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**Title**

***Race, Law and Europe***

**Abstracts**

**Iyiola SOLANKE (University of Leeds), "The evolution of anti-racial discrimination law in Europe: a socio-legal approach"**

Germany introduced a constitutional prohibition of racial discrimination in 1945 and the UK created its first Race Relations Act in 1965. Yet by 1976, the UK had far overtaken Germany in its legal framework for protection from racial discrimination. Why is this? In this presentation I will try to answer this question through a comparative historical socio-legal analysis of the creation of anti-discrimination laws in the UK and Germany. Drawing from my book, *The Evolution of Anti-Racial Discrimination Law* (Routledge 2009), I will look at the role played by different forms of social action – right wing violence, social investigations, lobbying and campaigning – in the emergence of these laws and try to explain why such action did or did not have any impact on law-makers.

**Mathias MOSCHEL (Central European University), "Post-racialism : divergences and convergences between the US and Europe"**

In 2010, Sumi Cho published a seminal piece entitled "Post-Racialism" in which she analyses the post-racial turn which the United States have taken around or after President Obama's election. She identifies a series of elements which define post-racialism and how it constitutes a new iteration of American colorblindness. In this presentation, I will compare and contrast her analyses with the continental European context. The main argument is that Europe likes to see itself as post-racial since after World War II (without ever having something coming close to a Black President) which has a series of negative consequences for racial minorities. The presentation will be (partly) based on an introductory note to the French translation of Sumi Cho's article in the recent book in French on Critical Race Theory published with Dalloz and edited by Hourya Bentouhami and myself.

**Discussant**

Julie Ringelheim (UC Louvain)

*NB : ce compte-rendu de séminaire a été rédigé à partir des notes manuscrites, nécessairement imparfaites, prises par Juliette Galonnier lors de la séance. Il est possible que des erreurs ou des approximations s'y soient glissées.*

*NB: these seminar proceedings derive from the hand-written notes taken by Juliette Galonnier during the session. Imprecisions and mistakes may have slipped into the text.*

## **Notes taken by Juliette Galonnier**

### **Iyiola Solanke, "The evolution of anti-racial discrimination law in Europe: a socio-legal approach"**

In this presentation, I will look at the UK and Germany, and I will be interested in hearing from you what the situation is like in France. This presentation is based on a book I wrote ten years ago, which also included an examination of the EU context. I focus on the legal regulation of racial discrimination.

Germany was quite progressive in this area right after the war. In the UK, for a long time it was believed that racial discrimination in the workplace should not be a concern for the law. In 1951 and 1966, two MPs introduced private members bills but they were told that this was the wrong way of tackling the problem: law was not to be involved in this matter. Things changed after the UN started taking action with the passing of ICERD in 1965. That was a 20-year process and there were attempts to prevent the Convention from going too far.

It is after the ICERD that we see a different approach being taken by Germany and the UK. Both countries ratified the ICERD and demonstrated good will towards the ICERD, which was a good thing to do in international terms, but the two countries implemented it differently.

In the UK, in 1965, the first Race Relations Act was passed. It did not go any further than the ICERD. The attributes of discrimination, the sphere of action, etc. were the same. It is only in 1968 that the issue of employment was introduced.

West Germany provided a very different response. It signed the ICERD in 1969 but explicitly rejected any legal action. In 1971, the SPD made many attempts to strengthen the legal framework in line with the ICERD but all these attempts were rejected. Issues of discrimination existed but the government was very much of the opinion that law was not the right way to fight against this.

I want to look at the impact that "social action" had in these two different national contexts. I identify three types of social action:

- right-wing activism, or what we may call "bad civil society", anti-social movements
- research, social investigation
- campaigns

I am looking at the impact of social action on two kinds of evolution:

- recognition: when racial discrimination becomes accepted as an issue of law
- definition: when we have a clear insertion in law of a prohibition of racial discrimination

### Right-wing activism

In the UK, in 1958, there were terrible riots in London and Nottingham. There was a lot of violence. It shattered the myth of Britain as a country where Black citizens from the Commonwealth would be treated as equals. It broke the idea of trust. Yet, there was also a recognition that Black people were citizens and that they were not going to go back home. This is when politicians thought about introducing a law.

Another event shook the country. In 1964, during the by-election, Peter Griffiths, a conservative MP run for election in Smethwick. His slogan was "if you want a n\*\*\* for neighbor, vote liberal or labour". He won. Malcolm X and Martin Luther King both visited the city afterwards. That created social action. The by-election also shook up the Labour party. Until then, the Labour party was as ambivalent as the Conservative party about racial discrimination. But this forced them to take position. They wrote a pledge, the "General election promise" of 1965, which included a reference to these issues. So we can say that bad civil society had a direct impact on anti-discrimination law. Without it, the Labour party would have remained ambivalent.

In Germany, there was also a lot of violence in the post-reunification period. Right-wing mobs were attacking refugees but also settled foreign nationals. There were 400 rioters and several dead in the 1990s. There were similar events in the east and the west. But the response to such violence was very different. Helmut Kohl's response was to say that the violence was due to the presence of too many foreigners in Germany. "This is a reasonable response from a despairing people". The only legal response was to introduce stronger restrictions to the right to asylum. They assessed the problem as being one of presence, rather than racism.

### Research, investigation

In the UK, prior to 1964, there was no research on these issues. The first investigation was conducted in 1964: the Rose report, on color and citizenship. The purpose of the report was to learn from the experiences of Black UK citizens and collect evidence for policy makers. In 1966, the Political and Economic Planning (PEP) published a report, remembered as the Daniel's report that focused on the sphere of employment and provided hard evidence. It was used to justify the expansion of anti-discrimination laws. The report provided graphic results, through situation tests: an English person, a white Polish person and a Black person were sent to the same job or house application. The Black person was discriminated against twice as much as the Polish person. The report showed very convincingly that the problem was not citizenship but skin color. This was a key turning point. In 1966, home secretary Roy Jenkins declared that the law now needs to protect Black citizens born in the UK. "If we don't address this now, we are storing problems for ourselves". The UK always looked more across the Atlantic than across the channel and were looking at the situation in the US, which they wanted to avoid.

In 1974, another PEP report highlighted the existence of not simply overt discrimination but also covert discrimination. It referenced an international study conducted in the US, in which lawyers talked to officials about how to deal with indirect discrimination. Roy Jenkins brought this notion home to be inserted in the Race Relations Act. The notion was first inserted in the Sex Discrimination Act of 1975 and then it was transferred to the Race Relations Act in 1976. Such was the impact of research in the UK.

In Germany, the Black community is not as large and it is not seen as part of German society. A large number of Black people were the children of US and French soldiers from Outre Mer

who were stationed in Germany. Some also hail from Namibia. These children were examined in the 1950s by anthropologists who believed in eugenic interpretations. They were not concerned with social problems linked to integration but wanted to show that these Black children were deficient. The research that was conducted was therefore inherently racist. There was also research conducted by the Evangelical Church, which was more sociological. This research focused on school children and the problems and stigmas associated with skin color, with being born out of wedlock and the fact that these children reminded German society of military defeat. The report recommended international action (UN convention), the creation of an agency for Black Affairs, increased education, and the promotion of Black role models. But the government response was to say that these children should rather be sent to places where there are more people who look like them, namely Africa or North America.

### Campaigns

In the UK, campaigns for anti-discrimination law were led by a combination of lawyers and activists who had access to the government. There was also a media campaign, especially with the Daily Mail, which played a huge role in obtaining justice for Stephen Lawrence's death. In 1997, home secretary Jack Straw launched a public inquiry, which gave rise to a definition of "institutional racism".

In Germany, it has proven harder to mobilize people on these issues, as demonstrated by a recent debate. In 2005, a zoo decided to have an "African village" exhibit, which created discomfort and summoned images of the "Völkerschau" (people's show, human zoo) from the colonial period. There was some debate around it but not much came out of it.

So why do we see such different responses to similar kind of events in the UK and Germany? This can be explained by differences in the political opportunity structure (Germany is based on corporatism and the UK on pluralism, which implies that the government is more open speaking to social groups). It can also be explained by differences in the models of integration (Germany is based on assimilation, the UK on multiculturalism). Finally, we need to take into account the status and the belonging of the affected groups: in the UK, those affected were citizens and they demanded a right to belong; in Germany, they were "gastarbeiter" (guest workers); and even the Black Germans were seen as foreign.

### **Mathias Moschel, "Post-racialism : divergences and convergences between the US and Europe"**

In this presentation, I will talk about post-racialism in continental Europe. My talk is based on a collective volume I co-edited with Hourya Bentouhami, which aimed at translating some of the key writings of Critical Race Theory into French. Every translation came with a short introduction. The idea was not to simply provide a linguistic translation but also offer avenues for a conceptual translation: how do these concepts transfer to the French and European contexts?

In this book, we introduced a piece by Sumi Cho on post-racialism in the post-Obama context. Our question was: how does this piece translate to the European reality?

In her 2010 article, Sumi Cho identified 4 elements of post-racialism:

- "racial progress": the idea that we have come all the way from abolishing slavery and segregation and that now we have an African-American president. This argument of

racial progress was found in case law for quite some time but gained new saliency after the election of Obama

- “race-neutral universalism”: the emphasis on the universalist appeal of not talking about race. It refers to the idea that it is more neutral and unifying not to mention race.
- “moral equivalence”: the idea that using race as active exclusion and using race as a means to integrate people and fight against discrimination are morally and legally the same. It puts things on the same plane.
- “distancing move”: colorblindness already existed in American but the distancing move adds another level of political posture. Liberals who were uncomfortable with affirmative action and critical race theory could now distance themselves from colorblind conservatives. Post-racialism speaks to young people. Post-racialism is the new cool. It is a means to differentiate oneself politically from the fringes on both the left and the right.

=> How does this apply to Europe? How far does Europe want to see itself as post-racial? What are the divergences and convergences with the US context?

The idea of “racial progress” is very much present in mainland Europe: after World War 2, there were the Nuremberg trials, restitution programs for victims, the UNESCO declaration on race, equality provisions in national constitutions, the creation of international instruments (the ICERD, the European convention on human rights, the EU Race directive, etc.). All this was done after WW2. This helps promoting the idea that “all this was done, so let’s not talk about race anymore”.

Regarding “race-neutral universalism”, there is the consistent idea in Europe that race is about the Holocaust, that talking about race is divisive and that race invites identity politics. These arguments made in the US are similar in the European context. This manifests itself through the refusal of ethnic/racial statistics, and attempt to eliminate the word “race” in some national constitutions. There is an active euphemization, an active erasure of the word “race”. There are no “ethnic and racial studies” departments in Europe, so there has been no backlash against them (although there is currently a backlash against Gender studies).

“Moral equivalence” is apparent in Europe through the unconstitutionality of race-conscious remedial measures. In France, the Conseil constitutionnel also rendered a decision against pre-remedial measures. It promoted the idea that using race in the remedial stage is just as bad as using it for active exclusion. This moral equivalence is also visible in the use of the expression “anti-white racism”: this is very clear in France and Germany. The discourse framing in most cases of anti-French or anti-white racism is telling. One could argue that this is actually worse than moral equivalence: because it leads to rejecting the framing of racism from majority to minority but endorsing that reading in attacks against the majority.

So regarding the first three criteria offered by Sumi Cho, there are similarities between the European and the US context. The fourth criterion (“distancing move”) is where we find differences. In Europe, there is the idea that we did not have the same type of brutal racism as in the US: there is a geographical removal of racism. There is also a distancing move from the colonial period and a historical removal of racism, with the idea that racism only existed as anti-Semitism in Germany. There is also a distancing move from Islamophobia and anti-Gypsyism. In 2017, France finally removed the law on the “nomades”. It said that identification was not to be based on ethnic or racial criteria but was to be made on the basis of whether

people were traveling or not. As a consequence of all these different factors, there is limited recognition of race discrimination by courts and there is limited recognition of cultural racism in general. If only anti-Semitism can be defined as racism, then other forms of hostility do not fall under the scope of racism.

More broadly, the Europe/US differences on race are the following:

- an exclusive focus on the Holocaust in Europe
- the absence of a strong civil rights movement in mainland Europe
- no “European Obama” to trigger the post-racial discussion. I will give only one example on this topic. For 22 years, Gaston Monnerville was the President of the Senate from 1947 to 1968. He was a Black man from Guyana. Maybe the absence of television at the time explained why it was less visible. But most people do not know that he was Black. Under the 4th Republic, there were more people of color in the Assembly. How did Monnerville navigate power and color? He talks a little bit about these issues in his autobiography. But his legacy on this topic has not been fully excavated. So we can say that in Europe, we are in a post-racial era without having had some of the key elements of the post-racial Obama era.
- the absence of ethnic or racial statistics or ethnic or racial questions in the census

I want to say a few words on very recent events as a conclusion. Trump’s election has displaced some of the misgivings of Critical Race Theory on post-racialism. It might be that the election of Obama was simply the election that confirmed the rule and that America is still in its racial era. In Europe, we need to be careful as well: in Italy, a lot of coffee products have advertisements which display stereotyped images of Black people from the colonial period. They are everywhere. These images circulate freely in daily life. In this context, can we really talk about a post-racial society? Europe likes to see itself as being post-racial but it is a heavily racialized context and reality.

### **Discussant: Julie Ringelheim**

We have two papers here that offer different viewpoints on race, discrimination and law in Europe. They are different but complementary. I have a first reaction to Mathias’ paper: to what extent is it possible to generalize an attitude toward race and racism throughout Europe? There is of course a general discourse that characterizes Europe as a whole and that distinguishes it from the US: the Nazi experience, the colonial experience, the colonial mindset and imaginary. All these things continue to influence the perception of race. But once we get into details and look at the attitudes of governments and elites, we see clear differences between European countries. And this is what Iyiola shows in her paper comparing the UK and Germany. This shows the importance of the interactions between attitudes toward race and conceptions of integration, migration (which remains an important trope that shapes conceptions of racism in Europe), policy, etc. Maybe Mathias’ analysis is too influenced by the French model?

A second set of questions pertains to the relevance of antidiscrimination law in Europe. The EU Race directive of 2000 forced all EU member states to adopt legislation. It focused on both direct and indirect discrimination, which is very ambitious. These directives created a debate in most European countries on racial discrimination. How does this evolution fit into your diagnosis? This directive was passed after there were alliances across NGOs to give the EU

the power to act against racial discrimination. There was also in Austria the formation of the first government including a far-right party. This context incited the EU to adopt this regulation. So we can say that there are some counter-trends to what Mathias is saying. The Directive is one example. There is also some interesting case law to explore, such as the case Alain Ottan vs. France: lawyer Alain Ottan was defending the father of a young man who was killed by the police. The policeman was acquitted. When asked whether he was surprised by the verdict, Ottan replied he was not surprised because the “jury was all white”. He was exposed to disciplinary sanction for saying that. He went to the Court of Human Rights and he won. So there is a continuing debate in Europe. Elites themselves are divided on these issues.

And the fact that we now have racial legislation creates other problems, such as the “racial progress” argument. This raises new questions: what can antiracist movements do now that anti-racial discrimination has been adopted? What can be the next aims?

Another set of questions has to do with the current context. Why has discourse changed between 2000 and now? There are reasons to doubt that today we would be able to adopt such a Race directive. The history of attitudes towards race is not a history of continuity but a history of moves forward and backward.

Finally, I wonder about the concept of race itself. As mentioned by Mathias, people in Europe prefer to talk about ethnicity or religion. Hence, to what extent is it a problem if the term “race” is not used? In case law and in law, judges are not always very settled when using race. Is it a problem if we use other categories, like ethnicity, which might do the job?

## **Responses**

### **Iyiola Solanke**

I do find highly problematic the idea that race could be replaced by ethnicity. These are very different things. When I experience discrimination, it is not because of my ethnicity. It is problematic if we miss what we want to address. The UK legislation covers color, race, national origin and ethnicity. So it is a composite category. If we talk about ethnicity, we are talking only about one aspect of the problem. We must be careful of not entrenching invisibility in the law. At whose expense are we not talking about race? We have to count that cost. It is a too higher cost for any polity to pay.

Why was it easier in 2000? I agree that it was easier. It would be very difficult to pass the law today. The Race directive happened in a context where there was a lot of right-wing extremist violence in Europe and negative publicity about reunification. Germany went to Brussels and told them “we have this problem and you will have it too”. Germany presented it as an all-European problem, not just a German problem. It was able to promote this issue at the EU level.

What to do once overt racial discrimination has disappeared and the law is in place? This is a real challenge. We can say that there is regression in the UK. Young black Brits do not have the language to talk about racism in the UK. Ongoing education is necessary. We also need new strategies to tackle covert racism and other expressions of race in daily life. In 2017, there was a report by trade unions, MPs, etc. saying that racial discrimination is as bad as in the 1950s because the way we tackle it focuses on individual perpetrators. This leads to expansive, time-consuming, individual litigations. The outcome is very narrow. It is not changing society. We need a broader approach.

## **Mathias Moschel**

Regarding the concept of race and its shifting to ethnicity, what harm could come from that? Would it be that bad? I think that yes, it would, because taking out a word will not eliminate the problem. The shift to ethnicity has a euphemization effect: being accused of a “racist attack” has an element of strong reprobation that disappears when talking about ethnicity.

I do not think in Europe this much progress has been made with the Race directive. If we look at the litigations that make it to the EU, they are very specific. One involves a white Russian in Germany who did not get a job because of language restrictions; one involves a woman in Bulgaria who was outraged of being associated with Roma people, etc. So the instruments are here at the highest level but the case law does not always concern the victims we had in mind when drafting the directive.

Regarding the question of whether or not we can talk broadly about a “European context”, I agree that there are elements of local context. We can mention here work by Cengiz Barskanmaz on German exceptionalism. But I believe there is also the possibility to extrapolate, at least for continental Europe.

## **Questions from the audience**

Ary Gordien: I have a question about the term “race”. In 1955, Michel Leiris talked about “homme de race blanche”, “homme de race noire”. These words were used in that sense. We need to take into account the cultural and social context when using these words today.

I also want to make a comment about the dichotomy between overseas territories and mainland territories. The Netherlands, France... also had territories with slavery. So the US dichotomy does not work so much here.

Enfin, au sujet de Gaston Monnerville, on pourrait aussi souligner le fait qu’il était racialement ambigu et n’était pas classifié comme noir. Le député Hégésippe Jean Légitimus, par contre, était souvent comparé au clown Chocolat... La dimension coloriste doit donc entrer en considération lorsque l’on parle de Monnerville. Monnerville d’ailleurs avait adopté une posture color-blind lors d’un débat avec Angela Davis en 1972 chez Bernard Pivot.

Daniel Sabbagh: Iyiola Solanke mentioned that in the UK, anti-discrimination law was first passed with regards to sex, and then it was transferred to race. This is very different from the US where every major social progress first came with regards to race and then was transferred to sex (voting rights, etc.). Here we have the opposite pattern. Is there a reason for that?

Regarding Mathias Moschel’s argument, I am still not clear regarding the difference between post-racialism and color blindness. In my view, there is no conceptual value to this difference, except the fact that people use it to differentiate themselves. I don’t see any strong qualitative difference between the two.

Finally, regarding case law, and especially the Ricci vs. DeStefano case, I disagree that this is a move towards colorblindness. It is a very technical decision. There is nothing in that decision that predetermines that the outcome is going to be colorblind. This case is presented as the Damocles sword hanging over affirmative action, but in 1995 already, everybody was saying that this was the end of affirmative action. I have been studying this issue for 23 years



now. I am not saying that there is no dismantlement of affirmative action in 2018, but it is a complicated process.

=> Response by Mathias Moschel: the problem increasingly is that the only grounds we are left with are higher education and fair housing act.

Patrick Simon: The distinction between post-racialism and colorblindness is also unclear to me. Is post-racialism simply a rhetoric argument while colorblindness is a legal and political argument that says that race should not be taken into account? But that conversation was there 25 years ago. Maybe post-racialism shows the dual aspect of colorblindness. That could be a difference.

What is the use of history by official regimes to counter affirmative action? In 2008, the Comité Veil was asked whether France should introduce the "respect of diversity" within the Preamble of its Constitution. The answer of the Comité was: no. The Comité argued that promoting diversity through affirmative action was not something we should do in France because we did not have an institutional history of implementing racial discrimination. So history and the way we perceive history has a very strong influence in the decision-making process. There is also an element of comparison, the US, which creates complication in the contemporary period, especially because parts of the US population are now against affirmative action.

=> Response by Mathias Moschel: My response to that is that race thought was born in Europe. We are not importing anything from the US. The word "Caucasian" came from Blumenbach.

Mr. ???: I disagree with the way Iyiola Solanke characterizes the German model of integration. In my view, it is not an "assimilationist" model but a "differentialist" model. Germany does not want to assimilate people. Things began to change with the Social Democrats and now there is talk of "integration", but never of assimilation.

Sarah Mazouz: I agree that in Germany assimilation is not even an issue. The German model is definitely differentialist. I also found that people are very reluctant to use race as a concept but at the same time they use biological descriptions of themselves and others. People sometimes say "I am bio deutsch" in daily parlance.

=> Response by Iyiola Solanke: Germany is a very race-conscious country but race has to be silenced so that Germany can continue to believe in race in a biological sense. There is still the belief that race is real and that is why we cannot talk about it. In the UK, on the contrary, race is understood as a social construct. But in general, there is a rebiologization of the concept of race. We are moving away from the problem of racism as a social construct to talk about biological race or race as ethnicity, which are both problematic.

Regarding assimilation/differentialism, my research was on Black Germans. I focused on race, not on migration. And for Black Germans, the issue was one of assimilation. For the gastarbeiter, it may have been different, I recognize that.