

# **Anti-Discrimination Law and Systemic Racism: Challenges for the EU and the Nordic Countries**

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The year 2020 marked the 20<sup>th</sup> anniversary of the adoption of the European Union's *Race Equality Directive* (2000).<sup>1</sup> It was for the EU a wide implementation of a principle of equal treatment between persons irrespective of racial or ethnic origin. Since its adoption, the directive has served as a standard for antidiscrimination law, and the legal, institutional, and political recognition of racial and ethnic discrimination across the EU. In this chapter, the argument is made that the concept of discrimination in the Race Equality Directive does not encompass, recognise nor address 'systemic racism.' The latter includes any possible racial, ethnic or other related group differences, inequities, stratification or hierarchy in the access to, enjoyment or exercise of rights across areas of society.

By contrast, the concept of discrimination in the *International Convention on the Elimination of All Forms of Racial Discrimination* (ICERD)—adopted in 1965 prior to the recognition of the term 'institutional racism'—does encompass systemic racism.<sup>2</sup> However, more than half a century after ICERD's adoption, its concept of racial discrimination has not gained any broader traction in the EU. To recognise and address systemic racism a paradigm shift is needed across the EU. This means shifting away from an understanding of racism as unfounded beliefs in 'race', as merely a matter of discriminatory acts or behaviours, and as socially exceptional or rare. The chapter concludes with some reflections on the sort of legal standards, political and public conceptions of, and discourses on, racism, racial, ethnic and related forms of discrimination, that need to be established to recognise and address systemic racism in the EU and in the Nordic countries.

Besides the 20<sup>th</sup> anniversary of the Race Equality Directive, this chapter was written against the background of the popularization of the term systemic racism by the global Black Lives Matter protests in 2020. These protests gave rise to a growing acknowledgment of the systemic nature of the racism affecting Africans and people of African descent. Prompted by the groundswell of global protests, in June 2020, the United Nations Human Rights Council (HRC) held an urgent debate on racially inspired human rights violations, systemic racism, police brutality and violence against peaceful protests. This led to the adoption of an HRC resolution that the United Nations High Commissioner for Human Rights prepare a report on systemic racism and the violations of international human rights law against Africans and people of African descent by law enforcement agencies. The report, delivered to the Human Rights Council in June 2021, presented an agenda towards transformative change for racial justice and equality. Among its objectives was to reverse cultures of denial, dismantle systemic racism and accelerate the pace of action.<sup>3</sup> This chapter was conceived

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<sup>1</sup> Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin [2000] OJ L 180/22.

<sup>2</sup> It is widely appreciated that terms and concepts such as 'institutional', 'structural' and 'systemic' racism began with the introduction of the term 'institutional racism' (to contest the understanding of racism as merely a matter of irrational prejudice and bigotry) in Stokely Carmichael/Kwame Ture and Charles V. Hamilton's book, *Black Power: The Politics of Liberation* (Random House, 1967).

<sup>3</sup> Promotion and protection of the human rights and fundamental freedoms of Africans and people of African descent against excessive use of force and other human rights violations

in this context. Its call to move beyond individual instances of ‘unequal treatment,’ assumptions that racism is socially rare or exceptional, and denials of the continued relevance of ‘race’ in the EU—may also be read as a European response to Critical Race Theory in the US.<sup>4</sup> Likewise, its proposed conceptualisation of ‘systemic racism’ and its relevance to the EU, may be read as a cross-Atlantic contribution to conversations on how to theorize racism.<sup>5</sup> Finally, this chapter offers philosophical (conceptual) investigations into issues of antidiscrimination law and race and may thus be read as part of a growing philosophical conversation about racial equality and justice.<sup>6</sup>

## 1. The Nature of Systemic Racism from a (Human) Rights Perspective

What this chapter refers to as ‘systemic racism’ is an understanding of society as a social system,

- (i) *Consisting of elements that are organized, amenable to human change, and may be subject to political decision-making—including, laws, policies, institutions, practices, norms, behaviours and human relations;*
- (ii) *That is racially, ethnically and/or in other related terms hierarchical or stratified—in the sense that some racial, ethnic and/or other related group(s) consistently is/are privileged, whereas others are consistently less privileged or disprivileged, in their access to, enjoyment or exercise of (human) rights across areas of the social system/society (and that these groups, therefore, and in this manner, unequally enjoy or exercise human rights across areas of the social system/society)*

This understanding of systemic racism has borrowed some elements from Eduardo Bonilla-Silva’s understanding of it as a “racialized social system”—referring to “societies where social, political, economic, cultural and even

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by law enforcement officers. Report of the United Nations High Commissioner for Human Rights [2021] A/HRC/47/53.

<sup>4</sup> Cf. Kimberlé Williams Crenshaw, ‘Twenty Years of Critical Race Theory: Looking Back to Move Forward’ (2011) 43 *Connecticut Law Rev* 1253; Michele Grigolo, Costanza Hermanin and Mathias Möschel, ‘Introduction: How Does Race “Count” in Fighting Discrimination in Europe’ (2011) 34 *Ethnic and Racial Studies* 1635; and Mathias Möschel, ‘Race in Mainland European Legal Analysis: Towards a European Critical Race Theory’ (2011) 34 *Ethnic and Racial Studies* 1648.

<sup>5</sup> Philomena Essed, *Understanding Everyday Racism: An Interdisciplinary Theory* (Sage Publications, 1991); Eduardo Bonilla-Silva, ‘What Makes Systemic Racism Systemic?’ (2021) 91 *Sociological Inquiry* 513, ‘Rethinking Racism: Toward a Structural Interpretation’ (1996) 62 *Am Soc Rev* 465, ‘The Essential Social Fact of Race’ (1999) 64 *Am Soc Rev* 899; Joe Feagin and Sean Elias, ‘Rethinking Racial Formation Theory: A Systemic Racism Critique’ (2013) 36 *Ethnic and Racial Studies* 931; Charles W. Mills, *Blackness Visible: Essays on Philosophy and Race* (Cornell UP, 1998).

<sup>6</sup> Cf. e.g., Charles W. Mills, *Black Rights/White Wrongs: The Critique of Racial Liberalism* (Oxford UP, 2017), Tommie Shelby, *Dark Ghettos: Injustice, Dissent, and Reform* (Harvard UP, 2018), Lewis R. Gordon, *Freedom, Decolonization and Racial Justice* (Routledge, 2021), Elizabeth Anderson, *The Imperative of Integration* (Princeton UP, 2010).

psychological rewards are *partially* allocated along racial lines.”<sup>7</sup> As a social scientist, Bonilla-Silva thinks that the “analytical crux to understand [systemic racism] is identifying the collective practices, mechanisms, and behaviours that reproduce racial domination.”<sup>8</sup> By contrast, the conception of ‘systemic racism’ that is offered in this chapter does not depend on identifying any particular underlying ‘causal’ social processes, and is so broad and minimal that one could view it as *a minimalist conception of systemic racism*.

Here one could speak of ‘systemic racism’ and, e.g., ‘systemic racial discrimination’ or ‘systemic ethnic discrimination’ interchangeably. As long as one does not reduce ‘discrimination’ to actions or even practices, and sees it as applicable to unequal social conditions more broadly. What is critical here is that ‘racism’ (or, e.g., ‘racial discrimination’) may include, but is broader than, conceptions of ‘racism’ (or ‘discrimination’) as something belonging to individual actors—e.g., ‘racial prejudice’, ‘ideas of racial hierarchy’ or the ‘actions or practices of individual persons or institutions.’ Although the basis for social equality and hierarchy here are (human) rights, a similar conception could be given based on, e.g., rewards, life chances, basic goods, resources or capabilities.<sup>9</sup> In this chapter systemic racism refers to unequal enjoyment or exercise of (human) rights. This is because this is a chapter about antidiscrimination law and hence about the rights of persons.

Before we apply antidiscrimination law to this conception of systemic racism, let us iron out two potential misunderstandings of what it entails. First, the conception of systemic racism presented here clearly does not suggest that regarding the enjoyment or exercise of any given (human) right, all members of some racial or ethnic group(s) are privileged, whereas all members of other racial or ethnic groups are less privileged or disprivileged. Rather, the group differences should be understood in terms of group averages, frequencies and likelihoods of unequal enjoyment or exercise of (human) rights. For example, consider a society where, across areas of society, people of African descent do not enjoy or exercise (human) rights as fully as white Europeans. Given any (human) right there may be variations within these groups in their enjoyment of the right. Regarding, say, rights in employment and work life, some highly educated individuals of African descent may very well have employment that matches their level of education and do not suffer any discrimination at work, whereas some highly-educated individual white Europeans may find it difficult to find employment that matches their level of education and suffer harassment

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<sup>7</sup> Eduardo Bonilla-Silva, ‘What Makes Systemic Racism Systemic’ (2021) 91 *Sociological Inquiry* 513, 519.

<sup>8</sup> *Ibid.* In ‘Rethinking Racism: Toward a Structural Interpretation’ (1997) 62 *American Sociological Review* 465, 474, Bonilla-Silva sketches the elements of racialized social systems as (i) societies that allocate differential economic, political, social, and even psychological rewards to groups along racial lines, (ii) in which races historically are constituted according to the process of racialization, (iii) that on the basis of this structure there develops a racial ideology (what analysts have coded as racism), and (iv) where most struggles contain a racial component, but sometimes acquire and/or exhibit a distinct racial character.

<sup>9</sup> Cf. e.g., Eduardo Bonilla-Silva, ‘Rethinking Racism: Toward a Structural Interpretation’ (1997) 62 *American Sociological Review* 465, ‘What Makes Systemic Racism Systemic’ (2021) 91 *Sociological Inquiry* 513.

and bullying at work. Unless such differences represent group averages, they do not change the fact of systemic racism. Therefore, in the case of systemic racism it is more useful to speak of group averages, frequencies, and likelihoods of unequal enjoyment of (human) rights. For instance, that highly educated people of African descent on average may be less likely to find employment that matches their level of education and more frequently experience discrimination at work than highly educated white Europeans.<sup>10</sup>

Second, the conception of systemic racism offered here is merely descriptive of *de facto* inequities in the enjoyment or exercise of (human) rights. It does not offer any specific causal explanations—albeit in the course of argument, *possible* explanations are given as examples—and is in this sense not a (social scientific) theory.<sup>11</sup> Still, as the term ‘racism’ suggests, the framework is an indictment that whatever the underlying social processes are, the effect or outcome is a racially, ethnically and/or on other grounds unequal and stratified social order. In searching for social explanations of systemic racism, we should obviously be open to that they may include amassed, collective effects of direct forms of discrimination of persons on grounds of, e.g., race or ethnicity in situations of employment, housing, education, criminal justice and so forth. However, we should also be open to indirect forms of discrimination, which though not directly discriminatory in purpose and/or action, have discriminatory effects or outcomes. Here are a few illustrative hypothetical examples of this:

- Employment processes where jobs are found and gotten through contacts, networks and other ‘peer support’ that may be, e.g., racially homogenous and skewed;
- Giving all schools the same amount and kind of resources, while not being mindful that schools in racially or ethnically segregated communities may need extra resources to ensure racial and ethnic parity in access to quality education;
- The fact (if it is a fact) that racially and/or ethnically homogenous teams of police—regardless of whether such homogeneity itself is an expression of discrimination—tend to be more racially and/or ethnically biased in their policing than racially and/or ethnically diverse teams; and
- The fact (if it is a fact) that there is racial and/or ethnic homogeneity and/or domination in political representation may be an indication of racial and/or ethnic inequity in the enjoyment or exercise of civil and political rights. In addition, it may have a variety of subsidiary effects on the enjoyment or exercise of rights such as making it less likely for the interests of racial and/or ethnic minorities to be reflected in politics (including, e.g., combating racism); or even less likely that such minorities will believe that politics is for them and reflects their interests too, and thus be less inclined to be politically and democratically engaged citizens.

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<sup>10</sup> For an example of such statistics cf. Sima Wolgast, Irene Molina and Mattias Gardell (2018). *Anti-Black Racism and Discrimination in the Labour Market* (County Administrative Board of Stockholm, Report 2018:22).

<sup>11</sup> As a side note, this conception of systemic racism avoids any possible confusion of ‘explanandum’ with ‘explanans’—which Michael Banton criticizes Joe Faegin and Sean Elias’ theory of systemic racism as confounding: Michael Banton, ‘In Defence of Mainstream Sociology’ (2013) 36 *Ethnic and Racial Studies* 1000.

As this last example suggests, besides direct and indirect forms of discrimination, it may even be the case that the racial or ethnic groups that are subject to systemic racism themselves contribute to it—even if as a subsidiary, secondary effect of racism. Again, to illustrate with a few hypothetical examples it could be that:

- A relative lack of political and democratic engagement among already disadvantaged racial or ethnic groups contributes to their inequitable enjoyment or exercise of civil and political rights; and
- Some racial and/or ethnic groups do not have equal access to quality education or employment, partially since they disproportionately live in segregated communities with education and employment impeding social problems—some of which the residents themselves may be contributing to. For example, disproportionately high levels of youth delinquency, less support for children in their homes to acquire skills that are conducive to learning in school, negative peer-pressure regarding reading, writing, learning and aspiring to a wide variety of professions. Such factors may in turn contribute to poorer school environments, unequal access to quality education and a broad array of employment opportunities.

To the extent that such social processes may contribute to, perpetuate or exacerbate systemic racism, they too should be taken into account when understanding and addressing it.

## **2. The EU Race Equality Directive and Systemic Racism**

There are several aspects in the preamble of the EU Race Equality Directive that would seem to suggest a recognition of racism, racial or ethnic discrimination as a possible systemic issue. That is as a broad social issue where some individuals on grounds of their racial or ethnic origin are prone to be disadvantaged across areas of society with respect to enjoyment or exercise of rights. The preamble of the Directive states that “protection against discrimination for all persons constitutes a universal right” and refers to universal human rights law, including the ICERD.<sup>12</sup> Universal human rights law, the ICERD in particular, stresses equal enjoyment of rights as (itself) a human right that is applicable to all rights and across all areas of society (or ‘public life’ as the ICERD puts it). Further paragraphs of the Directive’s preamble affirm that racial or ethnic discrimination may be an issue across areas of society in ways that undermine social equity. Paragraph 9 of the preamble affirms that discrimination based on racial or ethnic origin may undermine “the attainment of a high level of employment and of social protection, the raising of the standard of living and quality of life, economic and social cohesion and solidarity.”<sup>13</sup> Paragraph 12 points out that:

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

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<sup>12</sup> Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin [2000] L180/22, Preamble, para. 2.

<sup>13</sup> *Ibid.*, at para. 9.

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 including social security and health care, social advantages and access to and supply of goods and services.<sup>14</sup>

Moreover, the preamble calls on Member States of the European Community to implement “the principle of equal treatment irrespective of racial or ethnic origin” to “aim to eliminate inequalities, and to promote equality between men and women, especially since women are often the victims of multiple discrimination.”<sup>15</sup> The responsibility of Member States to address systemic racial and ethnic discrimination may seem to be further emphasized in the preamble by the stated objective of the Directive to ensure “a common high level protection against discrimination in all Member States,” while laying “down minimum requirements, thus giving the Member States the options of introducing or maintaining more favorable provisions” and that its:

[P]rohibition of discrimination should be without prejudice to the maintenance or adoption of measures intended to prevent or compensate for disadvantages suffered by a group of persons of a particular racial or ethnic origin...<sup>16</sup>

However, that which in the preamble may seem like a recognition of systemic racism, is not supported by the actual provisions of the Directive—which suffer much of the same or similar weaknesses in addressing systemic racism as other domestic antidiscrimination laws around the world.

## 2.1 A Concept of Discrimination

The purpose of the Directive, as stated in its Article 1, is “to lay down a framework for combating discrimination on the grounds of racial or ethnic origin, with a view of putting into effect in the Member States the principle of equal treatment.”<sup>17</sup> The concept of discrimination of the Directive includes four kinds of discrimination:

- Direct discrimination;
- Indirect discrimination;
- Harassment; and
- An instruction to discriminate.<sup>18</sup>

The *principle of equal treatment*—which is the central principle of the Directive—is defined in terms of direct and indirect discrimination:

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<sup>14</sup> Ibid., at para. 12.

<sup>15</sup> Ibid., at para. 14.

<sup>16</sup> Ibid., at paras. 28, 25 and 17.

<sup>17</sup> Ibid., at Article 1.

<sup>18</sup> Ibid., at Article 2.

For the purpose of this Directive, the principle of equal treatment shall mean that there shall be no direct or indirect discrimination based on racial or ethnic discrimination.<sup>19</sup>

*Direct discrimination* is defined by the Directive as follows:

[D]irect discrimination shall be taken to occur 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.<sup>20</sup>

While *indirect discrimination* is thus defined:

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.<sup>21</sup>

For the purpose of our review, it is sufficient to note that *harassment* is defined by the Directive as unequal treatment involving “unwanted conduct related to racial or ethnic origin.”<sup>22</sup> Whereas *an instruction to discriminate* is defined in terms of an unequal treatment “against persons on grounds of racial or ethnic origin.”<sup>23</sup>

What is clear from how discrimination is defined by the Directive is that it only encompasses:

- (i) Discrimination as a violation of *equal treatment*;
- (ii) Isolated and individual occurrences of direct or indirect racial or ethnic discrimination (i.e., unequal treatment);
- (iii) Discrimination perpetrated by individual persons or institutions against persons (or in the case of indirect discrimination, also groups of persons);
- (iv) Discrimination for which individual persons or institutions are held accountable (but not the state—besides implementing the provisions of the directive, including establishing equality bodies, etc).

These four conditions of the discrimination concept of the Directive are in large part due to the logic of civil courts and being able to bring cases of discrimination before these.<sup>24</sup>

Albeit the concept of discrimination of the Directive is limited to these four conditions, some of its provisions do seem to allow for recognising and

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<sup>19</sup> Ibid., at Article 2.1.

<sup>20</sup> Ibid., at Article 2.2.a.

<sup>21</sup> Ibid., at Article 2.2.b.

<sup>22</sup> Ibid., at Article 2.3.

<sup>23</sup> Ibid., at Article 2.4.

<sup>24</sup> Cf. Articles 7, 8 and 9.



addressing systemic racial or ethnic discrimination. For example, Article 5 of the Directive on positive measures states that:

With a view of ensuring full equality in practice, the principle of equal treatment shall not prevent any Member State from maintaining or adopting specific measures to prevent or compensate for disadvantages linked to racial or ethnic origin.<sup>25</sup>

Article 11 calls on Member States to:

[T]ake adequate measures to promote the social dialogue (...) with a view to fostering equal treatment, including through the monitoring of workplace practices, collective agreements, codes of conduct, research or exchange of experiences and good practices.<sup>26</sup>

Whereas Article 13 calls on Member States to “designate a body or bodies for the promotion of equal treatment of all persons without discrimination on the grounds of racial or ethnic origin.”<sup>27</sup> These bodies may “form part of agencies charged at national level with the defence of human rights or the safeguard of individuals’ rights,” and shall, among other things, include “conducting independent surveys concerning discrimination.”<sup>28</sup>

As these aspects of the Directive show, the Directive does hold Member States responsible for establishing laws, equality bodies and practices to address discrimination on grounds of racial or ethnic origin. In addition, the scope of the Directive is broad—including, both public and private sectors in relation to employment, participation in organizations, social protection (including social security and healthcare), social advantages, education, access to and supply of goods and services (including housing).<sup>29</sup> Still, the concept of discrimination of the Directive fails to encompass, and even runs counter to, an understanding of racial or ethnic discrimination as a social condition (of systemic racism). This remains true even if we view the concept of discrimination of the Directive as a legal and political standard to protect individual rights, which could be scaled up to include racial or ethnic groups of individuals and their unequal treatment in society at large.

## 2.2 *Is Equal Treatment Sufficient?*

As we have seen, a *principle of equal treatment* is central to the concept of discrimination in the Directive. Again, in accordance with this principle, racial or ethnic discrimination occurs when, on grounds of racial or ethnic origin, either (a) persons are treated less favourably in a comparable situation or (b) an

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<sup>25</sup> Ibid., at Article 5.

<sup>26</sup> Ibid., at Article 11.

<sup>27</sup> Ibid.

<sup>28</sup> Ibid.

<sup>29</sup> Ibid., at Article 3.

apparently neutral provision, criterion or practice puts persons at a particular disadvantage.

The Directive does not say exactly what the equal treatment pertains to; concerning what persons are not to be treated less favourably or put at a particular disadvantage. However, given the context of the directive of antidiscrimination law, human rights, certain provisions of the Treaty on European Union and references to protection against discrimination as a right—it seems safe to say that discrimination is understood as unequal treatment of persons with respect to their rights; and that equal treatment is itself a right which pertains to the access to or enjoyment of other rights (in the areas outlined in the scope of the Directive). This principle of equal treatment focuses on third-person observable and measurable behaviours, provisions, criteria and practices, and their outcomes, and includes unintentional or unconscious as well as some institutional forms of discrimination.

Yet, the principle of equal treatment of the Directive falls short of recognizing, protecting against and addressing:

1. Possible baseline social conditions of unequal access to, enjoyment or exercise of rights that discriminate against persons and groups of persons on grounds of racial or ethnic origin—but that cannot be described in terms of unequal treatment, direct or indirect discrimination; and
2. Systemic racism as such.

### **2.3 Systemic Racism and Equal Treatment**

It should be clear by now that the concept of discrimination in the Directive—as outlined in the four conditions mentioned above—merely encompasses *individual acts of treatment* by persons or institutions in specific situations, e.g., of promotion or when applying to an educational program (i.e., *direct discrimination*) and *particular provisions, criteria or practices* of particular institutions, e.g., recruitment, retention or promotion practices or school admission requirements that may discriminate against racial and ethnic minorities (i.e., *indirect discrimination*). Additionally, it is merely *individual persons and institutions that are held responsible for (direct and indirect) discrimination*—not states—and, typically, only after discrimination has been proven in a court of law.

Overall, the Directive fails to include, recognise and address systemic racism as such. Its focus on equal treatment, isolated and individual occurrences of discrimination by individual persons or institutions, for which only individual persons and institutions are held responsible, typically only after a judgment by a court of law—is a far cry from recognising and addressing systemic racism as such (even as a *possibility*, not to mention as a *reality*).

First,

*The Directive does not encompass pre-existing (or ‘baseline’) social conditions of unequal access to, enjoyment or exercise of rights on grounds of race or ethnicity.*

It may be that due to a history of unequal treatment and other social processes of discrimination on grounds of racial or ethnic origin, some racial and/or ethnic groups in society experience unequal access to or enjoyment of rights. This may even be the case across areas of society—e.g., housing, employment, education, health care and criminal justice. For example, it may be the case that people of African descent and Roma already disproportionately live in racially and ethnically segregated communities, with a lack of equal access to or enjoyment of rights and opportunities, e.g., to employment, quality education, and development of skills, knowledge, and experiences that are conducive to education and gaining employment. Where this is the case, it is not likely merely or primarily due to the unequal treatment by *particular* persons or institutions. The Directive does not include, recognise nor address such pre-existing social inequities.<sup>30</sup>

Second,

*The Directive does not encompass racial and/or ethnic group differences in access to, enjoyment or exercise of rights.*

The situation-specific, equal treatment, direct and indirect discrimination concept of the Directive does not cover racial and/or ethnic *group differences* in experiences of discrimination and access to or enjoyment of rights. This is true of the concept of discrimination in the Directive even while being mindful that Article 5 on ‘positive action’ states that,

With a view to ensuring full equality in practice, the principle of equal treatment shall not prevent any Member State from maintaining or adopting specific measures to prevent or compensate for disadvantages linked to racial or ethnic origin.

This provision as well as Article 13 on the establishment of Equality Bodies for the promotion of equal treatment of all persons without discrimination on grounds of racial or ethnic origin—may seem to suggest a possible recognition of social *group differences* in the access to, enjoyment or exercise of rights as a matter of ‘*discrimination.*’ However, the concept of discrimination of the Directive—premised as it is on equal *treatment* by persons and/or institutions—does not allow for the recognition of group inequities on grounds of race or ethnicity as themselves a form of discrimination and does not hold anyone responsible for them (such as the state or society). For example, the Directive does not recognise as ‘discrimination’ nor hold anyone or anything accountable for a social situation where people of African descent and Roma (as groups of

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<sup>30</sup> A similar argument has been made by Silvia Rodriguez Maeso, that the master narrative of the Race Equality Directive of the principle of equal treatment presumes a context of equal individuals, and protects them against the possible breach of the rule, while evading the fact that the law operates in a racially conceived (and unequal) society, and ignoring existing, and historically produced, inequalities [‘Europe and the narrative of the “True Racist”: (Un-)thinking Anti-Discrimination Law Through Race’ (2018) 8 Oñati Socio-legal Series 845, 864-5]. Michele Grigolo, Costanza Hermanin and Mathias Möschel have also pointed out that the clear limitations of antidiscrimination law in the EU are its focus on individual, isolated events—while neglecting structural racial discrimination rooted in colonial history, etc. [‘Introduction: How Does Race “Count” in Fighting Discrimination in Europe?’ 34 *Ethnic and Racial Studies* 1635, 1636].

individuals) experience greater frequencies of discrimination across areas of society. It could be that people of African descent, Roma or members of other groups are at greater risk—than, say, white Europeans—of being subjected to discrimination across areas of society, e.g., in job recruitment, promotion and retention, by schoolteachers, social workers, doctors, judges and police officers. Regarding such situations of social inequity, one could say that the Directive offers equality, non-discrimination and justice for individuals, but not for groups of individuals.<sup>31</sup>

Third,

*Equal enjoyment and exercise of rights among racial and ethnic groups (and across areas of society) is broader than the principle of equal treatment.*

To say that all persons in a society, irrespective of their racial or ethnic origin, should be entitled to an equal enjoyment or exercise of all available rights—is not the same as saying that they should all be treated equally by persons and institutions in that society. In other words, their equality or inequality of enjoying or exercising rights does not stand or fall with the principle of equal treatment in the Directive. Neither is the ‘public’ scope of the Directive sufficient to recognise the many social forms that discrimination may take that may contribute to systemic racism.

For example, the racial, ethnic, cultural and national identities of white Europeans in the EU—and their concurrent racial, ethnic, cultural and national ideals—may lead them to make many (probably mostly unconscious) decisions in their ‘private’ lives based on who they are most likely to see, e.g., as friends, neighbours, sexually desirable, romantic partners or possible family members; as being loveable, worthy of care, respect or admiration; as individuals rather than as members of racial or ethnic ‘others’; as ‘like themselves’ rather than as ‘different’ or ‘alien’; as full-fledged members of society rather than as outsiders or only partly or abstractly members of society, and so forth. Even if the principle of equal treatment may not apply to these many decisions in the private lives of white Europeans—e.g., in the areas of love, friendship and family, accommodations, political engagement and support, cultural consumption and everyday interactions—they may have major social and discriminatory effects on the equal enjoyment or exercise of rights of people of colour in Europe. In general, a baseline or de facto social racial or ethnic inequality across areas of society need not be due to the unequal treatment of individual persons and institutions (not even if scaled up en masse). Nor will mainstreaming the principle of equal treatment serve to address and correct such racial or ethnic inequalities.

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<sup>31</sup> Christopher McCrudden speaks of an alternative ‘Group Justice Model’ which focuses more on outcomes than processes and is concerned with the relative position of groups rather than individuals—and thinks that the Race Equality Directive, as it includes both direct and indirect forms of discrimination, includes both ‘Individual’ and ‘Group Justice’ [‘International and European Norms Regarding National Legal Remedies for Racial Inequality’ in Sandra Fredman (ed.), *Discrimination and Human Rights* (Oxford UP, 2001)].

Fourth,

*The Directive is suitable for societies where discrimination is relatively rare or exceptional, but not where it is relatively frequent or entrenched.*

Due to the conceptual aspects already mentioned, and the practical implications of the Directive, it will be difficult if not impossible to recognise and address relatively frequent occurrences and entrenched patterns of racial or ethnic discrimination through individual cases of direct and indirect discrimination. For example, even in societies with a highly effective judicial system that manages to successfully encourage possible litigants to bring their cases of discrimination to court—unless it is a society where discrimination is rare or exceptional, it is highly unlikely that such a judicial system and its situation-specific, case-based handling of discrimination will have a major effect concerning protection against and elimination of discrimination in society. It will not protect against or eliminate socially entrenched issues of discrimination on grounds of racial or ethnic origin, including, e.g., racial and ethnic segregation or belonging to a racial or ethnic group which makes one disproportionately vulnerable or subjected to discrimination across areas of society. Neither will it protect against or eliminate relatively frequent occurrences of discrimination where it is practically implausible, even in a best-case scenario, to resolve all or most of them case-by-case.

Fifth,

*Recognising and addressing isolated, individual occurrences of discrimination by individual persons and institutions, will do nothing or little to recognise and address systemic racism as such.*

Firstly, there is a categorical difference between recognising isolated occurrences of unequal treatment and recognising that society as such is racist (i.e. socially stratified or hierarchical on grounds of race, ethnicity or other similar grounds). Secondly, whereas it makes sense to hold individual actors responsible for their individual actions of unequal treatment—it will make little sense to hold individual actors responsible for a racially or ethnically stratified social order (although, of course, they may contribute to, and instantiate, it). Thirdly, systemic racism will require recognition and address by states—over and above recognition and address by individual actors. It is states, rather than individual actors, that can be held responsible for, and, through law- and policymaking, can affect the social system as such. Fourthly, even if we scale up the sum of all individual occurrences of unequal treatment across all areas of society to a general social level—it will not be identical to systemic racism. As has already been pointed out above, and will be illustrated with further examples below, systemic racism cannot be reduced to the sum of individual actions or practices of unequal treatment. In conclusion, the Directive is conceptually and practically insufficient—as a legal and political standard or instrument or as a policy directive—in addressing systemic racism.

### 3. Universal Human Rights Law and Systemic Racism

Arguably, the antidiscrimination law in the world that most fully recognizes and addresses systemic racism is the *International Convention on the Elimination of All Forms of Racial Discrimination* (ICERD). It was the first universal human rights convention, adopted by the UN General Assembly in 1965. The ICERD elaborates on the twin principles of universal human rights as expressed in articles 1, 2 and 7 of the *Universal Declaration of Human Rights* from 1948 that:

- (a) all human beings have an inherent and equal moral worth as persons on which human rights are based, and hence that
- (b) all human persons have the right to equal human rights without distinction (or discrimination as it was later referred to).

Thus, the preamble of the ICERD refers to “the principles of the dignity and equality inherent in all human beings,” that “all human beings are free and equal in dignity and rights” as well as that “all human beings are equal before the law and are entitled to equal protection of the law against any discrimination”—whereas all Member States of the United Nations have pledged themselves to take joint and separate action to “promote and encourage universal respect for and observance of human rights and fundamental freedoms for all, without distinction as to race, sex, language or religion.”

It should be quite clear from these words alone that the ICERD is a legal standard that—in contrast to the EU Race Equality Directive—calls on states to put in place legal protection against what is referred to in this chapter as ‘systemic racism’ and that all human beings are, as the preamble puts it, “entitled to equal protection of the law against *any discrimination*” (emphasis added). Similarly, the preamble affirms “the necessity of speedily eliminating racial discrimination throughout the world in all its forms and manifestations and of securing understanding of and respect for the dignity of the human person.” While expressing the conviction that “the existence of racial barriers is repugnant to the ideals of any human society” and resolution to “adopt all necessary measures for speedily eliminating racial discrimination in all its forms and manifestations” and “build an international community free from all forms of racial segregation and racial discrimination.”

However, even if this ‘holistic’ language of the preamble of the ICERD as a legal standard towards eliminating racial discrimination in all its forms and manifestations seems to call on states to recognize, protect against and eliminate systemic racism—the provisions of the Convention are open to some ambiguities and different interpretations on this point.

The nature and scope of ‘racial discrimination’ in the Convention is defined in Article 1.1:

In this Convention, the term ‘racial discrimination’ shall mean any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life.

In other words, the Convention counts as *discrimination* on grounds of race, colour, descent, national or ethnic origin,

- (i) any distinction, exclusion, restriction or preference;
- (ii) which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms;
- (iii) in the political, economic, social, cultural or any other field of public life.

### 3.1 *Must Discrimination be an Act?*

How to interpret “any distinction, exclusion, restriction or preference” is critical to whether the ICERD can fully envelop and address systemic racism. It may be taken for granted that ‘discrimination’ must be an *act*, something someone (i.e., a person) or at least something (e.g., an institution) *does*. Two prominent scholars on the ICERD, Michael Banton and Nathan Lerner, both understand the phrase “any distinction, exclusion, restriction or preference” as referring to behaviours or acts. For instance, Michael Banton writes that, “Article 1.1 identifies four kinds of behaviour—distinctions, exclusions, restrictions, and preferences—each of which can be based on five different grounds, and each of which can have a discriminatory purpose or effect.”<sup>32</sup> Whereas Nathan Lerner writes that, “According to paragraph 1 [of the ICERD], four kinds of acts are, in given circumstances, considered discriminatory: any *distinction, exclusion, restriction or preference*.”<sup>33</sup>

However, there is a quite subtle, but critical distinction to be made between, on the one hand, understanding “any distinction, exclusion, restriction or preference” as referring to behaviours or acts, and, on the other hand, as referring to social conditions. If we interpret these terms as referring to behaviours or acts, and insist that they must be things someone or at least some institution *does*, then we will not be able to point to social conditions as discriminatory (unless they are the result of an act or several acts of “distinction, exclusion, restriction or preference”). To this, the likes of Banton and Lerner may rejoin that certainly acts and behaviours based on “distinction, exclusion, restriction or preference”, when carried out by many persons and institutions in society, can lead to discriminatory social conditions.

Still, social conditions can very well themselves be discriminatory without being the direct result of one or several discriminatory acts or behaviours. For example, racial segregation (which is referred to in Article 3 in the Convention) may be described as a form of social distinction, exclusion or restriction of the people who are racially segregated, which impairs their enjoyment of, e.g., rights to employment and education—without it being the result of any particular acts or behaviours. Instead, the racial segregation may be due to a multitude of past and present social processes which cannot be reduced to any particular acts or behaviours. This can be seen in a history of being relegated to cheap, low-income

<sup>32</sup> Michael Banton, *International Action Against Racial Discrimination* (OUP, 1996) 72.

<sup>33</sup> Nathan Lerner, *The UN Convention on the Elimination of All Forms of Racial Discrimination* (Brill, 2015) 33.

housing, being offered and assisted to get public housing, being shunned by private property owners, ‘white flight’ of tenants from residential communities with a growing number of people of colour, a lack of knowledge of how to find non-segregated housing, not being able to afford non-segregated housing, a sense of belonging and comfort in an otherwise racially alienating society, and negative cycles of lack of opportunities, social hopelessness and ‘dysfunction’ which perpetuate the racial segregation. Even if we in such a case of racial segregation cannot speak of it as the result of any particular *act* of “distinction, exclusion, restriction or preference” we can still speak of it as a social exclusion and restriction on grounds of race or other related grounds, with the effect of impairing the enjoyment or exercise of human rights. This will also allow us to understand racial segregation as an element of systemic racism—where racial, ethnic and/or other related distinctions, exclusion, restrictions, and preferences regarding the recognition, enjoyment or exercise of human rights are part of the social fabric.

Besides the reasons just given there are several additional reasons for interpreting the ICERD in this manner. The Convention says “*any* distinction, exclusion, restriction or preference” (emphasis added) and does not refer to behaviours or acts. An understanding of racial discrimination as any social distinctions, exclusions, restrictions or preferences on grounds of race, colour, descent, national or ethnic origin, which has the purpose or effect, etc... is in line with an understanding of universal human rights—as expressed in the first and second articles of the Universal Declaration—that all human beings are in force of their humanity entitled to equal rights without any distinction or discrimination of any kind on grounds of race or other grounds. This is in line with the fact that in the ICERD it is states—not individual actors—that are held responsible for the racial discrimination in society and in all areas of public life to which human rights apply.

### 3.2 *The ICERD as Addressing Systemic Racism*

To understand the ICERD as encompassing and addressing systemic racism—we need not merely understand “any distinction, exclusion, restriction or preference” as referring to social conditions (importantly, including those that are not a direct result of anyone’s or any institution’s actions or behaviours). We also need to recognize that many of these social conditions may broadly include social and institutional phenomena, practices, habits, norms, rules, laws, policies and more—which, although they may not have the *purpose*, they at least have the *effect* of “nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights” on grounds of race, colour, descent, national or ethnic origin. In other words, in following the Convention, we need to focus on whether *the social conditions* are such that they distinguish, exclude, restrict or give preference to people on grounds of their race and the other related grounds—regarding their “recognition, enjoyment or exercise, on an equal footing, of human rights.”

For example, whether the social conditions are such that some racial groups do not have an equitable enjoyment or exercise of human rights, e.g., to education, free choice of employment and favorable work conditions, equality before the law or participation in cultural activities. Rather than being the direct



result of discriminatory actions or behaviours such social conditions could have a multitude of social causes, of which only some could be described as directly discriminatory actions or behaviours, albeit with discriminatory effects. For instance, it may be the case in a society that people of African descent or Roma do not have equal access to quality education. Reasons for this may include that people of African descent and Roma disproportionately find themselves in segregated communities where the schools are less conducive to learning, teachers in these schools are less motivated, the social problems are greater, the students lack educational support outside school, experience negative peer-pressure, and are more prone to experience school as representing an alienating society.

It may also be the case that white parents are likely to associate communities and schools with relatively large numbers of people of colour with social problems and be inclined to keep their families and children away from these communities and schools. Whatever the reasons, what matters from the perspective of the ICERD and universal human rights is that everyone in society—regardless of race, colour, descent, national or ethnic origin—has the right to the recognition, enjoyment and exercise of human rights on an equal footing.

Another critical point which is central to the ICERD, and two further reasons why it encompasses systemic racism, is that it that *it holds states (rather than individual actors in society) responsible* for racial discrimination, and *across areas of society* “in the political, economic, social, cultural or any other field of public life.” Given the nature of universal human rights law as being an agreement among states regarding what should be the basic legal and political standards for any society based on a respect for human dignity and non-discrimination—it is only natural that it is states and not individual actors in society that are held responsible for upholding equal rights and non-discrimination. Of course, individual actors can and do discriminate under the ICERD. However, it is the responsibility of states, not individual actors, to put in place basic structures of society—laws, policies, institutions and so forth—towards eliminating all forms of racial discrimination and to do so across all areas of society to which human rights apply.

Related to this is that the ICERD calls on state parties to the Convention to:

[W]hen the circumstances so warrant, take, in the social, economic, cultural and other fields, special and concrete measures to ensure the adequate development and protection of certain racial groups or individuals belonging to them, for the purpose of guaranteeing them the full and equal enjoyment of human rights and fundamental freedoms.<sup>34</sup>

Here it should be noted that the ICERD holds states responsible for ensuring the full and equal enjoyment of human rights of *all racial groups* (or individuals belonging to them). To guarantee de facto equality among all racial groups (or individuals belonging to them), the ICERD requires states to develop special measures towards these ends when the circumstances warrant it.

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<sup>34</sup> Article 2.2.

Again, this speaks to a focus on the social conditions of racial and ethnic groups and their de facto (un)equal enjoyment of rights across all fields of public life. In the Convention, these fields include, but are not limited to:

- Legal provisions concerning nationality, citizenship or naturalization that discriminate against any particular nationality;<sup>35</sup>
- State sanctioned acts or practices of racial discrimination, sponsorship, defense or support of racial discrimination by any persons or organizations, laws and regulations which have the effect of creating or perpetuating racial discrimination;<sup>36</sup>
- Prohibiting and bringing to an end racial discrimination by all appropriate means, including legislation;<sup>37</sup>
- Encouraging integrationist multiracial organizations;<sup>38</sup>
- Racial segregation and apartheid;<sup>39</sup>
- All propaganda activities by organizations, public authorities, institutions and others, which promote and incite racial discrimination;<sup>40</sup> and
- Equality before the law, and in the enjoyment of human rights, in the areas of justice, security of person, politics, civil life, freedom of movement and residence, nationality, marriage, property, freedom of belief, freedom of expression, freedom of assembly, the economic, social and cultural spheres, employment, housing, public health, social security, education and public services.<sup>41</sup>

Together the provisions of the ICERD call on state parties to not merely address individual acts of racial discrimination, but to eliminate all forms of racial discrimination or distinction in the enjoyment of human rights, among all groups and individuals belonging to them, and across all areas of public life. This includes any social conditions of unequal enjoyment of human rights among racial and ethnic groups, and, when needed, to develop compensatory special measures for racial or ethnic groups to guarantee their full and equal enjoyment of human rights.<sup>42</sup> This calls for a careful monitoring of and readiness to recognize the (possible) existence of systemic racism in society, and where such racism exists, mainstream racial equality efforts across all areas of public life.

#### 4. Systemic Racism in the EU?

For EU Member States, half a century of having ratified the ICERD has not led to recognising, let alone addressing, socially pervasive racial and ethnic hierarchies in the enjoyment or exercise of (human) rights. With twenty years of

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<sup>35</sup> Article 1.3.

<sup>36</sup> Article 2.1(a-c).

<sup>37</sup> Article 2.1(d).

<sup>38</sup> Article 2.1(e).

<sup>39</sup> Article 3.

<sup>40</sup> Article 4.

<sup>41</sup> Article 5.

<sup>42</sup> For provisions on special measures, see Articles 1.4 and 2.2.

the Race Equality Directive, and its conceptual limitations as outlined in this chapter, it should be clear that it is an insufficient legal and political standard to recognise and address systemic racism. To move towards EU laws, policies and institutions that can clearly recognise systemic racism—be it as a *possibility* and/or as an *actuality*—a paradigm shift is needed in the understanding of racism in the EU. For this to happen, three relatively widespread views of racism in the EU need to be dismantled and transcended, namely: (i) racism without ‘race’; (ii) racism as discriminatory acts; and (iii) racism as exceptional.

#### 4.1 Racism Without ‘Race’

A widespread view of racism and racial discrimination in the EU is that it is based on false biological assumptions about ‘race’. Namely, the assumptions that:

- (i) There exist discrete human races (with distinct physical features and geographical origins);
- (ii) These human races have innate psychological (and cultural) proclivities;
- (iii) Because of their varying degrees of e.g., human development, intellectual ability, cultural capacity and moral virtue human races have varying degrees of worth or value.

From the point of view that these beliefs are scientifically unfounded, the following three conclusions have commonly been drawn in the EU:

- a) As there are no distinct human ‘races’ in the manner that racism and racists assume—racism is unfounded and irrational;
- b) As racism is premised on false beliefs in the existence of human ‘races’—to be anti-racist is to be against references to ‘race’;
- c) EU is ‘post-racial’ since quasi-biological beliefs in human ‘races’ have been thoroughly discredited, socially, politically and legally denounced and abandoned.<sup>43</sup>

Each of these three conclusions, as well as their premise that racism and racial discrimination is based on quasi-biological assumptions about race, are misleading and barriers to recognizing systemic racism. By way of example,

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<sup>43</sup> Cf. e.g., Terri E. Givens, ‘Comparative Perspectives: Race in Europe’ in David L. Leal, Taeku Lee and Mark Sawyer (eds.), *The Oxford Handbook of Racial and Ethnic Politics in the United States* (Oxford UP, 2014); Eduardo Bonilla-Silva, ‘“This Is a White Country”: The Racial Ideology of the Western Nations of the World-System’ (2000) 70 *Sociological Inquiry* 188; David Theo Goldberg, *The Threat of Race: Reflections on Racial Liberalism* (Blackwell Publishing, 2009); Alana Lentin and Gavan Titley, *The Crises of Multiculturalism: Racism in a Neoliberal Age* (Zed Books, 2011); Stefanie C. Boulila, *Race in Post-Racial Europe: An Intersectional Analysis* (Rowman & Littlefield Publishers, 2019); Mathias Möschel, ‘Race in Mainland European Legal Analysis: Towards a European Critical Race Theory’ (2011) 34 *Ethnic and Racial Studies* 1648; Caroline Müller, ‘Anti-Racism in Europe: An Intersectional Approach to the Discourse of Empowerment Through the EU Anti-Racism Action Plan 2020-2025’ (2021) 10 *Social Sciences* 1; Silvia Rodríguez Maeso, ‘Europe and the Narrative of the “True Racist”: (Un-)thinking Anti-Discrimination Law Through Race’ (2018) 8 *Oñati Socio-Legal Series* 845; Mark Bell, *Racism and Equality in the European Union* (Oxford UP, 2008).

Sweden removed the term ‘race’ from the list of protected grounds in its Discrimination Act in 2008, with the legislator stating these very reasons. Racial discrimination became subsumed under “ethnic discrimination” and a subcategory of ethnic discrimination on grounds of “skin colour or other similar circumstance.” The Act represents Sweden’s implementation of the Race Equality Directive.<sup>44</sup>

Although the expressed purpose of the Race Equality Directive is to lay down a framework for combating discrimination on the grounds of racial or ethnic origin—this has not translated into a widespread use for antidiscrimination purposes of the terms ‘race’ and ‘racial discrimination’ in European law and policy. In fact, the term ‘race’ is actively avoided in mainstream politics and law throughout the EU. To a lesser extent, so are racial or racialized terms like ‘white’, ‘black,’ ‘people of African descent,’ ‘East Asian’ and ‘people of colour.’ Instead, there is a proliferation of terms used as euphemisms for race and racial discrimination such as ‘ethnic origin,’ ‘ethnic discrimination,’ ‘minority discrimination,’ ‘national origin,’ ‘third-country nationals,’ ‘migrants,’ ‘immigrant background’ and ‘skin colour.’ This terminological practice makes it difficult to verbalize and recognize systemic racial discrimination as such. One scenario is where people of colour on grounds of their race, and not their ethnicity, nationality or minority status per se, are among the most discriminated in various areas of society across the EU; and that among people of colour in the EU, people of African descent and Roma are especially discriminated against.

Regarding the premise that racism and racial discrimination are based on false biological assumptions about ‘race,’ this understanding of racism became the preoccupation of European antiracism after WWII—so much so that since then ‘antiracism’ oftentimes has become tantamount to ‘antiracialism’ (i.e., rejecting beliefs (i) and (ii) above). This sort of racism and its racialism/race-thinking had evolved during the Enlightenment period to become a part of mainstream biology, anthropology, philosophy, history, social and cultural life. During the 19<sup>th</sup> Century this became a widespread ‘common sense’ belief among Europeans and their descendants in the colonies and former colonies in the Americas, Africa, Asia and Pacific. As such it was routinely used to justify the rule of Europeans (‘white people’) and the subjugation of the rest of the world (‘people of colour’).<sup>45</sup>

After WWII the term racism became widely used to describe the ideology of Nazism—which was seen as quintessentially based on above beliefs (i), (ii) and (iii). Therefore, even rejecting the term ‘race’ itself and the meanings that had been given to it became central to the antiracism of European states. Much of the antiracism of European states post-WWII has been premised on the assumption that racism is based unfounded beliefs about ‘race’; that these beliefs can be eliminated by rational persuasion, public education, and social, legal and political norms that reject ‘race’ (and beliefs in biologically distinct psychobiological races); that ‘race’ has a proven track record of being a

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<sup>44</sup> Cf. Michael McEachrane, ‘There’s a White Elephant in the Room: Equality and Race in (Northern) Europe’ in Michael McEachrane (ed.), *Afro-Nordic Landscapes: Equality and Race in Northern Europe* (Routledge, 2014), 94-99.

<sup>45</sup> E.g. Charles W. Mills, ‘The Chronopolitics of Racial Time’ (2020) 29 *Time & Society* 297.

dangerous fiction, and that referring to it may perpetuate beliefs in its reality.<sup>46</sup> For instance, it is for this reason that the term ‘race’ has been expunged from Swedish and German law, and the preamble of the Race Equality Directive states that:

The European Union rejects theories which attempt to determine the existence of separate human races. The use of the term ‘racial origin’ in this Directive does not imply an acceptance of such theories.<sup>47</sup>

However, this understanding of race and racism misconstrues and underestimates the many ways in which ‘race’ may factor in our language, beliefs, emotions, perceptions, attitudes, behaviours, and social lives. First, in everyday parlance, psychological and social life as well as legal and political discourse, ‘race’ may refer to and single out variations in physical features linked with geographic ancestries—in ways that do not presume beliefs (i) and (ii) above.<sup>48</sup> Strictly speaking, ‘race’ may lack biological, physical, and geographic distinction; and be biologically, physically, and geographically continuous and overlapping. Still—despite any race-biological connotations that it may have and however strong they may be—‘race’ may be used to roughly refer to socially salient distinctions in physical features and geographic ancestries. These distinctions may be roughly singled out by such terms as ‘White’, ‘Non-European’, ‘East Asian’, ‘South Asian’, ‘Black’, ‘person of African descent’, ‘Middle Eastern’, ‘Arab’, ‘people of colour’ and ‘Indigenous American’.

Second, neither need interpersonal, institutional or systemic racial discrimination, bias, prejudice and more, be premised on ‘racialism’ (i.e., beliefs (i) and (ii) above). Stereotypical views or negative ‘outgroup’ sentiments need not hinge on beliefs in discrete psychobiological populations—but may, for instance, be more associative in how they link cultural traits, identification, familiarity, belonging and/or social status with race.<sup>49</sup> On the whole, people may discriminate on the basis of ‘race’ (i.e., rough variations in physical features linked to geographic ancestries) while holding no particular or less certain beliefs about any innate connections between race, culture and behaviour. For example, without believing in the existence of discrete human races and innate racial differences in psychology, a person may:

- Find that people of colour in general have alien and inferior mores and therefore discriminate against them—say, in situations of hiring, professional collaboration, or promotion;

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<sup>46</sup> See, e.g., David Theo Goldberg, *The Threat of Race: Reflections on Racial Neoliberalism* (Blackwell Publishing 2009).

<sup>47</sup> Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin [2000] L180/22, Preamble, para. 6.

<sup>48</sup> Michael O. Hardimon, ‘Minimalist Biological Race’ in Naomi Zack (ed), *The Oxford Handbook of Philosophy and Race* (Oxford UP 2017); Michael O. Hardimon, *Rethinking Race: The Case for Deflationary Realism* (Harvard University Press 2017).

<sup>49</sup> Mary E. Kite and Bernard E. Whitley, Jr. (eds), *Psychology of Prejudice and Discrimination*. Third Edition (Routledge 2016); Todd D. Nelson (ed.), *Handbook of Prejudice, Stereotyping and Discrimination* (Psychology Press 2016).

- Have sexual preferences based on ‘racial’ differences in physical appearance (such as skin colour, hair texture and facial features);
- Have romantic preferences partly based on the social status or positions of various ‘races,’ their social acceptance among friends, family and in society;
- Prefer friends of the same ‘race’ because of a sense of identification, and their already ‘racially’ homogenous friends and networks;
- Prefer colleagues at work or neighbors at home to be of their own ‘race’ for a sense of familiarity, ease and belonging; or
- Prefer to send their kids to schools where the majority of students are ‘white’ because they associate this with high educational achievement.

None of these examples presume (beliefs in) either biologically discrete ‘races’ or that these have distinct innate psychological characteristics.

In short, confining racism to racist ideology—as European states sometimes do—will greatly miss the mark in understanding racial discrimination, especially systemic racial discrimination. For instance, routine behaviours can be racial albeit not based on racialism, while having large accumulative effects on equality of dignity, rights, and non-discrimination in a society. In addition, this will confine racism to individual ‘racists’ (who hold racist beliefs) and miss many other forms of race-based behaviours with discriminating outcomes—not to mention non-race-based behaviours with racially discriminating outcomes—or racially discriminating social and cultural norms, institutions, laws and policies.<sup>50</sup>

Moreover—and, arguably, most importantly—reducing racism to misguided beliefs in the existence of discrete, psychobiological ‘races,’ may lead to forgone conclusions that the EU is ‘post-racial’ (since it widely rejects ‘race’ as a quasi-biological category), and deprive us of a precise language to describe, recognize and address systemic racial discrimination as such.

#### **4.2 Racism as Discriminatory Acts**

A related view of racism and racial discrimination—including, racial, ethnic and related forms of discrimination—is that it has to do with racist acts, behaviours, prejudice, beliefs, stereotypes, attitudes and/or sentiments. Here is an example of this view from the recent EU anti-racism action plan 2020-2025:

Racism comes in different forms. Overt expressions of individual racism and racial discrimination are the most obvious. All too often, racial or ethnic origin is used as a ground to discriminate – the COVID-19 pandemic and the aftermath of terrorist attacks are just the most recent cases where blame has been unjustly directed at people with a minority racial or ethnic background. People of Asian and African descent, Muslims, Jewish and Roma people have all suffered from intolerance. But other, less explicit forms of racism and racial discrimination, such as those based on unconscious bias, can be equally damaging. Racist and discriminatory behaviours can be embedded in social, financial and political institutions, impacting on the

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<sup>50</sup> Cf. e.g., Eduardo Bonilla-Silva, ‘Rethinking Racism: Toward a Structural Interpretation’ (1996) 62 *Am.Soc.Rev.* 465.

levers of power and on policy-making. This structural racism perpetuates the barriers placed in the way of citizens solely due to their racial or ethnic origin. Every day, people affected by racism can feel its impact on their access to jobs, healthcare, housing, financing or education, as well as cases of violence.<sup>51</sup>

Here racism is described in terms of (i) overt expressions of individual racism and racial discrimination, (ii) less explicit forms of racism and racial discrimination such as those based on unconscious bias, and (iii) structural racism understood as racist and discriminatory behaviours that can be embedded in social, financial and political institutions. What is in common to these three forms of racism is that they describe it as a matter of acts and behaviours (founded, one can only assume, in prejudice, beliefs, stereotypes, attitudes and/or sentiments). Hence, here racism and racial discrimination is reduced to racist acts and behaviours. There are at least two broad issues with such reductions.

First, even if we keep with the view that racism and racial discrimination is a matter of acts and behaviours—this will likely miss routine acts and behaviours that, while not clearly ‘racist,’ may have major cumulative effects on the (un)equal enjoyment of (human) rights among racial and ethnic groups. For example, the kind of racial preferences described in the previous section regarding sexual attraction, romantic bonding, friends, family, housing and education. Not only may it be difficult to conceptualize all forms of racial (or ethnic) preferences in terms of ‘racism’ and ‘racial discrimination,’ many of them may belong to the ‘private’ as opposed to the ‘public’ sphere, and therefore, not be subject to the sort of antidiscrimination law prescribed by the Race Equality Directive. Furthermore, many acts and behaviours may not even be a matter of racial (and/or ethnic) preferences, but still have major cumulative effects on the (un)equal enjoyment of (human) rights among racial (and/or ethnic) groups. For example, politicians and other members of society can exacerbate and in other ways contribute to racism and racial discrimination by being complicit with it, not recognizing and countering it, and acting as if it is not a broad social issue across areas of society.

Second, reducing racism and racial discrimination to acts and behaviour overlooks ‘systemic racism’ (as a possibility, not to mention as a fact if it is a fact). It misses the many ways in which society itself, its social organization, and conditions, may be racist (i.e., in the sense of being racially and/or ethnically hierarchical or stratified). For example, that there is a hierarchical relationship among racial and/or ethnic groups in society regarding, e.g.,

- Housing, education and employment (including, segregation);
- Who holds the most decision-making power, influence and privilege regarding, e.g., employment, housing, education, health care, and organizational leadership;
- Whose interests are politically represented;

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<sup>51</sup> Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, A Union of Equality : EU anti-racism action plan 2020-2025 [2020] COM/2020/565 final, 1-2.

- Who is most vulnerable to, and affected by, individual acts of discrimination;<sup>52</sup>
- Who has the most resources (that will allow them to more fully access and enjoy rights);
- Who is the most represented, and more positively represented, in media and culture; and
- Who is seen as belonging to the ‘nation’ and/or Europe and who is not.

Although the recognition of the EU antiracism action plan 2020-2025 of ‘structural racism’ is a step forward from merely recognizing individual acts of racial (and/or ethnic) discrimination—to fully recognize all forms of racial discrimination, a further step is needed towards including ‘systemic racism.’ For instance, rather than, as the action plan does,

- Refer to racial (and/or ethnic) housing segregation as a result of (structural) racism—understand it as itself a matter of racism and racial discrimination (i.e., as part of a racist/racially discriminatory social order);<sup>53</sup>
- Merely refer to racism against particular racial, ethnic or religious groups such as people of African or Asian descent, Roma, Jewish and Muslims—unambiguously refer to possible patterns of racial discrimination as such (e.g., against ‘people of colour’) across areas of society and across Europe; and<sup>54</sup>
- Merely refer to colonialism and enslavement as historical roots of prejudice and stereotypes—understand them as shaping systemic racism in Europe as well as in its (former) colonies (and in the relationships among states for that matter).<sup>55</sup>

### 4.3 *Racism as Exceptional*

As previously argued, the concept of discrimination in the Race Equality Directive—in terms of equal treatment, individual acts of discrimination by individual actors for which individual actors are held accountable (typically, after a conviction in a court of law)—suits a society where racial discrimination is rare or exceptional. However, it does little to recognize and address systemic racism and a baseline social structure or order of racial (and/or ethnic) discrimination.

Overall, understanding racism and racial discrimination as rare or exceptional is antithetical to recognizing systemic racism. Yet, there has long been a strong trend in Europe towards understanding racism and racial discrimination as rare and exceptional occurrences in European societies.<sup>56</sup> For example, in the

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<sup>52</sup> Cf. Philomena Essed, *Understanding Everyday Racism: An Interdisciplinary Theory* (Sage Publications 1991).

<sup>53</sup> Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions A Union of Equality : EU anti-racism action plan 2020-2025 [2020] COM/2020/565 final, 12-13.

<sup>54</sup> *Ibid.*, at, e.g., 1.

<sup>55</sup> *Ibid.*, at 14.

<sup>56</sup> Cf., e.g., Michael McEachrane (ed.), *Afro-Nordic Landscapes: Equality and Race in Northern Europe* (Routledge, 2014); Michael McEachrane, ‘Universal Human Rights and the Coloniality of Race in Sweden’ (2018) 19 *Human Rights Review* 471.



conversations at the EU during the 1990s, leading up to the development and adoption of the Race Equality Directive, there were prominent voices against it, arguing that it was not needed as racial discrimination was not a prevalent social issue. Additionally, among the strong arguments for the Race Equality Directive was a concern that immigration had led to a rise of xenophobia and far-right nationalism.<sup>57</sup> The two most prominent EU policies against racism and racial discrimination, the Race Equality Directive and the 2008 European Council Framework Decision on combating certain forms and expressions of racism and xenophobia by means of criminal law, both treat racism as rare or exceptional acts or behaviours.<sup>58</sup> For example, the Framework Decision focuses on hate speech and describes “racism and xenophobia” as “a threat against groups of persons which are the target of such behaviour.”<sup>59</sup>

It may be fair to say that, at the EU level since the 1990s, the dominant focus on racism in Europe has been that it is about individual acts, and a rise in xenophobia, far-right nationalism, Neo-Nazism, hate speech and hate crimes as a response to increasing immigration to European countries.<sup>60</sup> This is a view of racism that can conveniently be coupled with a view of the EU and European States as, in its mainstream, thoroughly Liberal Democratic, principally and practically based on equal human dignity and rights. As the preamble of the *Charter of Fundamental Rights of the European Union* puts it, “Conscious of its spiritual and moral heritage, the Union is founded on the indivisible, universal values of human dignity, freedom, equality and solidarity; it is based on the principles of democracy and the rule of law.”<sup>61</sup> This is a view of racism and the EU that does not factor in, nor hold European States and the Union accountable for, any possible histories, legacies or present conditions of having perpetuated systemic racism. For example, colonial histories and legacies of de jure and de facto racial discrimination, the European Union as partly motivated by and serving to secure global economic and political interests rooted in such histories, how the EU and its Member States may reproduce racial hierarchy, or any mainstream prevalence of *racial/white European* identifications, historical narratives, nationhoods or social contracts.<sup>62</sup>

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<sup>57</sup> Terri E. Givens and Rhonda Evans Case, *Legislating Equality: The Politics of Antidiscrimination Policy in Europe* (Oxford UP, 2014). Silvia Rodriguez Maeso, ‘Europe and the Narrative of the ‘True Racist’: (Un-)Thinking Anti-Discrimination Law Through Race’ (2018) 8 *Oñati Socio-Legal Series* 845.

<sup>58</sup> Council Framework Decision 2008/913/JHA of 28 November 2008 on combating certain forms and expressions of racism and xenophobia by means of criminal law [2008] OJ L 328/55.

<sup>59</sup> *Ibid.*, at Preamble.

<sup>60</sup> Silvia Rodriguez Maeso and Marta Araújo, ‘The (Im)plausibility of Racism in Europe: Policy Frameworks on Discrimination and Integration’ (2017) 51 *Patterns of Prejudice* 26; Mark Bell, *Racism and Equality in the European Union* (Oxford UP, 2008)

<sup>61</sup> Charter of Fundamental Rights of the European Union [2012] OJ C 326/391

<sup>62</sup> Cf. e.g. Eduardo Bonilla-Silva, ‘“This is a White Country”: The Racial Ideology of the Western Nations of the World-System’ (2000) 70 *Sociological Inquiry* 188; Silvia Rodriguez Maeso, ‘Europe and the Narrative of the “True Racist”: (Un-)thinking Anti-Discrimination Law Through Race’ (2018) 8 *Oñati Socio-legal Series* 845; Carolin Müller, ‘Anti-Racism in Europe: An Intersectional Approach to the Discourse of Empowerment Through the EU Anti-Racism Action Plan 2020-2025’ (2021) 10 *Social Sciences* 1; Peo Hansen and Stefan

In general, it seems fair to say, across the EU the trend has long been to reduce racism and racial discrimination to occasional, individual and isolated acts, perpetrated by individual ‘racists.’ It is a view in which mainstream Europe is understood as racially and ethnically equal, democratic, liberal, open and tolerant. A Europe to which racism and racial discrimination is an occasional aberration and systemic racism does not apply.

## 5. In Conclusion—What will it take to Recognize Systemic Racism in the EU and the Nordic Countries?

There have been a few developments at the EU level, and in Sweden, in recent years that could be initial steps towards mainstreaming recognition and address of systemic racism. For instance, Article 1 of the *European Parliament Resolution on the Fundamental Rights of People of African Descent* (2019):

Calls on the Member States and the EU institutions to recognise that people of African descent are subjected to racism, discrimination and xenophobia in particular, and to the unequal enjoyment of human and fundamental rights in general, amounting to structural racism, and that they are entitled to protection from these inequities both as individuals and as a group, including positive measures for the promotion and the full and equal enjoyment of their rights.<sup>63</sup>

What this article refers to as ‘structural racism’ could be interpreted in terms of what in this chapter is referred to as ‘systemic racism.’ Similarly, the *European Parliament Resolution on the Anti-racism Protests Following the Death of George Floyd* (2020) refers to ‘structural racism’ eleven times and states in the preamble that:

[S]tructural racism is also mirrored in socio-economic inequality and poverty, and these factors interact and reinforce each other; whereas this is particularly visible in the labour market, where the most precarious workers are people of colour, but also in housing and in education; whereas actions for equality and against structural racism must go hand in hand and be addressed systematically.<sup>64</sup>

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Jonsson, *Eurafrica: The Untold History of European Integration and Colonialism* (Bloomsbury Academic, 2014); Barnor Hesse, ‘Racialized Modernity: An Analytics of White Modernity’ (2007) 30 *Ethnic and Racial Studies* 643; Charles W. Mills, *The Racial Contract* (Cornell UP, 1997); Mathias Möschel, ‘Race in Mainland European Legal Analysis: Towards a European Critical Race Theory’ (2011) 34 *Ethnic and Racial Studies* 1648.

<sup>63</sup> European Parliament resolution of 26 March 2019 on fundamental rights of people of African descent in Europe [2019] 2018/2899(RSP). I helped draft this article. As of today, 8 November 2021, this resolution is yet to be implemented. The new EU action-plan against racism does not include any targeted measures for people of African descent.

<sup>64</sup> European Parliament resolution of 19 June 2020 on the anti-racism protests following the death of George Floyd [2020] 2020/2685 (RSP), [https://www.europarl.europa.eu/doceo/document/TA-9-2020-0173\\_EN.html](https://www.europarl.europa.eu/doceo/document/TA-9-2020-0173_EN.html) [accessed 8 November 2021].

Albeit the resolution refers to “structural racism and inequalities” as if they must be two different phenomena,<sup>65</sup> in a charitable interpretation, the resolution calls on Member States to recognise and address systemic racism.

Although the discrimination surveys of the European Agency for Fundamental Rights (FRA) do not use clear and unambiguous language regarding “racial discrimination” as such—they point to that people with a non-European background (i.e. ‘people of colour’) belong to the most discriminated against, across areas of society, and across the EU. For example, the *Second European Union Minority and Discrimination Survey* (MIDISII), shows that people of colour in general, and people of African descent and Roma in particular, regularly experience discrimination.<sup>66</sup> The report, *Being Black in the EU* (2018), points to that across the EU people of African descent regularly feel discriminated in many areas of life. For example, a majority of people of African descent in Finland (63%), and 4-out-of-10 in Sweden and Denmark, had experienced harassment motivated by racism during the past five years.<sup>67</sup>

In the FRA report, *Equality in the EU 20 Years on From the Initial Implementation of the Equality Directives* (2021), FRA expresses “concern that phenomena of systemic or structural discrimination affect equal treatment,” and states that,

Data collected by FRA reveal evidence of structural discrimination across Member States, as illustrated by the findings on Roma and people of African descent in EU-MIDIS II and the Roma and Travellers Survey. These results indicate that people who experience some of the highest rates of discrimination also tend to face high and above average rates of material deprivation.<sup>68</sup>

Even if such initiatives are steps towards some recognition of systemic racism—they do not represent the sort of legal, political, and public paradigm shift that is needed to fully recognise and address systemic racism.

From a legal point of view, the Race Equality Directive and antidiscrimination laws across the EU need to be superseded or at least complemented by antidiscrimination law that includes:

1. A concept of discrimination that is not limited to the concept of equal treatment, direct and indirect discrimination—as defined by the Race Equality Directive—but encompasses *equal (de facto) access to, enjoyment*

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<sup>65</sup> Ibid., at Articles 4 and 5.

<sup>66</sup> European Union Agency for Fundamental Rights (FRA), *Second European Union Minority and Discrimination Survey: Main Results* (Publications Office of the European Union, 2017), [https://fra.europa.eu/sites/default/files/fra\\_uploads/fra-2017-eu-midis-ii-main-results\\_en.pdf](https://fra.europa.eu/sites/default/files/fra_uploads/fra-2017-eu-midis-ii-main-results_en.pdf) [accessed 5 November, 2021].

<sup>67</sup> European Union Agency for Fundamental Rights (FRA), *Second European Union Minority and Discrimination Survey: Being Black in the EU* (Publications Office of the European Union, 2018), 15, [https://fra.europa.eu/sites/default/files/fra\\_uploads/fra-2018-being-black-in-the-eu\\_en.pdf](https://fra.europa.eu/sites/default/files/fra_uploads/fra-2018-being-black-in-the-eu_en.pdf) [accessed 5 November, 2021].

<sup>68</sup> European Union Agency for Fundamental Rights (FRA), *Equality in the EU 20 Years on From the Initial Implementation of the Equality Directives* (Publication Office of the European Union, 2021), 11, <https://fra.europa.eu/en/publication/2021/fra-opinion-eu-equality-20-years> [accessed 8 November 2021].

- and exercise of (human) rights* (including, *social conditions* of such equality);
2. A concept of discrimination that encompasses any possible racial, ethnic and other related *group differences, inequities, stratification* or *hierarchy* in (de facto) access to, enjoyment and exercise of (human) rights;
  3. A concept of discrimination that *holds states, governments, state institutions and policy makers responsible and accountable* for recognising, monitoring and eliminating all forms of racial, ethnic and other related kinds of discrimination;
  4. A concept of discrimination whereby states, governments, state institutions and policy makers are obliged to eliminate all forms of racial, ethnic and other related kinds of discrimination across all areas of society, and to provide *special or positive measures* for members of racial, ethnic and other related groups that do not have equal (de facto) access to, enjoyment or exercise of (human) rights (to ensure their equal de facto access to, enjoyment or exercise of (human) rights);
  5. A broad material scope that includes all areas of society; and
  6. Provisions for the establishment of mechanisms for the implementation of this expanded antidiscrimination law—for instance, legal processes, periodical policy reviews, monitoring of implementation by equality bodies and national human rights institutions, and comprehensive collection of equality data.

From a broad political and public perspective, among the factors that could help bring about a shift towards fully recognising and addressing systemic racism are:

1. Broad, mainstream recognition that racism, racial, ethnic and related forms of discrimination are broader than merely a matter of acts, behaviours, prejudice, beliefs, stereotypes, attitudes and/or sentiments—and that the social conditions, organization, structure or makeup of society can be racist or discriminatory too;<sup>69</sup>
2. Broad, mainstream establishment of discourses and policy making that unambiguously recognises that society as a social system privileges the rights of some members on grounds of race, ethnicity and related forms of discrimination;
3. That ‘race’ and ‘racial discrimination’ are widely and unambiguously spoken of, recognised and addressed as such;
4. Broad, mainstream recognition that Europe does not merely have a history of mainstreaming equal rights, but also a history of mainstreaming racial discrimination, for instance, in practices of colonialism, and the forging of national and continental identities;
5. Broad, mainstream recognition that a past of systemic racial discrimination by European states may have been allowed to linger into the present without ever being effectively and resolutely recognised, addressed or redressed as such. For

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<sup>69</sup> Here it may be noted that the new EU Anti-Racism Action Plan 2020-2025 does include some equality mainstreaming ambitions on grounds of racial and ethnic origin in EU law- and policymaking “ensuring that EU and national policies serve the interests of all people, irrespective of their racial or ethnic origin” (19). However, this will mean little unless it is legislated. Furthermore, the 1998 EU Anti-Racism Action Plan also included similar equality mainstreaming ambitions, which was never translated into EU law- and policymaking. Cf. Opinion of the Committee of the Regions on the ‘European Action Plan Against Racism’ cdr 369/98 FIN [1999] OJ C 198; Mark Bell, *Racism and Equality in the European Union* (Oxford UP, 2008), 83.

example, the privileging of white Europeans and the disprivileging or subjugation of people of colour, or the negative social and international effects of European colonialism, enslavement, native genocide and suppression. While being mindful that, as is being noted by the above-mentioned EP resolution on the fundamental rights of people of African descent as well as the report from the UN High Commissioner for Human Rights which was mentioned in the introduction, this may call for corrective measures—including, reparations and other forms of redress.<sup>70</sup>

6. Broad, mainstream discourses regarding how European states can become social systems that in their domestic, regional and international affairs are firmly based on equality of human dignity, rights and non-discrimination irrespective of race, colour, descent, ethnic or national origin.<sup>71</sup>

Overall, the expanded understanding, recognition and address of systemic racism at the EU level—as outlined in this chapter—is probably needed for a similar change in those Nordic countries that are members of the EU, that is, Denmark, Finland and Sweden. Firstly, since these countries are unlikely to want to make any major changes in their antidiscrimination laws and policies that are not aligned with EU antidiscrimination laws and policies. Secondly, since these are ‘dualistic states’ to which international law does not directly apply unless it has been implemented in domestic law, the provisions of the ICERD are not directly legally applicable or relevant to these countries.<sup>72</sup>

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<sup>70</sup> European Parliament resolution of 26 March 2019 on fundamental rights of people of African descent in Europe [2019] 2018/2899(RSP), at Articles 5-8; Promotion and protection of the human rights and fundamental freedoms of Africans and people of African descent against excessive use of force and other human rights violations by law enforcement officers. Report of the United Nations High Commissioner for Human Rights [2021] A/HRC/47/53.

<sup>71</sup> Cf. Michael McEachrane, ‘There’s a White Elephant in the Room: Equality and Race in (Northern) Europe’ in Michael McEachrane (ed.), *Afro-Nordic Landscapes: Equality and Race in Northern Europe* (Routledge, 2014).

<sup>72</sup> Cf., e.g., Marlene Wind, ‘Do Scandinavians Care about International Law? A Study of Scandinavian Judges’ Citation Practice to International Law and Courts’ (2016) 85 *Nordic Journal of International Law* 281.



# **Protected Grounds**

