what the form of law precludes is a discussion of the racist nature of the idea of integration and the relationship established between Roma families and school failure. In this context, the *subtlety* of discrimination is understood in terms of (un)awareness in a “borderline” situation where the “pedagogical diagnosis” is considered outside the power relations constitutive of race and racism, that is, the diagnosis is complicit with the power relations that shape the relations between Roma and white students and families (“traditional Portuguese” as they are referred to by one of the Commissioners), between Roma families and the school board (and other institutions and public bodies). If instead of a framework based on (subtle or blatant) *discrimination*, we consider cases like the one described above within the ambit of the critical notion of institutional racism, law could pose a challenge to its self-representation as exterior to racism and therefore to its Eurocentric understanding qua extremist ideologies that is, as an exception. School segregation cases reveal the racialised normalcy of democratic institutions at work – a public school, a city council or an equality body –, and they call for an understanding of institutional racism not as a type of racism – what institutions do *versus* what individuals do – but as an example of the embeddedness of coloniality in democracy. In this context, the law normalises exceptional regulations – in the name of integration, segregation is allowed – for citizens that are regarded by law and public policing as an exception to the democratic society.

5. Concluding remarks: (un-)thinking racism, thinking law through race

The Fundamental Rights Agency (FRA) has recently published the results of the *Second EU Minorities and Discrimination Survey* (EU-MIDI) – conducted in 2015-2016 – with a specific focus on the situation of Muslims and Roma (FRA 2016, 2017). The key findings of the survey examining the experiences of Muslims are presented under the theme: *Living Together in the EU: Citizenship, Trust and Tolerance*, and they highlight that the majority of Muslim respondents “feels strongly attached to their country of residence” and “indicate higher levels of trust in democratic institutions than the general population did in the European Social Survey 2014” and “tend to feel comfortable with having neighbours of a different religious background”. The survey also revealed that “almost one in four Muslim respondents (23%) feels uncomfortable with having lesbian, gay or bisexual people as neighbours, and one in three (30%) with having transgender or transsexual persons as neighbours” (FRA 2017, p. 17). The survey on Roma portrays their situation of poverty and marginalisation, with an emphasis on the lack of access to housing, education, healthcare and employment. Regarding education, and more precisely, Roma Children’s “equal participation” in the different education levels, FRA opinion makes the following recommendation:

²³ Law 134/99 was revised in 2017; the new law, Lei n° 93/2017 [Law 93/2017, 23 August], does not include any possible justification for the formation of segregated classes (Article 4, line g).

National educational authorities should work closely with Roma civil society and local authorities to *resolve community conflicts and/or phenomena of anti-Gypsyism* that prevent Roma parents from enrolling their children in integrated schools and classes. (...) *Policy measures should offer incentives, and social and learning support at schools* to offset the multiple challenges Roma children face and boost their opportunities for an equal start. (FRA 2016, p. 11, emphasis added)

One general observation: although the EU-MIDIS focuses on portraying minorities' experiences and situations of discrimination, there is no discussion of racism, how it affects the situations described and, more important, how it shapes the implementation of policies and legal provisions that are constantly called into action throughout the report. This absence should be striking in a report on discrimination against minorities, as striking as the focus on Muslims' preferences for democratic values and the confidence in local authorities or school boards for implementing measures that would ensure "equal access" to schooling. Yet, it is not striking. The FRA reports are examples of "the unthinking of racisms (as opposed to their unthinking, their undoing or unmasking) renders populations and individual people disposable, nuisances to be set aside or destroyed" (Goldberg 2015, p. 161). The unthinking of racism in current European contexts is intertwined with the prevalence of the narratives of *historical Europe* and the *true racist*. These narratives have *reasonably accommodated*²⁴ racism within the narration of Western identity, that is, racism is an occurrence that does not disrupt the normal operation of institutions, does not disrupt the performativity of democracy as a tale of Western exceptionalism. This reproduces the need for surveillance, re-education and/or support of minoritised/racialised people that are regarded as challenges to the democratic order: never completely adequate, integrated, trustworthy. Public policies, institutions and legal provisions are seen as insufficient, lacking effectiveness or implementation yet, they are not subject to scrutiny and remain unproblematised (see Hesse 2011, p. 171).

Racism, thus, remains *unthought* – always a(n) (im)possibility –, the opposite to a "*thinking* response to racisms (...) that un-thinks – that critically picks apart – the premises on which it is predicated" that is, the acknowledgement of its structural and institutional articulations (Goldberg 2015, 162). Racial anti-discrimination law seems always in the way to be implemented more effectively but within a political context that has been, for the last half century, more committed to *anti-racialism* – "[it] seeks to end racial reference. It tends to be a politics from dominance, from power seeking to hang on to its social stranding or force, to extend itself (...). [I]t has always entailed no more than erasing the evidence of racisms rather than addressing their structures, deeds, and effects" (*Id.*, pp. 162-163) – than to anti-racism. The analysis and the political struggle need to address not only the potentialities of legal provisions for a sustained anti-racist horizon but rather to think law through race. This move involves the problematisation of law, its liberal self-representation and thus, it politicises the debate over race beyond anti-racialism. The emergence of notions such as coloniality and institutional racism are examples of the need of a political and analytical vocabulary that is able to displace narratives that equate the West with Democracy and committed anti-racism. They call for (un-)thinking racism: the undoing of the dominant Eurocentric definition of racism that denies (democratic) racist cultures, and the formation of "cultures of engaged critique of the histories of racist exclusion and humiliation" (*Id.*, p. 167).

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²⁴ I deliberately use the liberal template on the (reasonable) "accommodation of minorities" that had its momentum in the second half of the 2000s with the publication of the Bouchard and Taylor (2008) Report as co-chairs of the Consultation Commission on Accommodation Practices Related to Cultural Differences in Quebec.

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