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25th IVR World Congress

LAW SCIENCE AND TECHNOLOGY

Frankfurt am Main

15–20 August 2011

Paper Series

No. 051 / 2012

Series B

Human Rights, Democracy; Internet / intellectual property, Globalization

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Critical Race Theory in a Swedish Context

URN: urn:nbn:de:hebis:30:3-249093

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Critical Race Theory in a Swedish Context

Abstract: Race has been a term avoided in the Swedish debates, while at the same time, protections with respect to unlawful discrimination on the basis of race or ethnic origins have not been vigilantly upheld by the courts. This paper looks at the treatment of race by the Swedish legislature, as well as the treatment by the courts, specifically the Labour Court, with respect to claims of unlawful discrimination in employment on the basis of ethnic origins, against the background of Critical Race Theory. The disparities between the intent of the legislature and the outcome of the cases brought to the Swedish courts can be in least in part explained through the lens of Critical Race Theory, particularly with respect to the liberal approach taken by the courts when applying the law.
Keywords: "Critical Race Theory", discrimination, race, "ethnic origins", Swedish Labour Court, Sweden

When enacting the most recent Discrimination Act (2008), the Swedish legislator deliberately removed the term "race" from the list of unlawful discrimination grounds. According to the legislative preparatory works to the act, this was to demonstrate that a biological concept of race is unacceptable: "[T]here is no scientific basis for dividing human beings into different races and from a biological perspective, consequently is there neither any reason to use the word race with respect to human beings."[1] The Parliament also stated that the Swedish Government is to act in the international arena towards that the word "race", as used with respect to human beings, to as great a degree as possible is avoided in official texts. The Government was also to review the extent to which the term "race" occurs in Swedish laws not based on international texts, and as far as possible, suggest a different term. To date, no such alternative term has been proposed, either by the Parliament or the Government. This "post-race" perspective by the Swedish Parliament can be juxtaposed against the judgments of the Swedish Labour Court (*Arbetsdomstolen*) in cases raising claims of unlawful ethnic discrimination in employment. In one almost contemporaneous case, by way of example, the Labour Court found that statements by fellow workers, calling the plaintiff names such as Blackey, did not amount to unlawful ethnic discrimination in the workplace as the Court found that the plaintiff had consented to this banter.

The paradox resulting from these examples appears irreconcilable, with the Parliament assuming a protection that the courts are not giving. However, when evaluating this

[1] Legislative Bill 2007/08:95 at 119.

discrepancy through the lens of Critical Race Theory, though still not desirable, the paradox becomes more understandable. Part One of this article sets out the legal theoretical framework addressing race as based on Critical Race Theory. Part Two explores the treatment of "race" as defined by these theories in the Swedish legislation and particularly the case law of the Swedish Labour Court. The case law of the Swedish Labour Court is chosen for several reasons. First, the initial claims brought to courts were under the statutory protections of the 1994 act against discrimination on the basis of race and ethnic origins in the field of employment. Even if an employee not represented by a labor union or the ombudsman can bring such claims to the general trial courts, those judgments are then appealed to the Labour Court. In essence, the Labour Court is the ultimate arbitrator of such questions in the Swedish legal system within the area of employment law. The body of case law before the Labour Court is fairly developed, with approximately thirty cases having been brought in the past twenty years.

A first definitional issue to be addressed by way of introduction is the terminological apparatus that has been created around discrimination. Discrimination is a part of every society, as identified by Critical Race Theory. Consequently, a distinction has to be made between lawful and unlawful discrimination. For example, a person is free to marry whomever he or she chooses, whether the decision is racially motivated or not. However, a state health care provider cannot refuse to provide healthcare due to a person's color. The latter has been defined as unlawful discrimination in most countries seriously addressing problems of discrimination.

With respect to unlawful discrimination, two categories of unlawful discrimination have gradually evolved in both the American and European legal systems, direct discrimination/disparate treatment, and indirect discrimination/disparate impact. Direct discrimination/disparate treatment occurs when an individual or legal person directly (explicitly) discriminates against another individual on the basis of a legally protected ground. With the passage of Title VII of the United States Civil Rights Act in 1964, legally recognized grounds included an individual's race, color, religion, sex or national origin.[2] In Sweden,[3] the comparable protections were adopted piecemeal over a period of time, sex first

[2] See Title VII of the Civil Rights Act of 1964, 42 U.S.C. Chap. 21 § 2000e-2(a)(1). Separate acts prohibit unlawful discrimination on the basis of age, the Age Discrimination in Employment Act of 1967, 29 U.S.C. Chap. 14, and on the basis of disability, the Americans with Disabilities Act of 1990, 42 U.S.C. Chap. 126.

[3] Due to Sweden's membership in the EU as of 1995, Swedish legislation has to fill the requirements of European Union ("EU") law. On the European Union law level, a protection was put into place as to equal pay between women in men in Article 117 of the Treaty of Rome already in 1957. As of 2000, protections are also in place as to unlawful discrimination on the basis of racial or ethnic origins, religion or belief, disability, age and sexual orientation. There is no comparable federal American legislation prohibiting unlawful discrimination on

in 1979,[4] and race, color, nationality or ethnic origins initially in 1986.[5] Protections against direct discrimination/disparate treatment can be seen as the first generation of legal protection as to discriminatory behavior, banning explicit requirements based on any of these grounds, for example, prohibiting signs by employers stating that "Blacks need not apply" or "Gypsies not welcome."

Legal protections against indirect discrimination/disparate impact were first articulated by the United States Supreme Court in 1971 in *Griggs v. Duke Power Co.*[6] and the parameters of the disparate impact analysis have since then been fashioned by the courts. In European Union law, indirect discrimination was first defined by legislation in the 1976 Equal Treatment Directive prohibiting unlawful direct and indirect discrimination on the basis of sex[7] and in 2000 with respect to racial or ethnic origins, religion or belief, disability, age and sexual orientation. Sweden enacted new legislation prohibiting both direct and indirect discrimination on the basis of ethnic origins, religion or faith in 1999, and amended its 1991 Equality Act to include indirect discrimination on the basis of sex in 2000.[8]

Indirect discrimination/disparate impact often comprises structural discrimination as recognized already by the United States Supreme Court in *Griggs.* One of the primary focuses of the theories examined here is this very structural discrimination, seen as a main source of the discriminatory behavior persisting to the present date. Institutions and institutional rules—not simply customs, ideas, attitudes, culture, or private behavior—are viewed as shaping race

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the basis of sexual orientation, but certain states have adopted such legislation, see for example: California, Colorado, Connecticut, Hawaii, Illinois, Iowa, Maine, Maryland, Massachusetts, Minnesota, Nevada, New Hampshire, New Jersey, New Mexico, New York, Oregon, Rhode Island, Vermont, Washington, Wisconsin and the District of Columbia. A few states have laws prohibiting sexual orientation discrimination only in public workplaces: Delaware, Indiana, Michigan, Montana, and Pennsylvania.

[4] *Lag (SFS 1979:1118) om jämställdhet mellan kvinnor och män i arbetslivet* ("1979 Equal Treatment Act"). This act was eventually replaced by the 1991 Equality Act, *Jämställdhetslag* (SFS 1991:433) and ultimately repealed by the 2008 Discrimination Act, *Diskrimineringslag* (SFS 2008:567) effective 1 January 2009. An English translation of the Swedish 2008 Discrimination Act is available at the website of the Government Offices of Sweden at www.sweden.gov.se.

[5] *Lag (SFS 1986:442) mot etnisk diskriminering*. This act was replaced in 1994 by an act of the same name, *Lag (SFS 1994:134) mot etnisk diskriminering*, and then again in 1999, *Lag (SFS 1999:130) om åtgärder mot etnisk diskriminering i arbetslivet*. The 1999 act was also ultimately repealed by the 2008 Discrimination Act.

[6] See *Griggs v. Duke Power Co*., 401 U.S. 424 (1971) (holding that under Title VII of the Civil Rights Act of 1964, 42 U.S.C. Chap. 21 § 2000 et seq., when workplace tests disparately impact ethnic minority employees, businesses must prove that the tests are consistent with business necessity and "reasonably related" to the jobs for which the tests are required). See also *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409 (1968)(holding that Section Two of the Thirteenth Amendment gives Congress the authority to prohibit private discrimination in the lease and sale of property).

[7] Council Directive 76/207/EEC of 9 February 1976 on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions ("Equal Treatment Directive"), OJ 1976 L 39/40, Celex No. 31976L0207.

[8] *Lag (SFS 2000:773) om ändring i jämställdhetslagen* (SFS 1991:433), Prop. 1999/2000:143 *Ändringar i jämställdhetslagen m.m.*, Bet. 2000/01:AU3, Rskr. 2000/01:4. A new act prohibiting discrimination on the basis of race or religion was also passed in 1999, *lag (SFS 1999:130) om åtgärder mot etnisk diskriminering i arbetslivet*. These 1999 statutes were modeled on the 1991 Equal Treatment Between Women and Men Act.

relations.[9] As institutional rules, the role of the law has been seen as a pivotal force in both fighting against such structural discrimination as well as cementing race relations and preventing progress for minorities.[10]

Part One: The Legal Theoretical Frameworks for Race

Originating in Critical Legal Studies ("CLS"), and parallel to the developments in feminist legal theory, race became a focus of several legal theories beginning in the 1970's, including Critical Race Theory, Post-Colonialism[11] and later Intersectionality. Each of these outsider critical theories (outcrits) shares the basic premise of treating individuals as the subjects of the theory as opposed to theoretical objects. The use of the term "subject" is, however, problematic in itself as pointed out by Foucault: "There are two meanings of the word 'subject': subject to someone else by control and dependence, and tied to his own identity by a conscience or self-knowledge. Both meanings suggest a form of power which subjugates and makes subject to."[12] Recognizing and legitimating the experiences of the individual is seen by these theories as a step towards coming to terms with the historical treatment of certain groups, finding atonement/resolution, as well as creating a tool for combating discrimination.

I. The Origins of Critical Race Theory

Critical Race Theory (CRT or Race Crits) has its historical roots in the late 1970's, emerging as a new strategy for dealing with the post-civil rights racial structure in the United States. This structure was argued to be maintained by a colorblind ideology that hid and protected white privilege, while masking racism within the rhetoric of "meritocracy" and "fairness." CRT emerged within this historical context as a framework aimed at undermining colorblind

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[9] J. Morgan Kousser, Colorblind Injustice: Minority Voting Rights and the Undoing of the Second Reconstruction (1999) at 1.

[10] For the American context, see Martha R. Mahoney, *What's Left of Solidarity? Reflections on Law, Race, and Labor History,* 57 Buff.L.Rev. 1515 (2009). Mahoney argues that the dual developments in the case law rendered class-based interracial organizing difficult in labor history by making it difficult for workers to organize and strike and preventing states from giving workers effective protection in joining unions and for legislators to enact labor-protective regulation combined with cases limiting or striking down Reconstruction civil rights statutes that should have protected equality. According to Mahoney, this fostered racial division, promoted insecurity among workers, and placed burdens on class-based organizing. Id. at 1516.

[11] Given the constraints of this article, Post-Colonialism will not be examined closer here. For more information on this theory, see Leela Gandhi, Post-colonial Theory (Columbia Univ. Press 1998); Dipesh Chakrabarty, Provincializing Europe: Post-colonial Thought and Historical Difference (Princeton Univ. Press 2000); Chandra Talpade Mohanty, Feminism Without Borders: Decolonizing Theory, Practicing Solidarity (Duke Univ. Press 2003).

[12] Michel Foucault, *The Subject and Power*, 8 Critical Inquiry 777 (1982) at 781.

ideology through a deconstruction of its racist premise.[13] Lawyers, legal scholars and law students[14] across the United States felt that any of the gains made in the 1960's civil-rights era had stymied and even in some situations had rolled back. The consensus was that new, more nuanced approaches were necessary in order to combat the types of subtle, unconscious, or institutional racism that existed, which were even more deeply entrenched and difficult to combat than the former overt variety.[15]

One of CRT's most articulate proponents, Richard Delgado, traces the inception of CRT back to an article written by Derrick Bell in 1980, claiming that Bell startled the legal world with his article entitled *Brown v. Board of Education and the Interest Convergence Dilemma.*[16] Bell argued that the groundbreaking decision of *Brown v. Board of Education* was decided in favor of African Americans not because of any belated spasm of conscience on the part of the Supreme Court, but because of a fortuitous combination of material and sociopolitical circumstances.[17] Bell pointed out that the National Association for Colored Persons ("NAACP") Legal Defense and Education Fund had been litigating school desegregation cases throughout the South for decades and achieving, at most, narrow victories. Yet the skies suddenly opened in 1954 when the Supreme Court, in a unanimous decision, appeared to grant the organization everything it wanted. Bell postulated three reasons for the decision: America's need to protect its reputation internationally, the need for African-Americans to feel that progress could be made home, and the need for the South to go from a rural poor economy to a productive one.

As to the first, Bell noted that: "[*Brown*] helped to provide immediate credibility to America's struggle with Communist countries to win the hearts and minds of emerging third

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[13] Maria C. Malagon, Lindsay Perez Huber, Veronica N. Velez, *Our Experiences, Our Methods: Using Grounded Theory to Inform a Critical Race Theory Methodology*, 8 Seattle J. for Soc. Just. 253 (2009).

[14] Law students also played a pivotal role in the development of CRT as pointed out by Delgado, who concludes his article by stating: "A short, final Section draws lessons from the foregoing. One message, hopeful in nature, is, simply, that it is hard to kill an idea. A related insight holds that, as much as the establishment might wish to confine education to that which it finds useful, it cannot, in the end, do so. A 'theory of surplus education'--a correlate of Marx's famous proposition --holds that if you teach a worker enough mathematics to use a machine or operate a cash register, he will use that knowledge to figure out that you are raking off a great deal of profit and ask for a raise. If you teach Chicano children to read well enough that they can follow the directions on a bag of fertilizer or pesticide, they may also read the rest of the label, including the health warnings, and may one day get a lawyer and file a class action against you for personal injury. If you teach grade-school students the revolutionary ideals that led to the Boston Tea Party, you may find them using that same rhetoric against you if you have been tyrannizing them in the classroom. Like capitalism, education inevitably generates its own contradictions and pressures for reform." See Richard Delgado, *Liberal McCarthyism and the Origins of Critical Race Theory*, 94 Iowa L. Rev. 1505 (2009) at 1509 (citations omitted).

[15] Id. at 1511.

[16] Derrick Bell, *Brown v. Board of Education and the Interest Convergence Dilemma*, 93 Harv. L. Rev. 518 (1980) discussing the case, *Brown v. Board of Education*, 347 U.S. 483 (1954) (holding that primary school assignments sending white and black children to separate schools violated the Equal Protection Clause of the United States Constitution).

[17] Delgado (2009) at 1507.

world peoples. At least this argument was advanced by lawyers for both the NAACP and the federal government. And the point was not lost on the news media. *Time* magazine, for example, predicted that the international impact of *Brown* would be scarcely less important than its effect on the education of black children: 'In many countries, where U.S. prestige and leadership have been damaged by the fact of U.S. segregation, it will come as a timely reassertion of the basic American principle that 'all men are created equal.'"[18]

As to the second incentive, Bell observed that *Brown* "offered much needed reassurance to American blacks that the precepts of equality and freedom so heralded during World War II might yet be given meaning at home. Returning black veterans faced not only continuing discrimination, but also violent attacks in the South which rivaled those that took place at the conclusion of World War I." This disillusionment and anger were poignantly expressed by one black actor, Paul Robeson, who in 1949 declared: "It is unthinkable … that American Negroes would go to war on behalf of those who have oppressed us for generations … against a country such as the Soviet Union which in one generation has raised our people to the full human dignity of mankind."[19] The third impetus was that segregation in the South continued to impede it from reaching its full economic potential. These three reasons as driving forces behind the decision of the Court in *Brown v. Board of Education* were illustrative of the principle Bell termed "interest convergence." The interests of the majority converged with the interests of the minority, leading to the decision, as opposed to any true desire for equal rights for all.

However, Critical Race Theory, as its parent, Critical Legal Studies, is not defined by any one individual or based on any one theoretical framework. Beginning with the early works of Bell and Alan Freeman,[20] and building on the American civil-rights tradition, including the works of such individuals as Martin Luther King, Jr., W.E.B. Du Bois, and César Chávez, as well as Continental and postcolonial writers, scholars began to put forward the idea that racism is normal, not aberrant, in American society and over time becomes natural to those living in it.[21] As a result, scholars argued that formal equality and legal rules requiring equal treatment of blacks and whites (prohibiting unlawful direct discrimination – disparate treatment) are capable of redressing only the most dramatic forms of injustice, not the more routine forms that target persons of color on a daily basis.

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[18] Bell (1980) at 524.
[19] Id. at 525.
[20] See for example, Alan Freeman, *Race and Class: The Dilemma of Liberal Reform,* 90 Yale L. J. 1880 (1981).
[21] See generally Richard Delgado & Jean Stefancic eds., Critical Race Theory: The Cutting Edge (2d ed. 2000) (covering developments in various areas of this body of scholarship); and Richard Delgado & Jean Stefancic, Critical Race Theory: An Introduction (2001).

Legal scholarship itself also came under attack by these scholars. Delgado pointed out in 1984 the importance of scholarship for development of the law, demonstrating how the legal scholarship concerning civil rights up to that date was authored predominantly by white male legal scholars citing the works of other white male scholars.[22] Delgado named this elite white male perspective "imperial scholarship," arguing that this imperial scholarship in the academy was dangerous as it creating limited discourses, ideologies, and perspectives justifying and maintaining white superiority, in essence, an apartheid of knowledge was constructed and perpetuated in academic research through imperial scholarship. To counter effect this imperial scholarship and its inherent Eurocentricity, Delgado emphasized the clear need for scholarship drawing from non-traditional sources of knowledge, a scholarship drawing from epistemological, methodological and theoretical perspectives honoring sources of knowledge existing outside of the academy and within communities of color.[23] The origins of Critical Race Theory as such are traced back to a workshop held outside of Madison, Wisconsin by Kimberlé Crenshaw in 1989, giving CRT its name.[24]

II. The Tenets of CRT

Though lacking any one dominant legal theoretical approach, certain issues are deemed integral to a CRT approach. Delgado and Jean Stefancic, when compiling an annotated bibliography of CRT research in the early 1990's, identified eleven themes running throughout CRT scholarship:[25]

1. Critique of liberalism. Most, if not all, CRT writers are discontent with liberalism as a means of addressing the American race problem. Sometimes this discontent is only implicit in an article's structure or focus. At other times, the author takes as his or her target a mainstay of liberal jurisprudence such as affirmative action, neutrality, color blindness, role modeling, or the merit principle.

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[22]Richard Delgado, *The Imperial Scholar: Reflections on a Review of Civil Rights Literature*, 132 U. Pa. L. Rev. 561-78 (1984).

[23] This failure is interpreted as reluctance a decade later: "[T]here is buried deep inside the legal structure a failure to want to ask what I have called the race question .... Stated simply, 'How does race alter the contours of legal reality?'" Jerome M. Culp, Jr., Neutrality, the Race Question, and the 1991 Civil Rights Act: The "Impossibility" of Permanent Reform, 45 Rutgers L. Rev. 965, 966 (1993).

[24] For more on the history of the movement, see Kimberlé Crenshaw et al., Introduction to Critical Race Theory: The Key Writings that Formed the Movement (1995); Kimberlé Williams Crenshaw, *The First Decade: Critical Reflections, or "A Foot in the Closing Door*" in Francisco Valdes et al. eds., Crossroads, Directions, and a New Critical Race Theory (2002); and Athena D. Mutua, *The Rise, Development and Future Direction of Critical Race Theory and Related Scholarship*, 84 Denv. U. L. Rev. 329 (2006).

[25] See Richard Delgado and Jean Stefancic, *Critical Race Theory: An Annotated Bibliography*, 79 Va. L. Rev. 461 (1993); and Richard Delgado and Jean Stefancic, *Critical Race Theory: An Annotated Bibliography 1993; A Year of Transition,* 66 U. Colo. L. Rev. 159 (1995).

2. Storytelling/counterstorytelling and “naming one's own reality.” Many Critical Race theorists consider the majoritarian mindset—the bundle of presuppositions, received wisdom, and shared cultural understandings of persons in the dominant group—to be a principal obstacle to racial reform. To analyze and challenge these power-laden beliefs, some writers employ counterstories, parables, chronicles, and anecdotes aimed at revealing their contingency, cruelty, and self-serving nature.[26]

3. Revisionist interpretations of civil rights law and progress. One recurring question for Critical scholars is why antidiscrimination law has proven so ineffective in redressing racial inequality—or why progress has been cyclical, consisting of alternating periods of advance followed by ones of retrenchment. Some Critical scholars address this question by seeking answers in the psychology of race, white self-interest, the politics of colonialism and anticolonialism, or other sources.

4. A greater understanding of the underpinnings of race and racism. A number of Critical writers seek to apply insights from social science writing on race and racism to legal problems. For example, understanding how majoritarian society sees black sexuality helps explain the law's treatment of interracial sex, marriage, and adoption; knowing how different settings encourage or discourage discrimination helps in deciding whether the movement toward Alternative Dispute Resolution is likely to help or hurt disempowered disputants.

5. Structural determinism. A number of CRT writers focus on ways in which the structure of legal thought or culture influences its content, frequently in a status quo-maintaining direction. Understanding these constraints results in working more effectively towards racial and other types of reform.

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[26] See for example, Derrick Bell, And We Are Not Saved: The Elusive Quest for Racial Justice (1987) at 5-6; Patricia Williams, The Alchemy of Race and Rights (1991) at 5-8; Richard Delgado, *Storytelling for Oppositionists and Others: A Plea for Narrative*, 87 Mich. L. Rev. 2411 (1989) (explaining how legal storytelling differs from conventional, linear analysis and modes of discourse, and lends itself to transformative ideas and legal approaches). Another approach here is “Grounded Theory”, see generally Maria C. Malagon, Lindsay Perez Huber, Veronica N. Velez, *Our Experiences, Our Methods: Using Grounded Theory to Inform a Critical Race Theory Methodology*, 8 Seattle J. for Soc. Just. 253 (2009). Grounded Theory is a methodological strategy developed by Barney Glaser and Anselm Strauss in their book, The Discovery of Grounded Theory (1967) to generate theory from real life experience. Glaser and Strauss challenge positivist conceptions of the scientific method, which reigned as the only valid approach to conducting social science research until the middle of the last century. The belief that positivist methods were unbiased rejected other possible ways of generating knowledge. This use of positivism is argued to contribute to the apartheid of knowledge as it strives for a universal science of society, rooted in Western/Eurocentric epistemology.

6. Race, sex, class, and their intersections. Other scholars explore the intersections of race, sex, and class, pursuing such questions as whether race and class are separate disadvantaging factors, or the extent to which black women's interests are or are not adequately represented in the contemporary women's movement.

7. Essentialism and anti-essentialism. Scholars who write about these issues are concerned with the appropriate unit for analysis: Is the black community one, or many, communities? Do middle- and working-class African-Americans have different interests and needs? Do all oppressed peoples have something in common?

8. Cultural nationalism/separatism. An emerging strain within CRT holds that people of color can best promote their interests through separation from the American mainstream. Some believe that preserving diversity and separateness will benefit all, not just groups of color. Included here, as well, are articles encouraging black nationalism, power, or insurrection.

9. Legal institutions, Critical pedagogy, and minorities in the bar. Women and scholars of color have long been concerned about representation in law school and the bar. Recently, a number of authors have begun to search for new approaches to these questions and to develop an alternative, Critical pedagogy.

10. Criticism and self-criticism; responses. Under this heading is included works of significant criticism addressed at CRT, either by outsiders or persons within the movement, together with responses to such criticism.

11. Critical Race feminism. Included here are works addressing the unique situation of women of color (other than intersectionality and essentialism), such as reproductive freedom and the social construction of women of color.

The presence of any one of these themes in a work of scholarship sufficed according to Delgado and Stefancic for it to be deemed CRT scholarship. Almost twenty years later, the themes integral to CRT scholarship as defined by Delgado and Stefancic have been condensed by one group of scholars into five basic categories:[27]

[27] Malagon et al. (2009) at 256-7.

1. The intersectionality of race and racism with other forms of subordination. CRT, as a theoretical lens, exposes the centrality of race and racism and the intersection of race and racism with other forms of subordination. In the research process, CRT does not simply treat race as a variable, but rather works to understand how race and racism intersect with gender, class, sexuality, language, etc. as structural and institutional factors that impact the everyday experiences of People of Color. CRT critically frames race in the research process by including methodologies that expose the structural and institutional ways race and racism influence the phenomena being investigate.

2. The challenge to dominant ideology. CRT is committed to challenging race-neutral dominant ideologies such as meritocracy and colorblindness that have contributed to deficient thinking about People of Color. CRT counters deficit thinking within the research process and requires critical race researchers to deeply analyze how their research instruments, many of which stem from positivist research approaches, may end up affirming the same dominant ideologies they strive to challenge in their work. CRT seeks to develop, create, and utilize research methodologies and tools that can adequately capture the lived experiences of communities.

3. The commitment to social justice. CRT is committed to an anti-racist social justice agenda. It seeks to eliminate racism and other forms of subordination. Within the research process, the goal of CRT is to identify, analyze, and transform the structural aspects of education that maintain subordinate and racial positions in and out of the classroom. It also intentionally works to empower participants through the research process and requires researchers to reflect on how they employ methods as they enter and leave research sites, design interview protocols, and develop reciprocity with the communities that are a part of their research.

4. The centrality of experiential knowledge. CRT strongly believes that the lived experiences of People of Color are instrumental in helping us understand how, and to what extent, race and racism mediate everyday life. Connected to this, CRT believes that People of Color are creators of knowledge and have a deeply rooted sensibility to name racist injuries and identify their origins. Thus, in the CRT research process, there is an explicit attempt to employ methodologies that can center and capture the lived experiences of People of Color.

There is also an attempt, where possible, to work jointly with informants and to collectively analyze data and build theory as collaborators in the research process.

5. The transdisciplinary perspective. CRT also utilizes the transdisciplinary knowledge and the methodological base of ethnic studies, women's studies, sociology, history, and the law in constructing its theoretical premise. This is important to the research process because it offers the critical-race researcher an array of research methodologies to consider, especially those methodologies that have developed in an attempt to capture and understand the experiences of marginalized communities better than more traditional research methods.

Two things are vitally important to understand when approaching CRT. The first is that this school of legal theory is not fixed but fluid, and purposefully so. CRT scholars can be seen to have agreed to disagree as to the content and course of this school of legal thought. Much as with CLS, this lack of a fixed content is perceived by CRT scholars mostly as a strength, and less often at times as a weakness, leading to both internal and external criticism.[28]

III. Race and Racialization

The second pivotal issue within a CRT framework is that the use of the term "race" in no way refers to any biological understanding of race. Instead, much as the use of gender, it refers to a social construct: "Race is not ... simply a matter of physical appearance and ancestry .... [I]t is primarily a function of the meaning given to these."[29] Although race is neither truly biologically or scientifically significant, this does not weaken the power of the construction as summarized by one scholar:

As a result, I start with the assumption that race and the "one drop of blood" rule are not based on any established scientific or biological definition. Of course, that does not mean race has no meaning or power in our society. Quite the contrary, race is an intractable force in American society touching every facet of day-to-day American life--often affecting where one goes to school, the job opportunities presented, who one marries, where one lives, the health care one receives, and even where one is interred following death. Race, in other words, continues to matter in our society, whether its definitional base is scientific or not. In fact, race has become a more powerful factor in American society because of its social

[28] See for example Edward L. Rubin, *Jews, Truth and Critical Race Theory*, 93 Nw. U. L. Rev. 525 (1999).
[29] Ian F. Haney López, White by Law (1996).

construction. In sum, race, albeit socially constructed, continues to matter dearly in American society.[30]

Studies have shown that people continue to make decisions based upon race and proxies for race, such as African-sounding names, to discriminate in employment and housing.[31]

Given the premise that race is a social construct, groups of individuals who are not necessarily of the same ethnic origins can be "racialized" by society. Here race is used as a verb to convey the notion that racialization or using race and its attendant meanings as part of a system of assignment is an active and intentional process.[32] Groups that have experienced racialization include Asians, Muslims and Arabs.[33]

IV. CRT spin-offs

Dissatisfaction with the original focus of CRT on the situation of African-Americans led to a wave of spin-off movements within CRT such as Critical Race Feminism, Latino and Latina Critical Schools (LatCrit), Asian American Legal Scholarship and ClassCrits. [34] Though only briefly discussed below, it is apparent that these spin-offs have paved the way to an intersectionality analysis.

1. Critical Race Feminism

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[30] Alex M. Johnson, Jr., *The Re-emergence of Race as a Biological Category: The Societal Implications-Reaffirmation of Race*, 94 Iowa L. Rev. 1547 (2009) at 1561; see also Howard Winant, *Racial Dualism at Century's End* in Wahneema Lubiano ed., The House that Race Built (1997) at 87, 89-90: (criticizing contemporary racial categories as "North American designations" that are not "in any sense 'true' or original self-descriptions of the human groups they name" but still finding that the categories matter as a means of rendering the social world both intelligible and opaque).

[31] See, e.g.; Angela I. Onwuachi-Willig & Mario L. Barnes, *By Any Other Name? On Being "Regarded as" Black and Why Title VII Should Apply Even if Lakisha and Jamal are White*, 2005 Wis. L. Rev. 1283 (2005).

[32] See, e.g., john a. powell, *A Minority-Majority Nation: Racing the Population in the Twenty-First Century*, 29 Fordham Urb. L. J. 1395 (2002) at 1415: "Race is the vehicle through which we can include or exclude; stratify or equalize; divide or combine .... [R]ace is a verb"; and Kendall Thomas, *The Eclipse of Reason: A Rhetorical Reading of Bowers v. Hardwick,* 79 Va.L.Rev. 1805 (1993) at 1806:"[R]ace is a verb ... we are 'raced' through a constellation of practices that construct and control racial subjectivities."

[33] For discussions of the racialization of Asian-Americans and Arab-Americans as foreign, see Thomas W. Joo, *Presumed Disloyal: Executive Power, Judicial Deference and the Construction of Race Before and After September 11*, 34 Colum. Hum. Rts. L. Rev. 1 (2002)(alleging that "racialized presumptions of 'Oriental' foreignness and disloyalty ... have consistently influenced Asian American legal history"); Leti Volpp, *The Citizen and the Terrorist*, 49 U.C.L.A. L. Rev. 1575 (2002); and Adrien Katherine Wing, *Civil Rights in the Post 911 World: Critical Race Praxis, Coalition Building, and the War on Terrorism*, 63 La. L. Rev. 717 (2003) (arguing that although "Arabs and Muslims are often stereotyped as dangerous, evil, sneaky, primitive, and untrustworthy, much as Blacks are, the criminality has a twist--they are considered potential or actual terrorists").

[34] Athena D. Mutua, *The Rise, Development and Future Direction of Critical Race Theory and Related Scholarship,* 84 Denv. U. L. Rev. 329 (2006) at 330.

Critical Race Feminism can be seen as breaking ground for a concept of intersectionality. Critical Race Feminism brought forth the idea that race was too one-dimensional an analysis, based on a single axis framework of the experience of African-American men.[35] This theory has been successfully argued so that under American federal discrimination law, African American women are judicially recognized as a protected class.[36] As the Fifth Circuit Court of Appeals expressed it:

In the absence of a clear expression by Congress that it did not intend to provide protection against discrimination directed especially toward black women as a class separate and distinct from the class of women and the class of blacks, we cannot condone a result which leaves black women without a viable Title VII remedy. [37]

The court went on to find that this result was mandated by the holdings of the Supreme Court and its own case law in the "sex-plus" cases.[38] In another case decided by the Ninth

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[35] See Kimberle Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory, and Antiracist Politics*, 1989 U. Chi. Legal F. 139, 140 (1989). See also Angela Onwuachi-Willig, *Another Hairpiece: Exploring New Strands of Analysis under Title VII,* 98 Geo.L.J. 1079 (2010).

[36] See for example as to the early cases, *Hicks v. Gates Rubber Co.*, 833 F.2d 1406, 1416 (10th Cir. 1987)(the aggregation of both bases of discrimination was permissible to prove employment discrimination for "the removal of artificial, arbitrary and unnecessary barriers to employment when the barriers operate invidiously to discriminate on the basis of racial or other impermissible classifications," citing *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971)); *Lewis v. Bloomsburg*, 773 F.2d 561 (4th Cir. 1985)(accepting plaintiff's statistical evidence to support a class action claim that defendant's hiring practices intentionally or by disparate impact discriminated against African-American females who applied for employment); *Jeffries v. Harris County Community Action Ass'n,* 615 F2d 1025 (5th Cir. 1980) (citing the Supreme Court decision adopting sex plus in *Phillips v. Martin Marietta Corp.*¸ 400 U.S. 542 (1971) permitting a sub-class of individuals, women with pre-school children to claim disparate treatment). That African-American women are now viewed by the courts fairly routinely as a protected class can be most recently seen in *Oliver v. Napolitano*, --- F.Supp.2d ----, 2010 WL 3118383 (D.D.C. 2010).

[37] *Jeffries v. Harris County Community Action Ass'n,* 615 F.2d 1025 (5th Cir. 1980) at 1032. In the case, plaintiff, an African-American female, applied for one of two positions as a field representative. The positions were previously staffed by a white female and an African-American male. On the day she submitted her application, Jefferies noticed that a "personnel action" had been completed to hire Eddie Jones, an African-American male, as acting field representative. Jefferies filed a lawsuit alleging race and sex discrimination. During the trial, Jefferies submitted uncontroverted evidence that every position for which she applied had been filled by males or white females.

[38] The reference to the sex plus cases is in part to the Supreme Court decision in *Phillips v. Martin Marietta Corp.*¸ 400 U.S. 542 (1971) in which the Court accepted the theory of sex plus. In Phillips, plaintiff was denied employment by the defendant because she had pre-school-age children. However, defendant employed men with pre-school-age children. The district court granted a motion to strike the portion of the complaint which alleged that discrimination against females with pre-school-age children violated Title VII. The district court subsequently granted defendant's motion for summary judgment because 75 to 80 percent of the positions in question were held by females; thus, sex discrimination could not have occurred. On appeal, the Fifth Circuit affirmed the lower court decision. The Fifth Circuit stated:
We are of the opinion that the words of the statute are the best source from which to derive the proper construction. The statute proscribes discrimination based on an individual's race, color, religion, sex or national origin. A per se violation of the Act can only be discrimination based solely on one of the categories, i.e., in the case of sex: women vis-a-vis men. When another criterion of employment is added to one of the classifications listed in the Act, there is no longer apparent discrimination based solely on race, color, religion, sex or national origin. It becomes the function of the courts to study the conditioning of employment on one of the elements outlined in the statute coupled with the additional requirement, and to determine if any individual or group is being denied work due to his race, color, religion, sex or national origin.

Circuit Court of Appeals, the court recognized Asian American women as a combined category.

2. Latino and Latina Critical Schools

The Latina/o Critical Race Theory (LatCrit) employs CRT to examine the particular ways multiple forms of oppression intersect to shape the experiences of Latinas/os. [39] LatCrit embraces many of the same purpose and traditions of CRT, but focuses on issues relevant to Latinas/os where CRT falls short as an analytical lens. Elizabeth Iglesias describes the main limitation of CRT as one of scope; namely, that CRT's preoccupation with a Black/White paradigm often narrows its ability to adequately answer questions about the role of race, racism, and other forms of oppression in the lives of Latinas/os, Asian Americans, and other Communities of Color.[40] Thus, LatCrit, as a branch of CRT, has become an important theoretical lens that allows one to more fully examine how multiple forms of oppression based on immigration status, language, culture, and ethnicity, intersecting to shape the experiences of Latinas/os.

3. Asian American Legal Scholarship

The focus of Asian American Legal Scholarship has been on the experience of Asian Americans in the United States, with one of the central moments being World War II and the Japanese internment camps.[41] In the internment cases, religious difference was one aspect of Japanese American racial difference constructed by law. Yamamotar has pointed to the government's brief filed in the U.S. Supreme Court in *Hirabayashi v. United States*, for

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The Fifth Circuit found that plaintiff was not refused employment because she was a woman nor because she had pre-school age children. It is the coalescence of these two elements that denied her the position she desired. In vacating the appellate decision, the Supreme Court stated that "[s]ection 703(a) of the Civil Rights Act of 1964 requires that persons of like qualifications be given employment opportunities irrespective of their sex. The Court of Appeals therefore erred in reading this section as permitting one hiring policy for women and another for men--each having pre-school-age children."

[39] Malagon et al. (2009) at 255-6.

[40]See Elizabeth M. Iglesias, *International Law, Human Rights and LatCrit Theory* 28 U. Miami Inter-Am. L. Rev. 177 (1997).

[41] See for example Eric K. Yamamoto, *Friend, Foe or Something Else: Social Meanings of Redress and Reparations,* 20 Denv. J. Int'l L. & Pol'y 223 (1992) at 223-4: "[A] reparations law's salient meanings lie not in the achievement of payments and apologies to a particular group or in symbolic constitutional victories, but in the commitment of recipients and others to build upon the reparations process' inter-group linkages and political insights to contribute to a broad-based institutional and attitudinal restructuring." See also Chris K. Iijima, *Reparations and the "Model Minority" Ideology of Acquiescence: The Necessity to Refuse the Return to Original Humiliation*, 19 B.C. Third World L.J. 385 (1998); Mari J. Matsuda, *Looking to the Bottom Critical Legal Studies and Reparations,* 22 Harv. C.R.-C.L. L. Rev. 323 (1987); Natsu Taylor Saito, *Symbolism Under Siege: Japanese American Redress and the "Racing" of Arab Americans as "Terrorists"*, 8 Asian L.J. 1 (2001); Eric K. Yamamoto, *Racial Reparations: Japanese American Redress and African American Claims,* 40 B.C. L. Rev. 477 (1998-1999); and Thomas W. Joo, *Presumed Disloyal: Executive Power, Judicial Deference and the Construction of Race Before and After September 11,* 34 Colum. Hum. Rts. L. Rev. 1 (2002).

example, which relied heavily on a cultural explanation of race, arguing in regard to the "Japanese Problem on the West Coast" that a "factor to be taken into account in considering the viewpoints and loyalties of the West Coast Japanese is the existence and nature of Shintoism."[42] The Court accepted the United State Government's differential treatment on the basis of cultural differences which were deemed to give rise to a propensity to espionage and sabotage. A lesson to be drawn from the internment of Japanese Americans is that more current cultural views of race are not a panacea to scientific racism.[43]

Each of these spin-offs as cursorily discussed above bring aspects into the analysis other than simply race, for Critical Race Feminists, sex is an additional lens (as well as more recently, age), LatCrits bring to the discussion several factors, immigration status, language, culture, ethnicity, and Asian-American Legal scholars, religion and culture, all of which have become vital elements in any analysis of race and racialization.

V. Religion as an aspect of the social construct of race

CRT's initial focus was on the experience of African Americans. As seen from the spin-off theories above, this focus on only African-Americans was broadened fairly quickly. The original focus on the social condition of African Americans in America can be seen as a product of American history; asserting that the nation's entire history is pervaded by racial distinctions,[44] the badges and inheritance of slavery, that divide its population into a dominant, privileged majority and a subordinated, disadvantaged minority. In contrast, in Europe historically, religion has been a driving factor of oppression, with social fault lines and the mechanisms of oppression often defined in religious terms.[45]

LatCrits and Asian American legal scholarship began to bring issues relating to religion more to the fore in CRT.[46] The terrorist bombings of the World Trade Center in New York City on 11 September 2001 and the subsequent backlash against persons of Arab or Muslim descent sealed the urgency of such an inclusion:

In the post-9/11 era, what exactly is meant by race? Race is composed significantly of a religious dimension that has not been critically isolated, analyzed or discussed. Islamic religious difference has been racialized in the context of the war on terror, just as religious differences contributed to the consolidation of Japanese American racial difference during

[42] See for example Eric K. Yamamoto, (1992) at 271.
[43] Margaret Chon and Donna E. Arzt, *Walking While Muslim,* 68 Law & Contemp. Probs. 215 (2005) at 215-6.
[44] See, however, Forrest Wood, The Arrogance of Faith: Christianity and Race In America from the Colonial Era to the Twentieth Century (1990).
[45] See Edward L. Rubin, *Jews, Truth and Critical Race Theory,* 93 Nw. U. L. Rev. 525 (1999) at 531.
[46] See for example, Verna Sánchez, *Looking Upward and Inward; Religion and Critical Theory*, 19 Chicano-Latina L. Rev. 431 (1998).

World War II. Yet the existing architecture of domestic and international anti-discrimination law has avoided recognizing racial discrimination based on religious group difference. Domestic and international law simultaneously creates and obscures current “Muslim” racial identity. The most overt and publicly debated of law's methods in this regard is so-called racial profiling. Equally critical, however, is the incompleteness of legal remedies available to those targeted by religiously driven racial discrimination. Thus by both its commissions and omissions, law is implicated in this process of religioning race.[47]

The racialization of religion can be seen as a now established arena for CRT.

VI. Intersectionality

Kimberlé Crenshaw expanded Critical Race Theory to Critical Race Feminism to a theory of Intersectionality.[48] Intersectionality facilitates a focus on individuals whose subject-positions are formed by multiple and hybrid interests, such as through the lens of race, gender, class, religion and age. It is seen as “the interplay between individual versus structural sources of equality as well as the mutual construction of racism with other forms of “isms,” such as class-based oppression, gender-based oppression, and other inequalities based on religion, sexual orientation, immigration status, and so on--what is sometimes called intersectionality or simultaneity.” [49] Intersectionality argues that without “a deep understanding that each of these axes of injustice are part and parcel of an overall system and structure of power, in which some groups are systematically favored and others disfavored, any efforts at social change will only end up repeating the hierarchies but in slightly disguised ways.”

VII. A Post-Race Approach

A part of the discourse as to discrimination today in both the United States and Europe is the avoidance of the word “race” as being outdated and no longer valid in today’s world, a reasoning that can termed post-racialism.[50] A recent American example can be seen where Chief Justice John Roberts states in *Parents Involved in Community Schools v. Seattle School*

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[47] Margaret Chon and Donna E. Arzt, *Walking While Muslim*, 68 Law & Contemp. Probs. 215 (2005) at 215-7: “Walking While Muslim” is a play on the term popularized in the context of African-American racial profiling, “Driving While Black.” Both suggest that certain people are being targeted for no legitimate purpose.

[48] Kimberlé Crenshaw, Demarginalizing the Intersection of Race & Sex (Richard Delgado ed., 2003) (1989).

[49] Margaret Chon, Remembering and Repairing: The Error Before Us, In Our Presence, 8 Sea.J.Soc.Jus. 643 (2010) at 648.

[50] See Mario Barnes, *A Post-Race Equal Protection?* 98 Geo.L.J. 967 (2010) 970, 971. See also Symposium, *Beyond the Final Frontier: A “Post-Racial” America?*, 25 Harv. Blackletter L.J. 1 (2009); Ian F. Haney López, Post-racial Racism: Racial Stratification and Mass Incarceration in the Age of Obama, 98 Cal. L. Rev. (2010).

District No. 1, that “the way ‘to achieve a system of determining admission to the public schools on a nonracial basis' is to stop assigning students on a racial basis. The way to stop discrimination on the basis of race is to stop discriminating on the basis of race.” As Professor john powell notes, statements like this, which are frequently made by post-racialists, espouse a “false universalism”--a belief that every person is equal and requires no state-provided advantage.[51] At the same time, being post-racial eliminates the need for policies addressing the continuing legacy of a racist past. In contemporary society, being post-racial means that there is no longer a need for affirmative action or other race-based remedies. If society is post-racial, then race-based remedies are undesirable as a lingering remnant of less enlightened times. Affirmative action programs or other race-conscious remedies are, by definition, inconsistent with a post-racial “reality.” Post-racialism in its current form can be seen as an ideology reflecting a belief that due to the significant racial progress that has been made, the state need not engage in race-based decision-making or adopt race-based remedies.[52] Although post-racialism may be a panacea for those with racial fatigue, it also evinces a type of racial amnesia--a desire to forget that those marked by race neither asked for the designation nor can they escape its present day meanings and effects.[53]

Part Two: Race in Swedish Law

Sweden has had a long history with the term “race” that can be traced back to one of Sweden’s most well-known scientists, Carl Linnaeus, known as the father of modern taxonomy. Linnaeus used the term “ras” to categorize human beings into five groups in his work, *Systema naturae,* published in 1735: Africanus, Americanus, Asiaticus, Europeanus and Monstrosus.

Swedish legislation has expressly discriminated against specific groups historically, such as the Sami, Romani and Jews. One example is that it was forbidden for the Romani to migrant to Sweden from 1914 until after World War II, 1954 when that ban was lifted. In 1922, the State Institution for Racial Hygiene (*Statens institut för rashygien*) was established in Uppsala. A subtle change occurred after World War II, and the explicitly discriminatory laws began to be repealed. Sweden signed several international documents after World War II, including the United Nations Universal Declaration of Human Rights, the European Convention on Human Rights, and ILO conventions concerning protections against unlawful discrimination on the basis of race.

[51] See Barnes (2010) at 970, 971.
[52] See Sumi Cho, *Post-Racialism*, 94 Iowa L.Rev. 1589 (2009),
[53] See Mario Barnes, *A Post-Race Equal Protection?* 98 Geo.L.J. 967 (2010) 970, 971.

I. Sweden's International Commitments with respect to Combating Racial Discrimination

The first international instruments prohibiting racial discrimination as signed by Sweden is the United Nations Universal Declaration of Human Rights, adopted by the United Nations General Assembly in 1948. Under it, Sweden and all the other member countries (with the exception of six) declared in its Article 2 that "[e]veryone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status." Article 7 prescribes that "[a]ll are equal before the law and are entitled without any discrimination to equal protection of the law. All are entitled to equal protection against any discrimination in violation of this Declaration and against any incitement to such discrimination." Equal pay for equal work is protected in its Article 23(2), stating that "[e]veryone, without any discrimination, has the right to equal pay for equal work."

Three more instruments were issued by the United Nations in 1966. The United Nations Convention on the Elimination of All Forms of Racial Discrimination was signed by Sweden in 1966 and ratified in 1971. The United Nations Universal Covenant on Civil and Political Rights and the United Nations Covenant on Economic, Social and Cultural Rights were both signed by Sweden in 1967 and ratified in 1971.

The European Convention for the Protection of Human Rights and Fundamental Freedoms[54] was one of the first concrete human rights conventions adopted in the wake of World War II, drafted almost directly after the United Nations Universal Declaration of Human Rights in 1948. The Convention was signed in Rome in 1950 by the members of the Council of Europe,[55] of which Sweden has been a member since its inception in 1949.[56] Sweden ratified the Convention in 1952.[57] Under Article 14 of the Convention, the signatories

[54] For more on the European Convention and Sweden, *see* Iain Cameron, An Introduction to the European Convention on Human Rights (5th ed. Iustus 2006). For more on the Convention, the European Council and the European Court of Human Rights, *see* the Council's website at www.coe.int and the Court's website at www.echr.coe.int.

[55] At that time, the Council of Europe consisted of ten Member States: Belgium, Denmark, France, Ireland, Italy, Luxembourg, Netherlands, Norway, Sweden and the United Kingdom. It now consists of 46 Member States. *See* the Council of Europe website at www.coe.int.

[56] *See* Legislative Bill 1949:214 *Kungl. Maj:ts proposition till riksdagen angående godkännande av Sveriges anslutning till Europarådet*.

[57] The status of the European Convention in Swedish law during this first phase was uncertain, as the issue of whether Sweden had a monistic or dualistic system with respect to international obligations was not clear. Two cases presenting claims under the European Convention were decided by the Supreme Court and the Supreme Administrative Court in 1973 and 1974, respectively. See NJA 1973 p. 423 and RÅ 1974 p. 121. These judgments, referred to as the "transformation judgments", established the principle that foreign treaties had to be incorporated or transformed into Swedish law before Swedish citizens could cite them as a direct basis for a

committed to that “[t]he enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.” Two additional acts were required by the signatories for the implementation of the system regarding the protections under the European Convention, recognition of the Council’s jurisdiction to receive individual applications, which Sweden was the first to do in 1951, and a declaration accepting the jurisdiction of the European Court of Human Rights, which Sweden did in 1966. Swede incorporated the Convention as Swedish law in 1995 a part of the requirements of EU membership. Sweden also signed ILO Convention No. 111 on discrimination (employment and occupation), as the Swedish Government found that the conditions required to adopt the conventions existed in 1962.[58]

II. Swedish Constitutional Protections as to Unlawful Racial Discrimination

The Instrument of Government adopted in 1974 to replace that of 1809 was to embody the constitutional changes that had successively occurred during the interim. The failure of the 1809 Instrument of Government to reflect the political reality, and the marginalization of the outdated Instrument of Government, is seen as giving rise to a sort of anti-constitutionalism. The constitution did not and should not reign in popular sovereignty. A second departure consciously taken from the 1809 Instrument of Government was the decision to change the balance of political power from that of separation of power to a separation of function. Parliament is to be the sole legislator as seen from the portal paragraph of the 1974 Instrument of Government: “All public power in Sweden proceeds from the people.” As a result, a comparatively weak court system was created with only limited powers of constitutional review. This is also clear from the fact that the third branch of political power, after the legislative and executive branches, is generally not perceived of as the judicial branch in Sweden, but rather the press. The courts were not given a power of judicial review, simply the possibility in the case at hand to declare a law in violation of the constitution. If an act of

remedy. Incorporation entails that the international treaty or convention itself has to be enacted as Swedish legislation, while transformation entails that the Parliament in some fashion, either translates the document into Swedish or reformulates it to better-fit Swedish law. There is no rule as to which of these two procedures is to be applied at any given point, with the Parliament making that decision. The courts ultimately determined that Sweden had a dualistic system and consequently, individuals could not raise claims under the Convention until it was incorporated as Swedish law in 1995, effective 1998.

[58] Legislative Bill 1962:70 *Kungl. Maj:ts proposition till riksdagen rörande ratifikation av Internationella arbetsorganisationens konvention (nr 100) angående lika lön för män och kvinnor för arbete av lika värde, m.m.*, Bet. 1962:2LU26, Rskr. 1962:333.

parliament or a government regulation, a higher threshold is required, with a court being able to declare it to be so only if manifestly not in compliance with the constitution.

Within this focus on majoritarianism, the very first draft of the 1974 Instrument of Government included no individual. After a general outcry, the next draft including a chapter on individual rights was adopted in 1974. These individual rights comprised only of five articles, concerning freedom of speech, expression, assembly, demonstration, association, religion and movement, as well as the right to information, protection from forced disclosures as to associations or religion, protection from unlawful searches of person, home or correspondence, access to public documents and the right for the social partners to take lawful industrial actions.

The chapter two rights were expanded already in 1976, including the addition of Article 15 stating that no law or other type of legal provision can entail that a citizen is treated less favorably on the basis of race, color or ethnic origin. The role of the rights as cataloged in chapter two, however, was still greatly debated in certain circles. Those legal scholars in favor of a weak judicial system argued that chapter two rights should be more of a policy declaration as were certain of the rights in chapter one, and not be meant to serve as a legal basis for a remedy. Instead, they should more be meant to serve as guidelines for the Parliament in its legislative work, giving precedence to the principles of parliamentary rule and popular sovereignty. These different views are reflected in the legislative preparatory documents for the 1974 constitution[59] and 1976 amendments.[60] The emphasis in the second chapter as to limiting the rights therein contained and the categorization of the rights as absolute or qualified rights was part of the compromise finally reached. Absolute rights can only be limited by the Instrument of Government, while qualified rights can be limited through legislation. In addition, a distinction is made in the Instrument of Government as to those rights accruing to Swedish citizens, and those to non-Swedish citizens.

III. Swedish Ethnic Discrimination Legislation

A first legislative act prohibiting discrimination on the basis of ethnic origins was passed in 1986.[61] Statutory protection against unlawful discrimination on the basis of race, color, nationality or ethnic origins was initially legislated in 1986, however, no statutory sanctions were enacted, which under Swedish law means that no sanctions can be assessed by the

[59] *See* Legislative Bill 1973:90 *med forslag till ny regeringsform och ny riksdagsordning.*
[60] *See* Legislative Bill 1975/76:209 *om ändring i Regeringsformen.*
[61] *Lag* (1986:442) *mot etnisk diskriminering.*

courts.[62] Containing only seven paragraphs, it simply prohibited ethnic discrimination based on race, color, nationality, ethnic origins or religion. The office of an Ombudsman against Ethnic Discrimination was created by the 1986 act to work towards preventing ethnic discrimination in employment and other societal areas. A second act was passed in 1994 again prohibiting discrimination on the basis of race, color, nationality or ethnic origins, enacted to mirror in many ways the Sex Equality Act. This time a right to damages and/or to declare a decision as to promoting or terminating employment invalid. Two cases were unsuccessfully brought under the 1994 act.[63] A new act prohibiting both direct and indirect discrimination on the basis of race, color, nationality, ethnic origins, religion or faith in employment was passed in 1999 in line with EU law.[64]

The 1999 act was replaced by the umbrella Discrimination Act of 2008 (*diskrimineringslag* 2008:567) which came into effect 1 January 2009.[65] The 2008 Discrimination Act forbids unlawful discrimination on the basis of sex, transgender identity or expression, ethnicity, religion or other belief, disability, sexual orientation or age with respect to employment, education, labor market policy, starting a business and profession recognition, membership in organizations such as labor unions, housing, the provision of goods and services both as provider and as customer, social benefits, social insurance, military service and public employment. The 2008 Discrimination Act prohibits unlawful discrimination, defined as direct and indirect discrimination, harassment, sexual harassment and instructions to discriminate.

In the 2008 Act, ethnic origins is defined as national or ethnic origins or color or other comparable conditions. Race has been taken out of the listing in comparison with the previous statutes. According to the legislative bill to the 2008 Act, the term "race" was removed from the list to demonstrate that a biological concept of race is not accepted, and that the Swedish Parliament "has stated that there is no scientific basis for dividing human beings into different races and from a biological perspective, consequently there is neither any reason to use the

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[62] *Lag* (1986:442) *mot etnisk diskriminering.*

[63] *Lag* (1994.134) *mot etnisk diskriminering.* The first two cases under the Ethnic Discrimination Act were AD 1997 no. 61 *The Swedish Association of Graduate Engineers v. Österåker Municipality* (plaintiff, of Greek descent, applied for job as system engineer, was not discriminated against by the municipality for not being called to an interview as plaintiff requested too high wages, SEK 27 000 per month as opposed to the hired candidate's SEK 20 000) and AD 1998 no. 134, *DO v. Otto Farkas Bilskadeverkstad Inc. in Växjö* (plaintiff was as qualified as the candidate hired, but offered no proof of discriminatory action by defendant despite DO's allegations that the defendant did not evaluate the qualifications in the same manner nor in compliance with industry practice, nor asked the same questions nor gave the same opportunity to answer).

[64] *Lag* (1999:130) *om åtgärder mot etnisk diskriminering i arbetslivet.*

[65] An English translation of the 2008 Discrimination Act can be found at the website of the Equality Ombudsman of Sweden ("DO") at www.do.se. The current DO was created in 2009, prior to that, reference to DO is prior Ombudsman against Ethnic Discrimination.

word race with respect to human beings. Against this background, and as the use of the word "race" in legislative text risks inflaming prejudices, the Parliament has stated that the Government is to act in part in the international arena towards that the word "race", as used with respect to human beings, is to as great a degree as possible be avoided in official texts, and also in part to review to which extent the term "race" occurs in Swedish laws not based on international texts, and as far as possible, suggest a different definition."[66]

The applications by the Swedish courts of these anti-discrimination laws with respect to claims of ethnic discrimination have been restrictive. The case of the Labour Court is summarized below, with a more in depth analysis of one recent case, AD 2009 no. 4.

IV. Claims of Unlawful Ethnic Discrimination in Employment

Claims of unlawful discrimination in employment are ultimately brought to the Labour Court. If the social partners are parties to the lawsuit, the case is brought directly to the Labour Court, which then acts as the first and final instance in one hearing. If the case is brought by an employee, it is first brought to the general courts and then an appeal can be made to the Labour Court. The decisions by the Labour Court cannot be appealed within Sweden as a general rule. Claims with respect to ethnic discrimination were first brought under the 1999 act, as the 1986 act had no sanctions. Of the approximately thirty cases brought up to 2011 alleging unlawful ethnic discrimination, the Labour Court has only found one case in which unlawful ethnic discrimination has been proven as in violation of then applicable 1999 Act,[67] and one case of unlawful ethnic harassment under the 2008 Act.

In contrast, the Labour Court has found that employers have had a number of "non-discriminatory" reasons for their employment decisions in the cases that have been brought. A review of the case law during the 2000's shows that the Labour Court has found that an employer failing to call a plaintiff of Kosovo-Albanian descent to an interview for a position as a truck driver at the hospital was not ethnic discrimination, as those called to the interview already knew other employees at the hospital.[68] Not calling a plaintiff of Yugoslavian descent

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[66] Legislative Bill 2007/08:95 at 119, citing also Constitutional Committee Report 1997/98:KU29.

[67] *See* AD 2002 no. 128 *DO v. Service Companies Employers' Association and GfK Sverige Inc. in Lund* in which the Labour Court found that defendant had indirectly discrimination against plaintiff by applying a requirement of "clear" Swedish that was higher than necessary for the position. In AD 2005 no. *21 The Swedish Municipal Workers' Union and A.Ö. on Ingarö v. Tbe Association of Healthcare Companies and Attendo Care Inc. in Stockholm*, the plaintiff, a Jehovah's witness, could not participate in certain employment activities due to her religious beliefs, such as decorating a Christmas tree. The Labour Court did not find discrimination on the basis of religion in the case, but found that plaintiff was constructively terminated from her employment and that the employer had violated LAS.

[68] AD 2006 no. 60 *The Swedish Municipal Workers' Union v. Skåne Region in Kristianstad*.

to an interview was not discrimination even though plaintiff was theoretically as qualified as those called, as he had less practical experience according to the defendant's assessment.[69] That a plaintiff from Kosovo was not hired by the defendant municipality for the position of building permit architect because of deficient Swedish was not discrimination despite the fact that plaintiff had received a university degree from a Swedish university and later received the same position with a different municipality.[70] The fact that plaintiff submitted an employment application within the deadline set by the job advertisement, but defendant hired another Swedish candidate prior to the deadline, was not discrimination.[71] Where plaintiff of Iranian background had applied for a job as pre-school teacher via fax, the Labour Court found it doubtful that the school had received the application as it claimed it did not, as the school would have been eligible for more funding if they had hired any person for the position, thus there was no motive for the school to discriminate.[72] Plaintiff of Russian background sent in an application and was asked to call for an interview, but when plaintiff called, she was not scheduled for an interview.

The Labour Court found that the employer did not discriminate against her on the basis of her Russian accent, but rather because during the telephone call, defendant discovered that plaintiff had not gone to a three-year high school program in Sweden and she had not submitted additional information concerning her education in Russia.[73] Plaintiff of Algerian descent was not hired for overtime work despite his being first on the list for such work in the company, but this was not discrimination as the signalmen refused to work with him for safety reasons.[74] Plaintiff of Iranian descent was not called to an interview during a telephone conversation, but it was not discrimination as defendant's employee felt that plaintiff was aggressive and not suitable for the position.[75] Plaintiff of Bosnian descent was not

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[69] AD 2005 no. 126 *The Swedish Association of Graduate Engineers v. Klippan Municipality*.
[70] AD 2005 no. 98 *DO v. Norrköping Municipality*.
[71] AD 2005 no. 7 *N.K. in Norrköping v. Nor Di Cuhr Inc. in Norrköping*.
[72] AD 2005 no. 14 *The Swedish Teachers' Union v. ALMEGA Service Employers' Associations and K.E.M. in Skarpnäck*.
[73] AD 2005 no. 3 *DO v. Comsol Inc. in Stockholm*.
[74] AD 2004 no. 22 *A.K.T. in Malmö v. Copenhagen Malmö Port Inc. in Malmö*.
[75] AD 2003 no. 73 *DO v. The Swedish Metal Trades Employers' Association and Westinghouse Atom Inc. in Västerås*. Other cases decided against plaintiffs in 2003 are AD 2003 no. 58 *DO v. Swede-Eye Inc. in Täby* (no discrimination when the 27 year old plaintiff, with education as hotel receptionist, experience as a hotel receptionist as well as five years' experience as a personal assistant but no sales experience, was not called to job interview and instead a 19 year old candidate with experience from MacDonald's and a video store after high school was hired), AD 2003 no. 55 *DO v. The Swedish Social Insurance Administration and Jämtland County's General Social Insurance Administration in Östersund* (no discrimination when plaintiff, the only one with a foreign background of twelve hired temporarily, was not also permanently hired as were the other eleven. The employer found that she was not sufficiently cooperative and did not adjust herself to the demands of the employer as evidenced by her failure to participate in internal educations, from which for one she had received a dispensation for a trip abroad and had attended seven, and that she also had requested a wage increase) and in 2002, AD 2002 no. 54 *L.G-C. in Haverdal v. Boods Färg, S.K. Inc. in Halmstad* (plaintiff, of Israeli descent, not

discriminated against with respect to a promotion when the employer sent the successful Swedish male candidate to a course after the applications were sent in that was used a deciding qualification for the male candidate.[76] Questions posed by labor union representatives as to whether the male Palestinian candidate could work with women were not unlawful discrimination by the employer.[77] The Labour Court found that the employer was not liable for the actions of receptionist who sent letter to a job applicant from Iran, informing him that his application was rejected as it had too many spelling mistakes, as it was not proven that the employer ordered the receptionist to do this.[78] That the employer chose the one of the two candidates that spoke flawless Swedish was not unlawful discrimination.[79]

In one case, plaintiff, who was of the Muslim faith and wore a purdah, had been called to an interview after a telephone conversation.[80] At the interview, plaintiff was told by the person hiring that "I don't care what people have for religion, but you unfortunately cannot have those clothes on you when you demo, because you are our face to the customer."[81] In addition, the woman stated that "I live in Malmö where the most common name nowadays is Mohammed" and that she was used to seeing people from all corners of the world. The defendant employer admitted that the employee had said these things to the plaintiff, but that the woman had already hired someone else just seconds before the interview and felt she could not inform the plaintiff of this. Accepting this as the course of events, the Labour Court found that there was no discrimination as the position (a temporary position demonstrating food products) had already been filled.

In the cases that have been brought in the past two years, the Labour Court has stated that the employer did not unlawfully discriminate on the basis of ethnic origins as the candidate had included only a telephone number, and had not included her home address or her age.[82] Despite the fact that the employer hired three ethnic Swedish candidates with equivalent

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discriminated against though she was qualified for the job and employer defendant knew she was of a minority during the job interview, question was whether a representative of the employer informed plaintiff during the interview that she would not receive the job because of her skin color after singing "Hallelujah" during the interview. The Labour Court found that the person committing these acts at the interview was not a representative of the company).

[76] AD 2006 no. 96 *SECO v. The State of Sweden.*

[77] Under the 1999 act, only employers could be liable for unlawful discrimination, labor unions had no such liability. AD 2007 no. 17 *DO v. Örebro Municipality.*

[78] The Labour Court seemed to give the fact that the employer, after receiving the notice from DO of discrimination, gave the plaintiff a job interview (although he was not hired), see AD 2007 no. 45 *DO v. Laika Film & Television.*

[79] AD 2008 no. 47. This case can be compared with the only successful case claiming unlawful ethnic discrimination on the basis of the level of Swedish required, see AD 2002 no. 128. There is no clear line of demarcation between these cases.

[80] AD 2003 no. 63 *DO v. DemÅplock in Gothenburg Inc. in Lindome*.

[81] *Id.* at 496 and 500.

[82] AD 2009 no. 11 DO v. Almega Tjänsteföretaget and First Rent A Car.

education but less work experience than the plaintiff, the employer did not unlawfully discriminate against the plaintiff with a Bosnian background. The ethnic Swedes who were hired were more personally suitable as the employer found them to be better team players than the Bosnian candidate who was considered too individualistic.[83] It was not unlawful ethnic discrimination nor constructive termination when the employer told the employee at a personnel party that he spoke poor Swedish and ought to go to a Swedish course as well as ought to speak Swedish with his daughters and father-in-law. The employee alleged in addition that the employer continued by saying, "You Serbs are the worst type of people, all you do is fight, you can see that from the history of Yugoslavia, you started all the wars." The Labour Court, finding that it was simply word against word as to the latter statement, held that the employer had not in any way acted unlawfully or in violation of good labor market practices.[84] In another case, the employer finding the ethnic Swedish candidate more personally suitable was not unlawful discrimination, as the second generation Swedish Macedonian candidate had misstated and placed her paid parental leave under the employment category in the application as opposed to under a different, miscellaneous category. That the interview was conducted in a manner that appeared more towards checking the candidate's Swedish competence as opposed to her professional qualifications was not unlawful ethnic discrimination in the view of the court.[85] A location chief for an association who raised questions as to the Muslim faith, unfaithful women, wearing a veil, and using the term "Halal pork" did not understand that the two hourly employees, young Muslim women, found the statements discriminatory, thus no unlawful discrimination had occurred at the workplace.[86]

A recent case that can be seen as taking the interpretation of the law to its outermost boundaries is AD 2009 no. 4. In this case, the plaintiff employee, originally from Gambia and having lived in Sweden for twenty-two years, was working as a rehabilitation assistant at a care facility for autistic adults for the municipality of Härryda, a public employer. He had worked at this facility since 2002. In 2004 a new head of the facility was appointed, Andersson. Plaintiff alleged that Andersson made statements such as that plaintiff took such good care of the patients because he used voodoo, and that they did what he requested them to do because they were afraid of him since he was big and black. Plaintiff alleged that he made it clear to Andersson that he thought such statements inappropriate. In addition, he alleged

[83] AD 2009 no. 16 DO v. Svensk Handel et al.
[84] AD 2009 no. 27 Union of Commercial Employees v. Gunnar Johansson Järn o Trädgård AB.
[85] AD 2009 no. 87 DO v. Eslöv's Municipality.
[86] AD 2010 no. 21 DO v. Idea, and IF Friskis & Svettis.

that three other of the employees called him names such as “Blackey”, “Big Black Bastard”, “Black Head”, “The African”, “Kunta Kinte”, “gangsta” and also told him that they did not understand what he said. At an employee review in 2006, Andersson informed plaintiff that none of the employees wanted to work with him, but refused to tell him who or why. The day after, the plaintiff wrote down his reaction to this conversation and had it read by another employee to all the employees on 14 February 2006. Plaintiff continued to work until almost two months later when he received written notice on 10 April 2006 that he need not come to work as well as a warning. Orally he was informed that the other employees were afraid of him. The municipality had not involved the union in this proceeding as required by the collective agreement. He was not given written notice of the reason for these actions until 1 June 2006 after the union became involved. He was forced to stay home for 37 days and then transferred to another work place. The municipality alleged that it did not know that plaintiff had felt discriminated against so that it had no duty to investigate. The municipality also alleged that the letter written by plaintiff was threatening and that Andersson knew that something needed to be done at the work place.

The Labour Court began with the statements made by the unit head, Andersson, finding it strange that if she had made such statements often, that none of the other employees had heard them, thus DO had not met the burden of proof with respect to them. As to the other employees calling plaintiff names such as “Big Black Bastard”, “Black Head”, “The African”, “Kunta Kinte” and “gangsta”, the Labour Court again found that none of the other employees had heard such and thus the behavior was not proven. However, there was banter at the workplace, including the use of nicknames such as “Blackey”, to which plaintiff responded at times with “Whitey.” The Labour Court found that as plaintiff had participated in this banter, the employer had no reason to believe that it was inappropriate and discriminatory, and as such, no duty to investigate. The Labour Court did assess damages due to the employer’s failure to involve the union with respect to the order to stay home from work.

The second victory with respect to claims of ethnic discrimination is also the most recent one addressed by the Labour Court. In the case, two women, one originally from Bosnia and the other from the former Soviet Union, were in the employ of a municipality. They were subjected to both sexual and ethnic harassment by their group leader, who eventually was promoted up to unit leader. The group leader referred to them as “Eastern girls” instead of by name, and put a sexually graphic picture up in the personnel lunch room as Christmas greetings two years in a row, 2006 and 2007. The leader was promoted to a management position in the municipality, no longer directly the women’s boss, and in 2008 he emailed the

picture to them as a Christmas greeting. The women had informed the man that they found the behavior offensive. Finally the two women filed complaints with the municipality and the Discrimination Ombudsman, as well as reported him to the police. The court found the municipality liable to pay damages for the sexual and ethnic harassment in the amount of SEK 35,000 (app. € 3,800) to one of the plaintiffs, but that only sexual harassment was proven with respect to the other plaintiff with damages set at SEK 25,000 (app. € 2,700). However, the divided court ordered that the parties bear their own legal fees and costs, resulting in a somewhat pyrrhic victory.[87] The interesting aspect here is that the damages for sexual harassment are based on the 2008 Christmas email, with the Court emphasizing that the women had notified the man in May 2008 that they found the picture offensive, this his knowledge of this was proven. This is close to the reasoning in the Blackey case, where the Court found that those persons using such terms had no knowledge they were offensive as the plaintiff had voluntarily participated in the banter. Here the women had notified the man that they found the picture offensive, so that he could not claim that he did not understand the picture could be offensive. The dissenting member of the Court stated that the picture, "against the flow of pictures with nudity and satirical content that today flood Swedish society" cannot be seen as particularly remarkable, and that it was not proven that the sender tried to influence the two women sexually or try to communicate anything sexual. Thus the dissenting member of the Court did not find any sexual harassment had occurred.

3 Analysis of the case law of the Labour Court through a CRT Lens

Under the burden of proof as set out in the 1999 Ethnic Discrimination Act as well as the current 2008 Discrimination Act, the plaintiff is to show circumstances indicating that unlawful discrimination has occurred, and then the burden of proof is to shift to the employer to prove that no unlawful discrimination has occurred. As can be seen in many of the cases above, when the Labour Court has come to the conclusion that it is word against word, it has found that the plaintiff has not made the necessary showing required for the burden of proof to shift to the employer.

Several aspects can be raised from a Critical Race Perspective as to the judgments in these cases. The first is that of interest convergence, as argued originally by Professor Derrick Bell with respect to *Brown v. Board of Education*. In the Swedish context, the argument would run that Sweden adopted its discrimination legislation for many of the same reasons as the United States Supreme Court decided the *Brown v. Board of Education* case, basically

[87] AD 2011 no. 13.

first due to international pressures. Sweden began signing international documents by which Sweden assumed the obligation to protect individuals against unlawful discrimination on the basis of race already in 1948. However, under the system of dualism as exists in Sweden, such international obligations cannot be cited as grounds for a remedy by a Swedish citizen within Sweden until legislated into Swedish law, which first occurred in 1986 with no sanctions, and in 1994 with sanctions. The other prong of interest convergence that can be seen as compelling here is the need for Sweden to pacify her now more culturally diverse citizenry of hers intentions of protecting the rights of all citizens regardless of ethnic origins.

Another of the original observations of CRT in the American context is also pertinent here, that issues of discrimination cannot be resolved in the liberal belief of the equal worth of all persons before the law regardless of anything else. The persons before the law in discrimination cases are not identical, but despite this, the Labour Court treats individuals claiming discrimination exactly the same as the employers, despite inequalities with respect to legal and financial resources. In the Blackey case, the employer knew of the racially-tinged banter in the workplace at the same time as it claimed it knew that there were conflicts in the same workplace, but that one was not related to the other. In other words, it was totally plausible to the Labour Court that a workplace could have racially-based "fun" banter at the same time as according to the employer, there were enormous conflicts at that same workplace, and the Labour Court found no cause to impose a duty to investigate on the employer. Another aspect of the banter, in addition to it being banter as the plaintiff consented to it, was whether there was an alternative course of action for the plaintiff that would not have been considered threatening. Even in the most recent case, the Labour Court has required plaintiffs to prove defendant had knowledge as to the offensiveness of the conduct at issue, in essence, heightening the burden of proof in such cases. As seen from the case law above, when any of the persons of non-Swedish background have attempted to assert their rights, they have been deemed as threatening, too individualistic, not team players, etc. From the rulings by the Labour Court, there are no alternatives available for persons of non-Swedish ethnic origins. The parties before the Labour Court, in the eyes of the Labour Court, are equal.

The last aspect that can be taken from CRT here is the analysis of the post-racial discourse. As seen from the legislative bill for the 2008 Discrimination Act, the Swedish Parliament has decided that the word "race" is not an appropriate term and is not to be used. However, there is nothing yet with which this vacuum is to be filled. In addition, without an understanding of race as a social construct, the courts will always be free to find that certain

behaviors fall outside of any listing. In addition, as warned by many CRT scholars, taking race out of the discourse glosses over not only the history of its coinage, but also the present state of affairs, and as can be seen from the case law above, is definitely a premature step in the Swedish context.

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