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Multiple Discrimination in a Multicultural Europe: Achieving Labour Market Equality Through New Governance

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MULTIPLE DISCRIMINATION IN A MULTICULTURAL EUROPE: ACHIEVING LABOUR MARKET EQUALITY THROUGH NEW GOVERNANCE

Diamond Ashiagbor

INTRODUCTION

The title of this article, 'Multiple discrimination in a multicultural Europe: Achieving labour market equality through new governance', is one in which almost every element is contested and requires explanation: what is meant by multiple discrimination; is it right to say the European Union is 'multicultural'; how does one define 'new governance'? My focus is more specifically on the intersection between gender and race in the European Union labour market, and the merits of new governance approaches in redressing labour market inequality. My interest in the issue of multiple discrimination, what has also been labelled intersectional or multidimensional discrimination, begins with some theoretical and empirical observations about the interaction between race and gender in the *UK* labour market. Anti-discrimination law and policies aimed at tackling labour market discrimination have been predicated on an understanding of the labour market which views race and gender as mutually exclusive categories of experience; the understandings of women's labour market participation which typically inform theorizing and campaigning around anti-discrimination law tend to be premised on an essentialist view of women. A major insight of the early black feminist movement in the US, in response to the experience of the civil rights movement, the Black Liberation movement and the women's movement, was that all too often, 'black' was equated with black men, and 'woman' was equated with white women. As a result, black women were an invisible group whose existence and needs were ignored. This insight is encapsulated in the title of one of the first collections of essays on black women's studies, published in 1982: *All the Women Are White, All the Blacks Are Men, But Some of Us Are Brave*.[1] One of the aims of the black feminist movement was to develop theory which could adequately address the way race, gender, and other facets of identity were interconnected.[2] What is crucial here is the move away from the supposition of a

[1] G. T. Hull, P. B. Scott, and B. Smith (eds.) *All the Women Are White, All the Blacks Are Men, But Some of Us Are Brave: Black Women's Studies* (New York, 1982).

[2] See http://www.mit.edu/activities/thistle/v9/9.01/6blackf.html.

unitary gender identity: namely, that there is an 'essential' woman's experience which can be described independently of factors such as race, ethnicity, religion, sexual orientation, etc. Further, at the empirical level, it is clear that equality campaigners and lawyers have succeeded in obtaining legally significant gains for women, but by assuming a common or universal norm, for instance, that the experience of white women within the labour market speaks for all women. By way of an example from the UK: research based on the 1991 and 2001 censuses has shown that the standard British pattern of women's employment is in fact a white pattern, and cannot be generalized to other ethnic groups.[3] For instance, the recognition that unequal treatment of part-time workers may amount to indirect sex discrimination is an important one, since the majority of part-time workers in the UK are women with family responsibilities. However, the prominence given to part-time work and domestic responsibilities as determinants of the sexual division of labour and of differential rewards between men and women's paid work can be seen as ethnocentric, since part-time working is not, in fact, a major factor in keeping black and Asian women's pay and prospects so far below those of white men. Whilst responsibility for child-care and home management *does* have a major influence on the participation of women in the UK labour market, this influence varies significantly between ethnic groups.[4]

Given recent developments in EU equality law, in particular, the introduction of Article 13 into the EC Treaty and the multiplication of the grounds on which discrimination is forbidden – to include race and ethnic origin,[5] religion and belief, disability, sexual orientation and age[6] as well as the pre-existing ground of gender[7] – I'm interested in

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3 For a fuller analysis of the UK experience, see my 'The Intersection Between Gender and Race in the Labour Market: Lessons for Anti-discrimination Law' in A. Morris and T. O'Donnell (eds.) *Feminist Perspectives on Employment Law* (London, 1999).

4 According to the 2001 Census for the UK, while some 41.5 per cent of white women employees worked part-time, only 35.5 per cent of non-white women did so. For black women (namely, Black Caribbean, Black African and Black Other), the figures are starker, with around 25 per cent of black women working part-time. Black Caribbean women have a high rate of single parenthood relative to other groups, but also have high rates of participation in the labour market and high rates of full-time employment: S. Botcherby and K. Hurrell, *EOC Briefing, Ethnic minority women and men* (Manchester, 2004); Government Equalities Office, *Minority Ethnic Women in the UK Factsheet* (London, 2007); T. Rees, *Women and the Labour Market* (London, 1992) at 19.

5 Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin, OJ L180/22, 19.7.2000.

6 Directive 2000/78/EC establishing a general framework for equal treatment in employment and occupation, OJ L303/16, 2.12.2000.

7 Directive 75/117 EC on equal pay for men and women; Equal Treatment Directive 76/207/EEC, and also Directive 2002/73/EC of 23 September 2002 amending Council Directive 76/207/EEC 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, L 269/15, 5.10.2002.

interrogating the extent to which EU equality law has been able to conceptualize and respond to 'multiple', 'multidimensional' or 'complex' discrimination, in particular, at the intersection between gender and race. This requires mapping of the labour market situation of ethnic minority women in the European Union, in terms of economic activity rates, pay, job quality and discrimination, and in considering the response of EU law. But to conduct such a mapping exercise, it is first necessary to lay bare the differing understandings of race and ethnicity across the various EU Member States: the extent to which a state perceives itself as mono- or multicultural, and its approach to the management of minority populations, is hugely significant for its approach to what labour market equality should look like, what kind of diversity is a legitimate goal. Second, this article will explore responses to complex discrimination from the perspective of what has become known as 'new governance'. The term 'new governance', at its simplest, is used to refer to the widely-observed shift within the EU from top-down, rule-based, centralized regulatory approaches towards more open, collaborative forms of rule-making, a shift which can be seen as a reaction to the difficulties inherent in attempting to regulate complex fields such as the labour market, and in seeking to regulate a diverse number of jurisdictions, by means of conventional 'command and control' mechanisms.[8]

Ultimately, I argue that a 'hybrid' approach to regulation, which combines 'old governance' mechanisms (such as the Race Directive) and alternatives to hard law, such as gender mainstreaming and diversity management, have the potential to provide a stronger framework for internalizing equality values, and one better suited to recognizing intersectional or multidimensional discrimination, than a focus on (traditional forms of) litigation and ex-post rule enforcement.

MULTIPLE DISCRIMINATION AND MULTICULTURALISM

Intersectionality and anti-discrimination law

Turning to the first element of this project, multiple discrimination in a multicultural Europe. I want to explain briefly what is meant by multiple or intersectional

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[8] See N. Bernard, 'Legitimising EU Law: Is the Social Dialogue the Way Forward? Some Reflections Around the *UEAPME* Case', in J. Shaw (ed.) *Social Law and Policy in an Evolving European Union* (Oxford, 2006) at 280.

discrimination, before concentrating more on the question of multiculturalism. At its core, intersectionality theory asserts that the law disadvantages those who put forward claims premised on multiple rights or multiple identities.[9] Originally, the concept of intersectionality was developed in the US as a means to examine the dilemma of 'women of color' in bringing employment discrimination claims, because the relevant legislative provision, Title VII of the 1964 Civil Rights Act, required them to plead either race or sex discrimination. The literature thus explores examples of the failures of US courts to recognize intersections of race and gender,[10] alongside the conceptually flawed attempts to recognize discrimination arising out of the claimant's dual minority status.[11] However, in the process of conceding the existence of discrimination against dual minorities, for example an African American woman, the case law in the US failed to acknowledge the complexity of their identities. Claims of discrimination were lost since such a claimant 'may be denied the ability to serve as a class representative of either *women* or *black people* in a discrimination suit … because she is adjudged insufficiently representative of the majority of women or the majority of black people'.[12] An early decision which still provides a good illustration of what an intersectional claim would look like in practice is that of *DeGraffenreid v General Motors*.[13] Here, five black women alleged that their employer's redundancy policy of 'last in, first out', and its reliance on a seniority system, perpetuated the effects of past discrimination against black women, as there had been a refusal to hire black women in

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[9] M. H. Chen, 'Hybrid claims of discrimination' (2004) 79:2 *NYU School of Law, Law Review*, 685-711, at 693. The literature is extensive; see, for example work cited in n 11 below and S. Hannett, 'Equality at the Intersections: The Legislative and Judicial Failure to Tackle Multiple Discrimination', (2003) 23 *Oxford Journal of Legal Studies*, 65-86; G. Moon, 'Multiple discrimination: problems compounded or solutions found? (2006) 3:2 *Justice Journal*, 86-102; D. G. Reáume, 'Of Pigeonholes and Principles: A Reconsideration of Discrimination Law' (2002) 40:2 *Osgoode Hall Law Journal*, 113-143; D. Schiek, 'Broadening the scope and the Norms of EU Gender Equality Law: Towards a Multidimensional Conception of Equality Law' (2005) *12 Maastricht Journal of European and Comparative Law*, 427-466; D. Schiek and V. Chege (eds.) *European Union Discrimination Law: Comparative Perspectives on Multidimensional Equality Law*, forthcoming 2008.

[10] See, in particular, *Rogers* v. *American Airlines*, 527 F. Supp. 229; *DeGraffenreid* v. *General Motors Assembly Division*, 413 F. Supp. 142, (E.D. Mo. 1976) (declining to recognize a protected sub-category of 'black women' with standing independent of black males).

[11] Such as *Lam* v. *University of Hawaii* in which the court recognized the discrimination claim of an Asian American female job applicant against a hiring committee which favoured Asian American men: 40 F.3d 1551, 1562 (9th Cir. 1994). See S. Sturm, 'Race, Gender, and the Law in the Twenty-First Century Workplace: Some Preliminary Observations' (1998) 1 *University of Pennsylvania Journal of Labor & Employment Law*, 639-689; P. M Caldwell, 'A Hair Piece: Perspectives on the Intersection of Race and Gender' (1991) *Duke Law Journal*, 365-396; A. P Harris, 'Race and Essentialism in Feminist Legal Theory' (1990) *Stanford Law Review*, 581; K. Crenshaw 'Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory, and Antiracist Politics' (1989) *University of Chicago Legal Forum*, 139.

[12] Chen, n 9 above, at 694; see *Moore* v. *Hughes Helicopter, Inc*., 708 F.2d 475, 480 (9th Cir. 1983).

[13] 413 F. Supp 142 (ED Miss. 1976, US Federal Court of Appeals).

the past. The court rejected the plaintiffs' attempt to bring a claim not on behalf of blacks or women, but specifically on behalf of black women, arguing that black women should not be treated any differently from white women or black men: 'They must choose to bring either a race action or a sex action in order to avoid the creation of an unauthorised class which would give Black women greater standing and relief'.[14]

One could envisage other intersections; the question is whether multiple inequalities are merely cumulative forms of disadvantage, or whether they might in fact interact to create new challenges for anti-discrimination law. Kimberlé Crenshaw, who did much to pioneer theorizing on intersectionality, argues that multiple discrimination does not merely consisting in the adding of two or more sources of discrimination; the result is qualitatively different or synergistic. And the synergistic nature of such discrimination makes it harder to frame policy and law and, crucially, it also makes such discrimination more difficult to monitor. Many national statistics bodies within the EU fail to collect data on race or ethnicity, or data disaggregated by race and gender, never mind data disaggregated by other sources of multiple discrimination.[15] Accordingly, it is the data dimension which preoccupies me in particular, since data is so central to evaluating the impact of anti-discrimination policies; to managing targeted approaches such as positive action, positive duties or diversity management; and to successful litigation.

Some of the complexity of multiple discrimination is slowly being recognised by policy makers. With the introduction of Article 13 into the EC Treaty, and the subsequent anti-discrimination directives, the European Commission has become increasingly aware of the concept. For example, it made passing reference in its 2005 communication, a framework strategy on non-discrimination and equal opportunities for all, to the adoption of an integrated approach to the promotion of non-discrimination and gender equality, which takes into account the fact that some people may experience multiple discrimination on several grounds.[16] A more substantive example is the commissioning

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[14] C. Scarborough, 'Conceptualizing Black Women's Employment Experiences' (1989) 98 *Yale Law Journal*, 1457. A subsequent case in which intersectional claims gained a limited foothold is *Jefferies v. Harris County Community Action Association*, 615 F.2d 1025, 1032 (5th Cir. 1980).

[15] See S. Fredman, 'Double Trouble: Multiple Discrimination and EU Law' (2005) 2 *European Anti-discrimination Law Review*, 13-18, at 14.

[16] Commission of the European Communities (hereinafter CEC) Communication, *Non-discrimination and equal opportunities for all - A framework strategy*, Brussels 1.6.2005, COM (2005) 224 final, at 3.

of a report by the Danish Institute for Human Rights, published in September 2007, on practices, policies and laws to tackle multiple discrimination.[17]

However, it is impossible to survey the development of anti-discrimination law at EU level in isolation from the dominant theme running through the EU's wider employment and social policy, namely the focus on job creation, economic growth, and competitiveness which crystallised with the Lisbon Agenda. The discourse revolves around modernizing welfare states and labour markets in order to support not just 'more' but 'better' jobs within the EU, and to bring previously excluded groups onto the labour market. What is of interest, therefore, is the interaction of a number of the EU's policy agendas: the Lisbon agenda, with its targets to increase rates of labour market participation amongst, for instance, both women *and* ethnic minority groups, and the EU's other policy objectives in particular, long-standing concerns to promote equality and social inclusion. It is apparent from the way in which equality and anti-discrimination issues are integrated into labour market policy at EU level that the major concern has at times been a pragmatic one: that inequality leads to inefficient labour markets. For example, the rationale behind the EQUAL initiative of the European Social Fund is that '[d]iscrimination in employment can marginalize individuals and reduce their productivity and overall contribution to society'.[18] The more recent PROGRESS initiative for 2007-2013 (the Community Programme for Employment and Social Solidarity) similarly uses anti-discrimination law instrumentally, recognising gender equality as a fundamental right, but also as a 'necessary condition for the achievement of EU growth, employment and social cohesion objectives'.[19] Gender equality policy contributes to meeting the challenges of globalization, the ageing population and demography.

To understand the ways in which anti-discrimination legislation might need to be reconfigured, and to re-think what equality in this area would mean, it is useful to examine patterns of ethnic difference in women's labour market participation and

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[17] CEC/Danish Institute for Human Rights, *Tackling Multiple Discrimination: Practices, Policies and Laws* (Luxembourg, 2007) available at : http://ec.europa.eu/employment_social/fundamental_rights/pdf/pubst/stud/multdis_en.pdf.

[18] CEC, EQUAL, *Free Movement of Good Ideas, Working against discrimination and inequality in Europe* (Luxembourg, 2004) at 6.

[19] Decision No 1672/2006/EC of the European Parliament and of the Council of 24 October 2006 establishing a Community Programme for Employment and Social Solidarity – Progress, OJ L 315/49, 15.11.2006; see also http://ec.europa.eu/employment_social/progress/gen_eq_en.htm.

employment experience across the EU. However, a central part of this process is how to deal with the deep-seated differences between European states in understandings of 'race' and multiculturalism. As will become apparent, these divergent paradigms have important implications for regulatory responses to inequality. They are also reflected in differences in terminology and approaches to data collection, such that there are real difficulties with classifying and measuring EU labour markets by 'race' and ethnicity, alongside statistics on gender, and with making meaningful comparisons of data across Member States.

Differing national paradigms in discourses around 'race' and multiculturalism

At a descriptive level, one might easily say that many EU states are multicultural, in the limited sense of being multiethnic. However, not all states within the EU would seek to describe themselves as multicultural societies, in the sense of being committed to the political project of multiculturalism. And these self-understandings have important implications for conceptualizations of 'race' and 'ethnicity' and policies towards labour market integration of excluded or underrepresented groups. Multiculturalism is such a deeply contentious idea, perhaps better, an essentially contested term. As Stuart Hall puts it, the term 'is now universally deployed… [but] this proliferation has neither stabilized nor clarified its meaning'.[20] However imprecise the term 'multiculturalism' is, it can nevertheless usefully be contrasted with alternative strategies or models of inclusion, such as assimilation or integration.[21] Assimilation is typically used to refer to a process of absorption of minorities, or the uni-directional process by which minorities adopt a commitment to an orthodox, hegemonic majority group identity and culture.[22] Integration, as a concept is used in various ways in Europe. For some, it is virtually interchangeable with assimilation, but more commonly, it is understood to mean a two-way process of social interaction involving change in values, norms and behaviour for both newcomers and members of the existing society.[23] It *can* mean a genuine process

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[20] S. Hall, 'Conclusion: The Multi-cultural Question' in Barnor Hesse (ed.) *Un/settled Multiculturalisms: Diasporas, Entanglements, 'Transruptions'* (London, 2000) at 209.

[21] See T. Modood, *Multiculturalism: A Civic Idea* (Cambridge, 2007) 46-51; E. Vasta, 'Accommodating diversity: Why current critiques of multiculturalism miss the point' Centre on Migration Policy and Society, University of Oxford, Working Paper No. 53, 2007, WP-07-53, at 4-8.

[22] See R. Grillo, 'Backlash Against Diversity? Identity and Cultural Politics In European Cities' Centre on Migration Policy and Society, University of Oxford, Working Paper No. 14, WP-05-14.

[23] S. Castles, M. Korac, E. Vasta and S. Vertovec, *Integration: Mapping the Field* (London: Home Office, 2003) at 14-15; Modood, n 21 above, at 48.

of supporting immigrants to integrate into the receiving society, whilst not *necessarily* requiring the accommodation of diversity.[24]

And multiculturalism: for the purposes of this article, by this I mean the political accommodation of minority ethnic and religious groups in the context of immigration to western European countries from outside the west.[25] I'm aware that this is a limited version of multiculturalism, but it has been the case that multiculturalism debates in Europe, in contrast to Australia for example, have primarily concerned the management of migration-based ethnicity.[26] This does of course include the question of the degree of *cultural and religious* accommodation of minority groups,[27] but my interest here is predominately in relation to participation *in economic life*. Those who use multiculturalism in a positive sense, focus on 'ideals of tolerance, the right of ethnic minority groups to maintain aspects of cultural heritage and language; equal treatment, equal access and full participation with regard to matters of law, employment, education, social services, economic activity and political representation; rights to collective expression'.[28] Researchers at the Centre on Migration Policy and Society at the University of Oxford have written widely on critiques of multiculturalism and the backlash against diversity in the wider political sphere.[29] For instance, Ellie Vasta talks

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[24] See Vasta, n 21 above, at 5-6.

[25] Borrowing from Modood, n 21 above, at 5.

[26] See C. Joppke, 'The Retreat of Multiculturalism in the Liberal State' (2004) 55:2 *British Journal of Sociology*, 237-257, at 239. For a discussion of 'weak' and 'strong' versions of multiculturalism, see Grillo, n 22 above, at 6: 'If we examine the many multicultural initiatives across Europe and beyond we may observe that they fall along a spectrum from "weak", where cultural diversity is recognised and accepted in the private sphere, but there is a high degree of assimilation to the local population in employment, housing, education, health and welfare, with acculturation in many areas of life, to "strong" where there is institutional recognition for cultural difference in the public sphere, with special provision in language, education, health care, welfare etc, and the organisation of representation on ethnic/cultural lines'.

[27] See, for instance, the speech of the Archbishop of Canterbury, Dr. Rowan Williams, at the Royal Courts of Justice, 7 February 2008, available at http://www.archbishopofcanterbury.org/1575:

> '[T]here remains a great deal of uncertainty about what degree of accommodation the law of the land can and should give to minority communities with their own strongly entrenched legal and moral codes. As such, this is not only an issue about Islam but about other faith groups, including Orthodox Judaism; and indeed it spills over into some of the questions which have surfaced sharply in the last twelve months about *the right of religious believers in general to opt out of certain legal provisions* – as in the problems around Roman Catholic adoption agencies which emerged in relation to the Sexual Orientation Regulations last spring' (Emphasis added).

These sentiments were subsequently echoed and supported by Lord Phillips, Lord Chief Justice, in his speech 'Equality Before the Law' to the East London Muslim Centre, 3rd July 2008; available at http://www.judiciary.gov.uk/.

[28] S. Vertovec and S. Wessendorf, 'Migration and Cultural, Religious and Linguistic Diversity in Europe: An overview of issues and trends' Centre on Migration Policy and Society, University of Oxford, Working Paper No. 18, 2005, WP-05-18, at 3.

[29] See, for example, Vasta, n 21 above; R. Grillo, 'Backlash Against Diversity? Identity and Cultural Politics In European Cities' Centre on Migration Policy and Society, University of Oxford, Working

of the 'moral panic' over immigration and ethnic and religious diversity being experienced within many European countries of immigration. The retreat from multiculturalism across Europe is justified on numerous grounds:

> [t]hat multiculturalism leads to segregation; it leads to welfare dependency; it prevents immigrants from integrating into the dominant culture and national identity; by extension, immigrants do not take the responsibility to integrate; multiculturalism undermines western democratic values; it allows an inflated 'tolerance' to cultural and religious difference; it is too focused on cultural rights of groups rather than on the rights of the individual.[30]

However, for the purposes of my interest in anti-discrimination, such 'moral panic' or critical discourse is problematic in that the primary focus has been on the 'culture' part of the equation, with insufficient attention to the continuing inequality experienced by many immigrant groups within societal institutions and structures, such as the labour market.

Why is this significant to an analysis of multidimensional discrimination? My argument is that the view of race or ethnicity which informs a state's policy interventions, the state's perception of itself as aspiring towards homogeneity or integration or multicultural accommodation will influence how discrimination is conceived, what the vision of an equal society will look like, and whether certain types of diversity are seen as a legitimate aspiration. The retreat from a strong or even a weak version of multiculturalism in those states which have had experience of accommodating difference may well constrain policy experimentation or reinforce a perception of 'equality fatigue'. Furthermore, there is a strong unwillingness within many EU states, in particular those which adopt integrationist or assimilationist policies, to identify populations by reference to race or ethnicity, a reluctance to engage in ethnic- or race-conscious data collection. Those states which promote assimilation of minority ethnic and religious groups, over multicultural recognition of ethnic and other differences,[31] typically exhibit a deep ideological resistance to the idea of using 'race' as a social

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Paper No. 14, WP-05-14; *Reassessing Multiculturalism in Europe: Critical debates, changing policies and concrete practices*, COMPAS International Workshop, University of Oxford, 30 June-1 July 2006.

30 Vasta, n 21 above, at 25. Further, on the 'crisis of multiculturalism' see Modood, n 21 above, at 10 et seq; and C. Joppke, 'The retreat of multiculturalism in the liberal state: theory and policy' (2004) 55:2 *British Journal of Sociology*, 237–257

31 See E. Bleich, 'The Legacies of History? Colonization and Immigrant Integration in Britain and France', (2005) 34:2 *Theory and Society*, 171-95.

signifier and of categorizing their populations according to this criterion.[32] This unwillingness can be understood for example through the lens of the French discourse, in that whilst there is a wide range of literature on the phenomenon of immigration in the post war years (in particular that from former colonies),[33] few French scholars utilize the analytical category of 'race'.[34] The management of post-colonial immigration in France is often placed in sharp contrast with the experience in the UK. It's easy to almost caricature these two countries as being at opposite ends of the spectrum with, for instance:

> France emphasizing the universalist idea of integration, of transforming immigrants into full French *citoyens*; and Britain seeing integration as a question of managing public order and relations between majority and minority populations, and allowing ethnic cultures and practices to mediate the process.[35]

However, in my view, this somewhat overstates the difference in that neither country's policies are wholly internally consistent: one can point to pluralist elements and recognition of group rights in French policies,[36] and to pro-assimilationist trends in UK policy. But what is more important for my purposes is the dominant *self-perception* within national discourse. In the French case: the aspiration to be a secular state, premised on the idea of republican citizenship, which shuns the recognition of difference in the public sphere.[37] This approach is variously attributed to a number of factors: the Revolution and the republican ideal; the memory of the Vichy regime and its racial categorization of Jews; and the more recent experience of electoral resurgence of extreme rightwing parties. As a result, the French state is avowedly 'colour-blind' in its policies;[38] a colour-blindness which has consistently received scholarly and intellectual support. This is related to a perception of equality which requires the state to treat all citizens alike; differentiation based on ethnic origin is seen as stigmatizing and

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[32] See E. Bleich, *Race Politics in Britain and France: Ideas and Policymaking since the 1960s* (Cambridge, 2003); A. Geddes and V. Guiraudon, 'Britain, France, and EU Anti-Discrimination Policy: The Emergence of an EU Policy Paradigm' (2004) 27: 2 *West European Politics*, 334-353.

[33] For references, see E. Bleich, 'Antiracism without Races: Politics and policy in a "color-blind" state' (2000) 18:3 *French Politics, Culture and Society*, 48-74.

[34] Bleich, n 33 above, at 49.

[35] A. Favell, *Philosophies of Integration: Immigration and the Idea of Citizenship in France and Britain* (London, 1998) at 3-4.

[36] For a critique of the standard characterization, see Bleich n 31 above.

[37] 'Dans les écoles, les collèges et les lycées publics, le port de signes ou tenues par lesquels les élèves manifestent ostensiblement une appartenance religieuse est interdit': Loi n° 2004-228 du 15 mars 2004.

[38] Bleich, n 33 above, at 49-50. See also E. Bleich, 'The legacies of history? Colonization and immigrant integration in Britain and France' (2005) 3 *Theory and Society*, 171-195, at 188-9.

potentially discriminatory.[39] All this serves to reinforce the official opposition to the collection of racial or ethnic data on citizens and residents; an opposition which has been codified in France since 1978 through the prohibition of computerized storage of data on racial origins save in limited circumstances.[40]

The French approach to race discrimination, in the labour market and elsewhere, has been referred to as a policy of 'anti-racism without races'.[41] Whilst there has been anti-racism legislation since 1972, establishing criminal penalties for discrimination and criminalizing hate speech, this is primarily rooted in a paradigm which conceives of anti-discriminatory measures as a means to combat the ideas of the extreme right, rather than as a tool for integrating ethnic or religious minorities or the management of visible migrant minorities.[42] Whilst there are some advantages to this colour blind approach, in France's 'republican' model of citizenship (the assumption that acquisition of French citizenship is *the* crucial step to attaining equality), nevertheless, there are in my view major drawbacks, especially in the context of labour market discrimination. The state does not permit data collection on race or ethnicity, thus making it difficult to gauge the relative well-being of minorities.[43] The lack of statistics means it is near impossible to prove indirect discrimination, proving direct discrimination is also difficult,[44] and group-targeted policies are judged illegitimate.[45]

A European paradigm or discourse?

In this context, it is difficult to say that the EU has been able to impose a distinctively European paradigm or discourse. I'm interested in the extent to which the EU can engage effectively in law- and policy-making which seeks to redress racial and ethnic inequality and disadvantage, *without* seeking to impose a uniform standard for

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39 J. Ringelheim and O. de Schutter, 'The Processing of Racial and Ethnic Data in Anti-Discrimination Policies: Reconciling the Promotion of Equality with Privacy Rights', 8 November 2007, manuscript on file with the author, at 46.

40 Namely, the storage of data on racial and ethnic origins is outlawed without the express consent of the individual or the formal approval of a national commission: French Act on Computing, Files and Liberties of 6 January 1978 (as modified by the Act of 6 August 2004). (*Loi relative à l'informatique, aux fichiers et aux libertés du 6 janvier 1978, modifiée par la loi du 6 août 2004*). For discussion, see Ringelheim and Schutter, n 39 above.

41 Bleich, n 33 above.

42 See Geddes and Guiraudon, n 32 above, 347.

43 Bleich, n 33 above, at 66.

44 Geddes and Guiraudon, n 32 above, 339-340.

45 Bleich, n 33 above, at 66.

conceptualizing race or ethnicity, given the background of highly heterogeneous approaches to the integration of minority groups.[46] It is worth briefly considering the example of the Race Directive of 2000.[47] To begin with, there is the insistence, at the behest of those Member States predominantly espousing a 'colour blind' approach to the management of minority ethnic groups, that the concept of 'race' is unacceptable. Accordingly, a form of words was inserted into the Preamble of the Race Directive (Recital 6) to signal a clear rejection of 'race' as a valid analytical category.[48] This spoke largely to the rejection of theories of scientific racism which posit the existence of separate human races. However, it is possible to reject those theories whilst recognizing the analytical and political utility of 'race' or ethnicity. A preferable approach is that adopted within much sociological discourse, which recognizes that ethnicity is a cultural not a biological concept, and similarly that race is a social construct: 'from a sociological point of view, "race" denotes a particular way in which communal differences come to be constructed and therefore it cannot be erased from the analytical map'.[49]

More significant is the treatment in the Race Directive of race-conscious data collection and statistics.[50] There are a number of purposes which may be served by the collection of statistical data on racial or ethnic lines: to guide and support policy development; in order to evaluate the impact of anti-discrimination policies; for the purposes of monitoring – at workplace level, by government agencies; in order to target public policies at certain groups, for example, in the context of positive action or to impose positive duties on public or even private bodies; and finally, in judicial proceedings, in order to assist in proving or rebutting a discrimination claim.[51] The Race Directive, on the one hand broadens the definition of indirect discrimination, codifying the case law of the European Court of Justice. Article 2(2)(b) reads:

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46 For instance, it is not the case that there has been homogeneity in the approach to gender equality, such as uniform approaches to affirmative action within Member States' legal systems.

47 Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin, OJ L180/22, 19.7.2000.

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

49 F. Anthias and N. Yuval-Davis, *Racialized Boundaries: Race, Nation, Gender, Colour and Class and the Anti-racist Struggle* (London, 2001) at 1-2; references omitted.

50 Again, there doesn't yet seem to me to be an identifiably European paradigm, but see Geddes and Guiraudon, n 32 above.

51 See CEC/ T. Makkonen, *European handbook on equality data* (Luxembourg, 2006).

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

This more expansive definition of indirect discrimination is to be welcomed; it recognizes that statistical information is not the only means to establish a prima facie case of indirect discrimination. This has the potential to free litigants from the complexities of a statistical analysis, for example, the difficulty of identifying the correct pool for comparison which has thwarted complainants in antidiscrimination cases before UK courts. However, whilst requiring Member States to establish equality bodies for the promotion of equal treatment, to monitor workplace practices and discrimination more widely, the Directive does not make it an express requirement that States should collect data on the racial and ethnic composition of their populations. This is a missed opportunity: carefully designed systems of data collection signal official recognition that discrimination does not consist solely of individual isolated acts of prejudice, but may have a structural and institutional character, that the situation of *groups* needs to be compared.[52] But also, by giving Member States a choice as to whether they institute a regime of data collection or allow statistics to be called in aid in proving discrimination, would seem to reinforce a limited understanding of discrimination and restrict the options available to complainants or victims. The impact of indirect discrimination will not be visible unless data exists which allows the differential impact of seemingly neutral provisions to be seen. Further, the Directive permits 'positive action' as a type of anti-discrimination activity, which generally requires ethnic monitoring in order to be meaningful.[53]

However, although the political negotiations leading to the enactment of the Race Directive resulted in this compromise over the question of race and data collection, it would appear that a process of mutual learning and policy transfer is nevertheless leading to greater willingness to accept the role that such statistics may play in antidiscrimination policy. In recent years, scholars immersed in the assimilationist or

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[52] Ringelheim and de Schutter, n 39 above, at 19.

[53] The view of the European Commission is that the scarcity of ethnic data in most Member States might hinder proper monitoring of the application of Community legislation: CEC Communication, *The application of Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin*, Brussels, 30.10.2006 COM(2006) 643 final, at 9.

colour blind tradition have been seeking to interrogate the assumption of official colour-blindness and to engage with the concept of 'race'. For instance, to return to the French example, even here, a number of government-commissioned reports since 2000 have given cautious support to the development of ethnic monitoring at the level of the firm.[54]

Comparability of statistical data across EU Member States

The current state of play is that Member States retain their own distinctive, historically specific approaches, although there is some EU level coordination. The European Monitoring Centre on Racism and Xenophobia was established in 1997, and in 2007 was subsumed within the EU Fundamental Rights Agency. Its task has been to provide objective and comparable information on racism, xenophobia, Islamophobia and anti-Semitism. To do so, the Monitoring Centre mainly engages in the secondary collection of data through a network of 27 national 'focal points' (RAXEN, the Information Network on Racism and Xenophobia). States seem relatively willing to collect *direct evidence* of discrimination in the form of reported incidents – for example, of racist violence – formal complaints and court cases. But the absence of statistical evidence on national and ethnic origin means that discrimination in the fields of employment, education and housing is difficult to quantify within a country, and compare between countries.[55] And in particular, trying to bring together the statistics on gender, with those on ethnicity, to obtain a portrait of intersectionality will be even more difficult.

Successive Monitoring Centre reports highlight the diversity of approaches in the EU Member States. The absence of standardized mechanisms to collect data and monitor progress is a real concern.[56] It is difficult to form representative and comparable statistical groups out of the immigrant and minority populations in the EU Member States because states use a number of legal and statistical concepts for their minority populations – terms such as ethnic minorities, immigrants, foreign-born, third-country

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[54] C. Bébéar, *Rapport au Premier Ministre – Minorités visibles: relever le défi de l'accès à l'emploi et de l'intégration dans l'entreprise – Des entreprises aux couleurs de la France*, (Visible minorities: Addressing the challenge of access to employment and integration in the workplace, Bébéar Report) November 2004, quoted in Ringelheim and de Schutter, n 39 above.

[55] European Monitoring Centre on Racism and Xenophobia (EUMC) *Racism and Xenophobia in the EU Member States: Trends, Developments and Good Practice, EUMC Annual Report 2005: Part 2*, at 100.

[56] CEC, *Equality and non-discrimination in an enlarged European Union: Green Paper* (Luxembourg, 2004) at 22-3.

nationals, and aliens.[57] The differences in statistical terminology to some extent map on to the paradigms discussed earlier, to diverse histories with immigration, diversity in legal frameworks, and in responses to integration of, and discrimination against, minority groups. As mentioned earlier, this diversity of approaches means that, in some EU countries, statistics based on ethnicity are proscribed by law and in most countries data based on country of origin (or country of birth) are simply not available.[58] However, as the UK data show, different labour market outcomes and patterns of discrimination emerge depending on whether one focuses on ethnicity, race, religion, citizenship status, national origin or some other category of identity. For example, a common factor for Pakistani and Bangladeshi women in the UK is that over 90 per cent are Muslim, 'with many younger women choosing to identify on faith rather than ethnic lines', such that Muslim women in, or seeking to enter, the labour market confront additional stereotypes associated with their faith and culture.[59]

Given these caveats about the statistics, it is nevertheless clear that national labour markets are still highly segmented along national or ethnic lines. Generally, labour force participation rates are highest in Nordic countries and the UK and lowest in southern European countries. There are disparities across the Member States, but what is striking are the *relative inequalities*: the stark differences between the labour market participation of minority compared to majority national groups, with persistently high levels of long-term unemployment for certain minority ethnic groups. In the case of the UK, ethnic minorities' labour market attainment is comparatively poor on all the

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[57] 'Theoretically, the production of EU-wide standardized data through the Labour Force Surveys of EUROSTAT should overcome these problems. In practice, however, relevant data on migrants and minorities, that are sufficiently detailed to yield a representative picture of inequalities on the labour market, do not exist. Part of this shortfall is due to the variety of concepts currently used in the EU Member States to describe 'their' immigrants and minorities (see also Section 3.2.). In addition, the small sample size of the Labour Force Survey makes even available economic data on 'foreigners' (in general) in some EU Member States very unreliable, and even more so for certain nationalities. We have therefore chosen to revert to the available national data only, while simultaneously pointing out the limitations of this approach': European Monitoring Centre on Racism and Xenophobia (EUMC), *Migrants, Minorities and Employment: Exclusion, Discrimination and Anti-Discrimination in 15 Member States of the European Union* (Vienna, 2003) at 28, fn 44.

[58] European Monitoring Centre on Racism and Xenophobia (EUMC), *Migrants, Minorities and Employment: Exclusion, Discrimination and Anti-Discrimination in 15 Member States of the European Union* (Vienna, 2003) at 15. See also J. Ringelheim, 'Processing Data on Racial or Ethnic Origin for Antidiscrimination Policies: How to Reconcile the Promotion Of Equality With The Right To Privacy?' NYU School of Law Jean Monnet Working Paper 08/06.

[59] Equal Opportunities Commission, *Moving on up? Bangladeshi, Pakistani and Black Caribbean women and work: Early findings from the EOC's investigation in England* (Manchester, 2006) at 5.

main measures, with consistently low employment rates across most ethnic minority groups.[60] As for unemployment, with the exception of Indian and Chinese adult men, very high rates of unemployment have persisted for ethnic minority groups over a long time. In 1992, the unemployment rate of Bangladeshi, Pakistani and Black Caribbean men was 15-20 percentage points higher than that of their White counterparts. By 2000, although the scale of this disparity had decreased, a difference of approximately 10-15 percentage points remained. Unemployment levels fell sharply for all groups during the 1990s. Despite this, the overall employment position of ethnic minorities at the end of the decade generally remained considerably worse than that of the White population.[61] And disaggregating race and gender, one finds that some groups have extremely low labour force participation rates, for example 30 per cent for Pakistani women.[62]

Within employment, third country nationals of both genders tend to be heavily concentrated in particular sectors of the labour market. But women with a migrant background are disproportionately found employed in low-skilled, low-paid jobs, in atypical or precarious employment in sectors such as personal and domestic services, cleaning, catering, health and care.[63] Looking again at the UK, having adjusted for the influence of individual characteristics and relevant variables such as age, educational level and human capital, there remain serious *net differences* in labour market achievements, sometimes also called 'ethnic penalties', of which discrimination is likely to be a major component.[64]

COMPLEX DISCRIMINATION AND NEW GOVERNANCE

Turning now to the role of new governance in tackling such discrimination and promoting equality. New governance techniques have been adopted in the *pre-labour market* context. The European Employment Strategy and the Lisbon Agenda have as their goals the achievement of full employment, the reduction of unemployment and investment in human capital. These strategies contain policy prescriptions highlighting

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60 Although within this overall picture, there are important differences between ethnic groups, with are low rates of economic activity and employment among Bangladeshis and Pakistanis, but high levels of economic activity and employment among Black Caribbeans: Cabinet Office (UK Government) *Ethnic Minorities and the Labour Market*, Final Report (London, 2003) at 18.

61 Ibid., at 18-20.

62 EUMC n 58 above, at 33.

63 EUMC n 58 above, at 5; see also Fredman n 15 above, at 14.

64 A. Heath and S. Y. Cheung, *Ethnic penalties in the labour market: Employers and discrimination*, Department for Work and Pensions Research Report No 341, DWP: 2006, at 5 and 51.

the need to integrate disadvantaged groups, in particular, women, immigrants and minorities into the labour market.[65] What is innovative about the Employment Strategy and the Lisbon Agenda is that such goals are to be achieved not solely, or even primarily, through traditional forms of hard law. These strategies (under the umbrella of the 'open method of coordination' or OMC) rely on guidelines, benchmarks, peer review and the dissemination of best practice from those Member States which score highly on key indicators such as rates of labour market participation, or integration of minority groups. Policy makers are resorting to new governance techniques, in particular the open method of coordination, not so much to displace hard law or old governance techniques, but to enter into new territory for EU level regulation, areas which had traditionally been the preserve of Member State control.[66]

This phenomenon has been described as a shift of power as between the nation state and the EU level, in its focus on self-regulation, participatory decision-making and local problem solving in place of the external imposition of universal rules. But if that is a fair assessment of what new governance entails, then perhaps such thinking can also help make sense descriptively of what is happening at the level of the firm, or normatively, what a regulatory response to *post-labour market* discrimination might look like. One insight of new governance is that devolving authority promotes learning more than retaining authority at state level. So my thesis here is that the insights of new governance theorizing may well have some purchase in understanding relations between state level regulation and that within firms; that new forms of governance can encourage what has been called 'a reconfiguration of self-regulation',[67] so that goals such as equality and diversity are internalized by the subjects of regulation. In a way, there is nothing new about 'new' governance in the labour law context, since the state has traditionally recognized or tolerated the autonomy and norm-setting of non-state actors, such as the social partners. Labour lawyers are familiar with rules made by a variety of labour market actors, and enforced through non-state mechanisms or social practice.[68]

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[65] Council Decision of 12 July 2005 on Guidelines for the employment policies of the Member States, OJ L 205/21, 6.8.2005.

[66] See C. Kilpatrick, 'New EU Employment Governance and Constitutionalism' in G. de Búrca and J. Scott (eds.) *Law and New Governance in the EU and US* (Oxford, 2006).

[67] H. Collins, Book Review (1998) 61 *Modern Law Review*, 916, at 917. See also C. McCrudden 'Equality Legislation and Reflexive Regulation: A Response to the Discrimination Law Review's Consultative Paper' (2007) 36:3 *Industrial Law Journal*, 255-266.

[68] B. Hepple, *Labour Laws and Global Trade* (Oxford, 2005) at 268.

Legal scholars have in the past been overly preoccupied with rule enforcement of 'old governance' measures such as directives as a means of achieving social policy goals. This old governance model, which privileged rule enforcement, is flawed in that, for instance, after decades of European equal treatment and equal pay law there is still a significant gender pay gap, on average of 15 per cent across the 27 EU states.[69] What is worth exploring is whether the coexistence of that rule enforcement approach to anti-discrimination with a revitalized use of the traditional legislative methods (for example to enact equality directives) and new governance mechanisms, such as the 'mainstreaming' of equality, may well be a more effective means of achieving the goals of European equality law and in recognizing complex intersectional inequality.[70]

Susan Sturm's analysis of law's role in addressing complex discrimination questions the adequacy of 'rule enforcement' as a unitary theory of law's role. So whilst there is necessarily room for rules enforced by sanctions, she also envisages a role for the law in structuring nonjudicial bases for generating norms and changing behaviour.[71] Sturm asks how the law does and should interact with organizational and cultural norms to reshape the conditions and practices constituting complex discrimination.[72] She acknowledges that '[r]ules enforced by sanctions remain an important backstop and platform for normative elaboration in the area of equality jurisprudence' especially in areas of normative simplicity.[73] But there needs to be a more 'dynamic and expansive conception of law's form and function' to enable equality norms to redress complex discrimination. The examples she gives in the US context include greater use of consent decrees (compromise agreements) and class certification as a means to establish a governance structure that can produce fair, effective and principled norm generation.[74]

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69 The pay gap has remained steady at 15% since 2003, and has narrowed by only one point since 2000: CEC, *Report on equality between women and men, 2008*, Brussels, 23.1.2008 COM(2008) 10 final, at 3.

70 T. Hervey, 'Thirty Years of EU Sex Equality Law: Looking Backwards, Looking Forwards' (2005) 12 *Maastricht Journal*, 307; J. Shaw, *Mainstreaming Equality in European Union Law and Policymaking*, European Network Against Racism (Brussels 2004); F. Beveridge, S. Nott and K. Stephen, 'Mainstreaming: A Case for Optimism and Cynicism', (2002) 10: 3 *Feminist Legal Studies*, 299-311.

71 S. Sturm, 'Law's Role in Addressing Complex Discrimination' forthcoming in L. B. Nielsen & R. L. Nelson (eds.) *Handbook of Employment Discrimination Research: Rights and Realities*, (Dordrecht, forthcoming 2008) at 8 [page numbers refer to manuscript].

72 Sturm, n 71 above, at 9.

73 Sturm, n 71 above, at 12.

74 Sturm, n 71 above, at 21.

I think that this analysis, which questions the adequacy of rule enforcement as a unitary theory of law's role in addressing complex discrimination, has a great deal of purchase as a means by which to understand various regulatory mechanisms that are being experimented with as a means to achieve labour market equality. Of the approaches to employment equity in the EU such as the promotion of equal opportunities, affirmative action, or gender mainstreaming, I would single out the possibilities raised by gender mainstreaming and what might be called diversity mainstreaming. Gender mainstreaming is yet another problematically open term, but it was described by the European Commission as early as 1996 as '[t]he systematic integration of the respective situations, priorities and needs of women and men in all policies and with a view to promoting equality between women and men and mobilising all general policies and measures specifically for the purpose of achieving equality'.[75] More simply, it means promoting equality between men and women in all activities and policies at all levels. One could even say that gender mainstreaming has been constitutionalized,[76] in that the Treaty of Amsterdam introduced Article 3(2) into the EC Treaty, which provides that in all of its activities, the Community shall aim to eliminate inequalities, and to promote equality, between men and women. But the crucial point about the EU's approach to gender mainstreaming is the express recognition that legislation and litigation alone cannot tackle the complex and deep-rooted patterns of inequality experienced by some groups.[77] Mainstreaming therefore presupposes a 'hybrid' approach to regulation, which combines 'old governance' mechanisms such as the Directives and with new governance methods, such as the adoption of ambitious employment targets for women or targets on the provision of childcare.[78]

However, one comes away from all the policy documentation on gender mainstreaming with a very fuzzy idea of what it means in practice, with 'limited guidance' available for governments on implementation.[79] One of the harshest criticisms of the EU's use of gender mainstreaming is that there is little normative content to the principle, that '[i]t is not clear what the intended goal of gender mainstreaming is, what sort of equality

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75 CEC Communication, *Incorporating Equal Opportunities for Women and Men into All Community Policies and Activities*, COM (96) 67 final, 21.02.1996.

76 See F. Beveridge, 'Building against the past: the impact of mainstreaming on EU gender law and policy (2007) 32: 2 *European Law Review*, 193-212.

77 CEC, n 16 above, at 6.

78 Presidency Conclusions, Barcelona European Council, 15 and 16 March 2002, Bull EU 3/2002, 1–56.

79 D. Ben-Galim, M. Campbell and J. Lewis, 'Equality and diversity: a new approach to gender equality policy in the UK' (2007) *International Journal of Law in Context*, 19-33, at 23.

agenda it is supposed to promote, nor how it relates to other equality goals established elsewhere in EU law or policy'.[80] This is where I think the idea of diversity management or diversity mainstreaming can be of assistance, in offering a more fruitful way to think about combating discrimination, especially multiple discrimination. To date, the focus within EU discourse has been on *gender* mainstreaming, on integrating a concern for gender throughout all policies. But this runs into the difficulty of presupposing, for example, that women are a single constituency. In reality, in many instances, factors other than gender are the primary cause of discrimination and inequality.[81] There has been no comprehensive programme of diversity mainstreaming drawing upon the other equality grounds, although in a Report on mainstreaming anti-racism in 2000, the Commission did refer to: 'the possible extension of the "mainstreaming" concept to include all the grounds for discrimination covered under Article 13 of [the EC Treaty]'.[82]

To begin with, it seems necessary to rescue the concept of 'diversity' from its use as a management tool. There is some 'conceptual slackness'[83] about the way the word is used, in particular in managerial discourse. One definition of diversity policies offered by the European Commission is very much in that mould, describing diversity policies as voluntary initiatives by businesses to recruit, retain, and develop employees from diverse social groups.[84] The emergence of the concept of diversity management in the EU in the 1990s followed the lead of management theorizing in the US. There, diversity management emerged as a strategy to create more inclusive workforces, but driven by the primary rationale of improving organizational competitiveness, efficiency and market advantage. It emphasised the need to recognize differences between employees, but in order to maximize the potential of individuals to ensure a more productive work environment and to fulfil organizational goals.[85] What observers have noted, however, is that this rise in managerial rhetoric about diversity went hand in hand with a reduced

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80 Beveridge, n 76 above, at 196.

81 O. Hankivsky, 'Gender vs. Diversity Mainstreaming: A Preliminary Examination of the Role and Transformative Potential of Feminist Theory' (2005) 38:4 *Canadian Journal of Political Science*, 977-1002 at 987.

82 J. Shaw, 'Mainstreaming Equality and Diversity in the European Union', (2005) *Current Legal Problems*, 255-312.

83 John Wrench, *Diversity Management and Discrimination: Immigrants and Ethnic Minorities in the EU* (Aldershot, 2007) at 4.

84 CEC/Centre for Strategy and Evaluation Services The Costs and Benefits of Diversity A Study on Methods and Indicators to Measure the Cost-Effectiveness of Diversity Policies in Enterprises Executive Summary, 2003, at 2.

85 Wrench, n 83 above, at3.

support for the civil rights legacy and affirmative action practices.[86] Diversity rhetoric was somehow seen as less threatening that equality rhetoric, and also as more politically palatable,[87] especially in the context of what one might call 'equality fatigue'.

This approach has, in large part, been mirrored within the EU: depoliticizing the contentious elements of equality discourse, and concentrating on the business case for diversity.[88] This business case has been championed, in particular, by the European Commission, possibly at the expense of the social justice arguments.[89] And a major problem with the business case for diversity is that, as Lizzie Barmes and Sue Ashtiany have cautioned, it typically contains ambiguity about the role of anti-discrimination law.[90] In other words, management rhetoric reinterprets or reframes legal ideas about equality contained in anti-discrimination law, in order to make it more consistent with internal managerial prerogatives.[91]

Whilst the use of diversity as a management tool may detract from its use in anti-discrimination policies,[92] it is nevertheless possible to reclaim the diversity concept and link it with ideas and techniques of mainstreaming. But diversity rhetoric needs to be re-positioned as an instrument first and foremost of social justice and equality, not as a human resource management tool, which means integrating the legal and diversity perspectives. As Barmes and Ashtiany put it, the processes which organizations adopt for identifying diversity priorities must be integrated with their processes for ensuring compliance with existing and coming anti-discrimination law.[93] This means dealing with the flawed tendency within managerial discourse on diversity to present it as an *alternative* to equality or equal opportunities approaches. A more conceptually sophisticated discourse on diversity would allow for a heterogeneous understanding of identity and the components that comprise it;[94] this understanding of diversity does not

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86 L. Edelman, S. Riggs Fuller, I. Mara-Drita, 'Diversity Rhetoric and the Managerialization of Law' (2001) 106: 6 *American Journal of Sociology*, 1589-1641.

87 Ben-Galim et al, n 79 above, at 22.

88 CEC, *The Business Case for Diversity: Good Practices in the Workplace* (Luxembourg, 2005); CEC, *The Costs and Benefits of Diversity: A Study on Methods and Indicators to Measure the Cost-Effectiveness of Diversity Policies in Enterprises* (Luxembourg, 2003).

89 For a critique of the business case, see M. Noon, 'The fatal flaws of diversity and the business case for ethnic minorities' (2007) 21: 4 *Work, Employment & Society*, 773-784.

90 L. Barmes with S. Ashtiany, 'The Diversity Approach to Achieving Equality: Potential and Pitfalls' (2003) 32:6 *Industrial Law Journal*, 274-296, at 278.

91 See Edelman et al, n 86 above, at 1592.

92 See Ben-Galim et al, n 79 above, at 20.

93 Barmes and Ashtiany n 90 above, at 285.

94 Ben-Galim et al, n 79 above, at 22.

presuppose that equality means assimilating to a particular standard, such as a male norm or a white norm. With respect to UK workplaces, this broader understanding of diversity may be strengthened by the recent Equality Bill, which seeks to create a space within which employers can promote diversity within a non-symmetrical model of equality, namely, the promotion of diversity by extending the scope of 'positive action' so that employers can take under-representation into account when selecting between two equally qualified candidates.[95]

CONCLUSIONS: HYBRID APPROACHES TO EQUALITY REGULATION

In conclusion, as Tamara Hervey has argued, 'where we seek to resolve complex social problems, such as inequality of women and men, a notion of "mixity" or "hybridity" of old governance and new governance probably holds the key to the realization of our goals'.[96] This hybridity has been echoed in the European Commission's own thinking, arguing in the context of gender equality for a 'dual approach' based on gender mainstreaming and specific measures.[97] My argument is that such an approach can and should be extended to the other equality grounds. Further, in respect of the intersection of race and gender, the Equal Treatment and Article 13 Directives provide a framework which, if Member States fully implement their provisions, can provide a starting point for recognition of intersectionality. The Race Directive in particular offers an intriguing prospect of hybrid regulation: a traditional old governance mechanism, namely a binding Community legislative act, which nevertheless contains within it the seeds for the development of new governance mechanisms – such as the scope envisaged for national equality agencies, ethnic monitoring and positive action – which may enhance its effectiveness.

The value of the move here to new governance approaches comes from the acknowledgement that a focus on (traditional forms of) litigation and ex-post rule enforcement has been inadequate to alter managerial discourse or restructure internal

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95 Government Equalities Office (UK) *Framework for a Fairer Future: The Equality Bill*, June 2008, available at www.equalities.gov.uk. At present, UK anti-discrimination law permits employers to target a particular group with job adverts, training or mentoring schemes, but does not allow an employer to take under-representation into account when choosing between two equally qualified candidates (affirmative action or positive discrimination in 'tie-break' situations).

96 Hervey, n 70 above, at 322.

97 CEC Communication, *A Roadmap for equality between women and men 2006-2010*, Brussels, 01.3.2006, COM(2006) 92 final, at 2.

labour markets; that such objectives may well be better achieved through retaining legal remedies in the background, whilst 'mainstreaming' values such as equality and diversity. Diversity mainstreaming has the potential to focus attention on how equality law does or should interact with organizational norms to combat intersectional discrimination. *However*, it is problematic if, in the wake of the Lisbon Strategy with its focus on the achievement of a competitive economy and full employment, diversity at EU level is conceptualized as primarily about improving organizational competitiveness and efficiency, as evidenced, for example, in the frequent references to 'the business case' for diversity. This conceptualization serves merely to reflect or reinforce existing managerial priorities. The other EU agenda I mentioned, the values of the EU's equality agenda implicit in Article 13, need to be made more explicit and woven through law and policy-making.